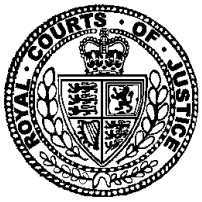

Case No: HC-2016-001671

Neutral Citation: [2019] EWHC 1405 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

The Rolls Building,
7 Rolls Building,
Fetter Lane,
London EC4A 1NL

Date: Tuesday, 14 May 2019

Page Count: 12
Word Count: 6233
Number of Folios: 87

Before:

MS KELYN BACON QC
(Sitting as a Deputy Judge of the High Court)

- -

Between:

(1) EC MEDICA GROUP UK LIMITED (formerly EC MEDICA GROUP LIMITED)	**Claimants**
(2) EC MEDICA MANUFACTURING LIMITED (formerly EC MEDICA LIMITED)	
(3) MEDICAL DEVICES LIMITED	
(4) EU AUTHORISED REPRESENTATIVE SERVICES LIMITED (formerly EC REP LIMITED)	
- and -	
(1) CHRISTOPHER DEARNLEY-DAVISON	**Defendants**
(2) CHRISTOPHER GARRETT	
(3) SAUL BERMAN	
(4) CS MEDICAL LIMITED	
(5) PAUL SHANE BENNETTS	**Part 20 Defendant**

- -

MR STEPHEN INNES (instructed by **Gunnercooke LLP**) for the **Part 20 Defendant**
MR TOM ALKIN and MR TIM BAMFORD (instructed by **Collyer Bristow LLP**) for the **Defendants**

Approved Judgment

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Kelyn Bacon QC (sitting as a Deputy Judge of the High Court):

Introduction

1. On 27 July 2018 I gave judgment in this action, finding for the Claimants in respect of two minor aspects of their claims against the Defendants, but dismissing the remainder of the claims. I also found for the Defendants as against the Claimants in respect of one aspect of their counterclaim, and against both the Claimants and Mr Bennetts, the Part 20 Defendant, in respect of the other part of the counterclaim. In my judgment on costs and consequential orders on 6 September 2018 I ordered that the Claimants should pay the Defendants 70% of their costs of the claim, and that the Claimants and Part 20 Defendant should pay the Defendants their costs of the counterclaim.

2. I ordered the Claimants to make an interim payment of £233,100 in respect of both the costs of the claim and the costs of the counterclaim, to be paid within 90 days of the order, which gave the Claimants until 5 December 2018. No payment whatsoever was made in respect of that interim payment, nor did the Claimants make any proposals to the Defendants for further time to make that payment.

3. On 6 December 2018, therefore, the Defendants issued petitions for the winding up of the First Claimant and a related company, M Devices Limited. Winding-up orders were made on 30 January 2019, following an uncontested hearing, and the two companies are now in the hands of liquidators, FRP Advisory.

4. Since then, however, the Defendants have discovered that various of the Claimants' assets were sold to third parties prior to the presentation of the winding-up orders. It also appears that the business of the Claimants has been migrated to a company known as JMW Resources Limited. In those circumstances, the Defendants now make an application for Mr Bennetts, the Part 20 Defendant to the proceedings, to be jointly and severally liable with the Claimants for the costs of the claim. That application is resisted by Mr Bennetts.

Claimants' previous representations as to their ability to pay costs

5. Before turning to the arguments of the parties, I should record what the Claimants have previously said about their ability to meet the costs of the claims if unsuccessful. It appears that the Defendants had expressed concerns about this in a letter sent to the Claimants on 26 July 2016, but did not pursue an application for security of costs until the pre-trial review, which was heard by Roth J on 3 May 2018. At that hearing, the particular concern expressed was that the business of the Claimants appeared to be being migrated to M Devices Limited which, as I have said, is a related company that is part of the EC Medica Group.

6. In response to the Defendants' application, M Devices Limited undertook to be bound, along with the Claimants, by any order for costs made against the Claimants. In addition, in a witness statement provided for the purposes of that hearing, Mr Bennetts gave evidence as to the funds available to the Claimants to meet any costs order that might be made against them. In particular, he said that the total net assets of the EC Medica Group stood at £596,000 as at June 2017, and that the net worth of the

group had been estimated to be approximately £574,000 in January 2018. Mr Bennetts then continued to say this:

> "It is clear from the details supplied above that the financial position of the Group has improved since 31 October 2016, and that the Claimants would be able to meet any costs order which might be made against them within the proceedings without risking the viability or liquidity of the Group. Any costs order made would be paid in its entirety within a reasonable period of time, given that the vast majority of the resources are easily liquidated and realisable."

7. The outcome of the hearing (of which there is no transcript) was that the Defendants' application for security for costs was dismissed. I note that the order from the hearing was wrongly dated 5 June 2018; it should have been dated 3 May 2018.

8. The question of the Claimants' ability to pay was subsequently ventilated again at the consequentials hearing before me on 6 September 2018. At that hearing, counsel for the Claimants said, on instructions from Mr Bennetts, that the Claimants would be able to pay £160,000 on account of costs within 90 days, but would require a further 90 days to raise the rest, on the basis that it would require the organisation of loans and various other matters in order to release the funds. However, given the time that had already elapsed since the judgment was handed down on 27 July 2018 and the fact that 90 days was already considerably longer than the usual time for a payment on account, I ordered that the full amount of the interim payment should be made within 90 days.

The law

9. Under section 51 of the Senior Courts Act 1981 the costs of and incidental to all proceedings in the High Court are in the discretion of the court, and the court has full power to determine by whom and to what extent costs are to be paid. It is by now well established that the power to make costs orders under section 51 extends to making orders against non-parties. In this case, although Mr Bennetts was the Part 20 Defendant, he was only brought into the proceedings for the purposes of the counterclaim rather than the main claim, so in respect of the costs of the claim he is effectively a non-party.

10. In *Dymocks Franchise Systems v Todd* [2004] UKPC 39, Lord Brown held that although costs orders against non-parties are exceptional, that means only that the case must be outside the ordinary run of cases which parties pursue or defend for their own benefit and at their own expense, and the ultimate question in any such exceptional case is whether in all the circumstances it is just to make the order. That point was recently repeated by the Court of Appeal in *Travelers Insurance v XYZ* [2018] EWCA (Civ) 1099 at paragraph 6, where it emphasised that:

> "On an application of this kind the court is not concerned with legal rights and obligations but with a broad discretion which it will seek to exercise in a manner that will do justice. The only immutable principle is that the discretion must be exercised justly."

11. The recent case law does refer to some features which may, depending on the facts of the case, be important or at least relevant considerations:

    i) A key factor in all cases is the nature and degree of the non-party's connection with the proceedings: *Deutsche Bank v Sebastian Holdings* [2016] 4 WLR 17 at paragraph 21.

    ii) Another important question is whether there is a causal link between the non-party's involvement and the costs that have been incurred. Although causation is not a necessary precondition for a non-party costs order, it is generally required to some extent. It may, however, be established on the basis of actions by the non-party which deprive a claimant of the opportunity to recover their costs: see *Turvill v Bird* [2016] EWCA (Civ) 703 para 28. I note also the case of *Total Spares v Antares* [2006] EWHC 1537 (Ch), in which the judge found at paragraph 57 that the combination of the transfer, the merger and the dissolution of Antares had deprived the claimant of any realistic opportunity of recovering its costs, unless a third party costs order was made, and that in those circumstances, it was in his view just that the third party should be responsible for the costs ordered to be paid by Antares.

    iii) If the non-party is effectively controlling the litigation and supporting it, whether financially or by giving evidence, and is doing so with a view to obtaining a personal benefit of some kind if it is successful, it may be appropriate to regard that party as the "real party" to the action. If that is the case, it will normally provide strong grounds for ordering that party to bear some or all of the costs if the litigation is unsuccessful – *Deutsche Bank v Sebastian Holdings* again at para 25.

    iv) It may be relevant to consider whether the non-party was warned that a costs order might be sought against them. In *Sony/ATV Music Publishing* [2018] EWCA (Civ) 2005 the absence of a warning until after final judgment was found to justify the refusal of a non-party costs order in circumstances where the clear evidence was that the non-party would have behaved differently if he had known that he was running the risk of a non-party costs order, and where the non-party was therefore deprived of realistic opportunities to settle the litigation, or protect himself against a costs order. At paragraph 32 of *Deutsche Bank* however, the court noted that the importance of a warning

> "will vary from case to case and may depend on the extent to which it would have affected the course of the proceedings … If the third party against whom an order for costs is sought is the real party to the litigation, the absence of a warning may be of little consequence."

12. As a final general point, I note that it is necessary to exercise caution in circumstances where factual points are being decided on a summary basis on the basis of witness evidence but without oral evidence. That having been said, it should be noted that this is a case in which Mr Bennetts has given oral evidence at trial, and indeed was (as I will explain shortly) the primary witness of fact, so he is not a complete stranger to these proceedings.

The parties' submissions

13. In the present case the Defendants rely on three principal matters which they say justify the making of a costs order against Mr Bennetts in this case: first, Mr Bennetts' close connection to the proceedings; secondly, an allegation that Mr Bennetts deliberately misled the court in his previous evidence as to the Claimants' ability to pay costs; and, thirdly, the divesting of assets from the Claimants.

14. Mr Bennetts disputes all of these, and relies for his part on the fact that no warning was given to him until 25 February 2019 that the Defendants were intending to make an application for a costs order against him. Mr Innes, representing him today, makes the further point that there is an alternative remedy available through the liquidation proceedings if it is the case that any assets have been improperly disposed of, and he also says that this is not a case where by reason of his shareholdings Mr Bennetts stood to benefit personally from the litigation.

15. Both the Claimants and Mr Bennetts rely on detailed witness statements in support of their contentions. For the Claimants, the evidence is set out primarily in the fourth witness statement of Mr Bamford, a partner at the Claimants' solicitors, Collyer Bristow. That was served on 17 April, together with the Claimants' application notice. That was supplemented by fifth and sixth witness statements dated 1 May and 10 May respectively, addressing minor additional points. On 11 May (a Saturday) Mr Bennetts served in response a lengthy witness statement, marked as his sixth but actually his seventh in these proceedings. Mr Bamford has responded to various of the points made in that witness statement in a seventh witness statement served shortly before the commencement of today's hearing. I will refer to the evidence of the parties in considering each of the points that they have raised in their submissions.

Mr Bennetts' connection to the proceedings

16. The Defendants point out that, as a managing director of the Claimant companies, Mr Bennetts controlled the conduct of the litigation on behalf of the Claimants throughout. He was the primary source of instructions to the Claimants' legal team, save for short periods when he was incapacitated by bad health. He was also the primary witness at an initial (unsuccessful) injunction hearing in July 2016, as well as at the pre-trial review and the main trial. In total he gave five lengthy witness statements, covering numerous and wide-ranging issues of fact relating to the proceedings.

17. Mr Bennetts also personally sent the 21 June 2016 email to a number of hospitals that was one of the bases of the successful counterclaim by the Defendants. His evidence was that he had initiated that email ("I approached our solicitors to ask if we could send a letter out") and had asked his solicitors to draft the email for him. Mr Alkin, for the Defendants, submits that Mr Bennetts' actions were driven by personal animus against the Defendants.

18. Mr Bennetts disputes the extent of his involvement in the litigation, claiming that all decisions throughout the proceedings were taken collectively by the board of three directors, consisting not only of himself but also Jill Deeks as Finance Director and Janet Borgerson who was the Quality Assurance and Regulatory Affairs Director, together with an "Associate Director" Dr Fabio Barcellona. On that basis, Mr

Bennetts says that he was not the controlling director, but was merely the conduit through which communications between the solicitors and the Claimants were made. He also seeks to downplay his involvement in the day-to-day management of the Claimants' business, saying that the directors did not have a "top-down" management approach and exercised little control.

19. I do not regard these claims as being credible. The evidence before me does not indicate that any other director had any significant involvement in the decision making relating to these proceedings. As Mr Bennetts accepts, Jill Deeks resigned from her directorships within the Claimant companies on 1 June 2018, prior to the commencement of the trial on 6 June. She gave no evidence at trial, nor did she provide any evidence for the earlier stages of the litigation. Indeed, it is particularly notable that in response to the Defendants' application at the pre-trial review for security for costs it might have been expected that Ms Deeks, as the Finance Director, would have given evidence as to the Claimants' financial position, but she did not. Instead, the Claimants' evidence was provided by Mr Bennetts.

20. As for Ms Borgerson, during the course of the litigation she provided only two very brief witness statements, both of which did little more than confirm particular limited aspects of the evidence of Mr Bennetts, specifically relating to her role within the Claimant companies. Neither of her statements indicated any wider role played by her in the decision making of the Claimants, whether related to these proceedings or otherwise, and she did not give oral evidence at the trial. It is also noticeable that she resigned as a director of the First Claimant on 14 January 2018, almost 5 months before the trial commenced.

21. In respect of Dr Barcellona, he is not listed as a director of any of the Claimant companies and the witness evidence at trial makes no mention of his involvement in these proceedings, as far as I am aware, or indeed in the wider decision making of the Claimants. The first mention of his role in the Claimant companies, as far as I am aware, is therefore in Mr Bennetts' sixth witness statement served for the purposes of this application, and there is no supporting evidence to corroborate Mr Bennetts' assertions in that regard.

22. In any event, by the time of the trial Mr Bennetts was the sole director of the Claimant companies, and I consider that it is clear from the evidence before me, including the evidence given at trial, that Mr Bennetts was the controlling mind of the Claimants. Furthermore, even before the resignation of the other directors, Mr Bennetts was the only director with voting shares.

23. On that basis, I do not think it is necessary to consider in detail Mr Bennetts' claims as to his management style. Suffice it to note that the Claimants' own evidence during the trial referred extensively to ActivTrak software that recorded the activities of all employees within the business by taking screenshots of each employee's computer screen approximately every 20 seconds, whenever the keyboard or mouse was used. The evidence of Mr Hancock, an IT administrator for the Claimants, was that the screenshots could be reviewed in order to ensure that an employee's emails and internet access were not being misused. In addition, Mr Bennetts' evidence was that the Claimants had installed a system that recorded all incoming and outgoing telephone calls. All of that indicates that the directors' control over the employees

within the Claimant companies was rather more sophisticated than would appear from Mr Bennetts' sixth witness statement.

24. The main relevant factor, however, is the connection of Mr Bennetts with the proceedings, and in that regard I have no doubt that he was the controlling director. As I have said, by the time the trial took place the other directors had resigned, and none of them gave evidence at the trial. The main witness throughout the proceedings was Mr Bennetts. The Claimants' only other witness at the trial was Mr Vieira. Far from being the principal witness of fact for the Claimants, as Mr Bennetts now claims, Mr Vieira's evidence was confined to addressing the specific (albeit important) technical issue of the design history of CS Medica's face cushion, and his evidence was more properly to be described as expert evidence. Mr Vieira made no comment on the numerous other factual issues that were the subject of Mr Bennetts' five witness statements provided for the trial and earlier stages of the proceedings.

25. In the circumstances, I do not need to decide whether Mr Bennetts bore any personal animus towards the Defendants. I merely note that his evidence made clear the level of his personal involvement with the proceedings, which put him in a markedly different position to the other directors.

26. Given all of these circumstances, I consider that although Mr Bennetts was not the sole shareholder of the Claimant companies and that the other shareholders would have stood to benefit or lose from the success or failure of the proceedings, he did indeed have a very close connection with these proceedings and could appropriately be described as the "real party" to the proceedings.

Mr Bennetts' evidence to the court as to the Claimants' ability to pay costs

27. The second matter relied upon by the Defendants is Mr Bennetts' evidence and statements to the court regarding the Claimants' ability to pay costs. I have already set out the content of his evidence at the pre-trial review, as well as the statements made via counsel at the hearing before me on 6 September.

28. It seems to me that the Claimants are right to raise a concern as to the accuracy of the information previously provided to the court. I have not seen any evidence to justify the net asset figure given for the EC Medica Group in Mr Bennetts' fifth witness statement. It is not supported by any of the company financial statements exhibited to Mr Bennetts' most recent witness statement, but appears to have been based on a valuation provided to the Claimants by an accountant. The valuation itself is, however, not in evidence before the court. Nor, as I have already commented, did the Claimants' Finance Director provide any evidence about this valuation and the state of the Claimants' finances at that time. Nor have I been shown any credible explanation of how in May 2018 the Claimants' position could have been that any costs order would be paid in its entirety within a reasonable period of time, on the basis that the vast majority of the resources were "easily liquidated and realisable", whereas by September the Claimants were saying that they could pay no more than £160,000 within 90 days, and in the event no payment whatsoever was made within that period.

29. Mr Bennetts says that this is all due to unexpected difficulties in raising the money. I do not consider that this is plausible, and the comments that he has made regarding his

difficulties and the efforts that he has supposedly made to raise the funds are not borne out by the very fragmentary evidence that he has adduced in support of these assertions. Nor have the Claimants at any time written to the Defendants with an explanation of the efforts that they are making and information as to the further time that will be needed to raise the funds.

30. Mr Bennetts' assurances to the Court have therefore neither been supported by the documentary evidence, nor borne out by reality. That is a serious matter, in light of the fact that the evidence in his fifth witness statement was given with the specific purpose of resisting an order for security for costs – and indeed, as I have already said, in that respect the Claimants were successful. The outcome might well have been very different if it had been apparent at the pre-trial review that the Claimants would not be able to meet an order for costs without selling key assets or indeed the premises from which the companies operated.

Divestiture of the Claimants' assets

31. The third matter relied upon by the Defendants is the apparent divestiture of the Claimants' key assets. Mr Bamford's evidence is that the liquidators of the First Claimant had been unable to obtain any assets of that company, either liquid or fixed, and that Mr Bennetts has failed to respond substantively to their enquiries. In the meantime, it is said, ownership of various intellectual property rights used by the Claimants appears to have been transferred to third party companies at various points in time since (or possibly even before) my judgment was handed down last year. In addition, the premises that were the registered office of the Claimants have been sold to Mr Bennetts' pension fund, and the Claimants' business itself has been sold to a third company, JMW Resources Limited, which is a company in which Mr Bennetts was previously a shareholder, and for which until 1 June 2018 Ms Deeks was a director and the company secretary.

32. As regards the ownership of intellectual property rights, Mr Bamford points to the fact, in particular, that various of the Claimants' trademarks and design rights have since the date of judgment on 27 July 2018 been transferred to an entity known as BIRTH (Bennetts International Research Trust in Healthcare), which is a company for which Mr Bennetts is both a shareholder and a director.

33. Mr Bennetts' response is to say that the unregistered designs used by the Claimants were all along owned by BIRTH, which he says is a charity that provides free master classes to clinicians. He says that BIRTH then licensed the rights to the Claimants. Again, however, I have seen no evidence of this licensing arrangement, and this account is inconsistent with the extracts from the EUIPO Register exhibited by Mr Bamford which show the transfer of registered trademarks and design rights from the first Claimant to BIRTH with effect from October 2018. As Mr Bamford points out, there is also no reason why BIRTH should be in possession of valuable IPRs which relate to the business of the Claimant companies rather than to BIRTH's charitable activities, as they have been described by Mr Bennetts.

34. As to the remaining intellectual property rights, Mr Bennetts says that these were already sold to a third company on or around 1 June 2018 as part of a package which included the sale of other assets in order to fund the Claimants' own legal expenses. No details have been given of the identity of the purchaser, nor of the nature of the

other assets sold, nor has any documentary evidence of that asset sale (for example a contract of sale) been provided. The Defendants suggest, however, that this sale was very likely again to BIRTH, not least because it is likely that all of the IPRs went as part of one and the same package. It is clear that BIRTH is closely related to the Claimant companies. A website printout indicates that it trades from the same address and is funded, at least in part, by the Claimants.

35. Even leaving aside the unidentified asset sale on or around 1 June 2018, it is clearly the case on the face of the material before me that intellectual property rights have been transferred from the Claimants to BIRTH since the date of the judgment against the Claimants, with no evidence of any payment for those rights. Since at the relevant time Mr Bennetts was the sole director of the Claimants, the instructions for transferring those IPRs must have come from him.

36. Regarding the sale of premises used by the Claimants, it is common ground that the property known as The Church in Portland Street, Southport, was sold to Mr Bennetts' pension fund on or around 2 October 2018. The Church is the property from which the Claimants traded, and is now apparently the trading premises of JMW Resources Limited. Mr Bennetts says that the arrangements for the sale of this property commenced in March 2018. Whether or not that is the case, it appears that the property was not actually sold until October 2018, which again was a point in time at which Mr Bennetts was the Claimants' sole director. According to Mr Bennetts, once the mortgage on the property was paid off the proceeds from the sale left a balance of £70,000. There is, however, no indication of where that £70,000 has gone. Certainly none of it has been paid to the Defendants, even in part satisfaction of the interim costs due to them.

37. The Defendants have also noted that the Claimants' business is now being carried on by JMW Resources Limited, which Mr Alkin describes as a "phoenix business". On 4 January 2019 JMW sent a letter to various customers of EC Medica, announcing that it had acquired the business and requesting that any further payments should be made into the new bank account operated by JMW. Otherwise, JMW noted that there would be no change to the products, services or pricing agreements previously in place. As I have already said, JMW is a company that has in the past been associated with both Mr Bennetts and the Claimants' former Finance Director, Ms Deeks.

38. Mr Bennetts does not deny that JMW has acquired the Claimants' business. What he says, however, is that JMW purchased the business in January 2019 from the "then current owner, which was not EC Medica Group". That statement is highly evasive, to say the least, given that Mr Bennetts does not reveal who the owner of the business at the time was, or how and when that unnamed entity came to have acquired the Claimants' business. The clear inference from this is that at some point during the course of last year the Claimants' business was sold to a third party, again presumably on the instructions of Mr Bennetts.

39. The Defendants have suggested that the interim third party owner of the business was again BIRTH, and that this was achieved through the asset sale on 1 June 2018 that I have already referred to. If this was the case, then that would amount to serious impropriety, given that none of this was revealed at trial. Even if that was not the case, no account has been given of the proceeds of that sale, and quite clearly none of those proceeds have been paid to the Defendants to meet the interim costs order.

40. The facts that I have just set out suggest that various of the Claimants' assets have indeed been transferred out of the Claimant companies since judgment was handed down in July (or possibly even before then) with no explanation from Mr Bennetts as to where the proceeds of those transfers have gone. The unavoidable inference is that Mr Bennetts has sought, again since July of last year (or possibly even before then) to transfer the value in the Claimants' businesses to third parties in order to avoid having to pay anything to the Defendants.

41. Mr Bennetts denies this and claims that around £229,000 can still be raised from the Claimants' assets, which would meet most, albeit not all, of the interim costs bill. On closer inspection of his calculations, however, it appears that only £30,000 of that figure represents cash at the bank. That is a very small amount, given that on Mr Bennetts' own account £70,000 was raised by the sale of The Church, and there should also presumably be a sizeable sum representing the sale of the Claimants' businesses with all of the associated goodwill. The majority of the figure of £229,000 is therefore not made up of liquid assets, but consists of the funds that could potentially be realised by the sale of a further property part-owned by the Claimants, as well as something that is described as a major debt due to the Claimants of £150,000. Mr Innes was, however, unable to explain where that £150,000 debt derives from or who the supposed debtor is.

42. The liquidators' account in response to all of this is that despite enquiries on their part no confirmation has been provided of the debtor and stock position as to validate the claims that Mr Bennetts has made as to the assets remaining in the Claimant companies. The liquidators have also said that they have repeatedly attempted to set up meetings with Mr Bennetts to no avail. I have seen no contrary evidence from Mr Bennetts in respect of that, whether in his witness statement or in the exhibits to his witness statement, and Mr Innes was not able to provide any further information in that regard.

Absence of warning

43. Regarding the absence of a warning, which is a factor relied upon by Mr Innes on behalf of Mr Bennetts, as I have said the existence of a warning that a non-party costs order may be sought is not a prerequisite for the making of such an order. Even leaving that aside, there is an important question as to whether such a warning would have made any difference in this case. Mr Bennetts says in his evidence that if he had been warned he would have sought further advice which might have led him to settle the proceedings or find alternative sources of funding.

44. I do not consider that those assertions are plausible, for two reasons. The first is that, for the reasons I have already given, I consider that Mr Bennetts can be said to have been the "real party" to the litigation on the basis that he was the controlling mind behind the companies; he was also the only director that was seriously connected with all stages of the proceedings, including the earlier stages but particularly the trial. The case law recognises that where a non-party is the real party to the litigation, the existence or otherwise of a warning may be less relevant.

45. Secondly, the Claimants pursued these proceedings despite an injunction hearing that was, on any account, disastrous, and despite an attempt by the Defendants to settle the dispute by alternative dispute resolution. The latter is a factor referred to in my

reasons for ordering costs partly to be awarded on the indemnity basis, and in particular at the hearing on 6 September 2018 I referred to the fact that the Defendants wrote to the Claimants on two occasions proposing alternative dispute resolution in the context of a consent order staying the proceedings to allow for settlement discussions. Despite that, no response whatsoever was made by the Claimants to those proposals. This, of course, does not amount to definitive evidence that Mr Bennetts would not have changed course, but it does provide some indication of the likelihood that Mr Bennetts would have changed his mind if appropriately advised.

46. As Mr Alkin has submitted, it is also appropriate to bear in mind the fact that it was Mr Bennetts himself who gave assurances as to the state of the Claimants' finances and the Claimants' ability to meet any costs order. Those assurances undermine the suggestion that Mr Bennetts might have changed course had he been advised or warned that a costs order might have been made against him, since his evidence was quite categorically that the Claimants were perfectly able to meet any costs sought of them.

Other matters

47. It is common ground that an alternative remedy that might be sought through the liquidation proceedings does not preclude an order under section 51 of the Supreme Court Act if, on the basis of all the facts and all the circumstances, it is just to make such an order. Nevertheless, Mr Innes has submitted that in this case the fact of an alternative remedy means that I should not in the exercise of my discretion make an order against Mr Bennetts. I accept that the availability of an alternative remedy is a relevant factor, given the particular circumstances set out above. However, I do not think that this outweighs the justice of making an order against Mr Bennetts.

48. Mr Innes has also said that there is no evidence of the value of any assets of which the Defendants have been deprived, even if assets have been taken out of the company. There is, however, no absolute requirement for a non-party costs order to be strictly limited to the value of the costs of which the relevant party has otherwise been deprived.

49. I should make a final comment on Mr Bennetts' state of health. Mr Bennetts has given evidence about his ill health over the years, particularly in the years leading up to the trial. However, it does not appear from the material before me, including his witness evidence, that he has suffered any particular ill health in the period since this application was made that would have prevented him from defending it properly if there were grounds on which to do so. On the contrary, I have already noted that Mr Bennetts has provided a detailed witness statement for the purposes of this hearing, together with a supporting exhibit. In those circumstances I do not think that his ill health is a basis on which I should refuse to make the order sought by the Claimants.

Conclusion

50. In light of all of the circumstances to which I have made reference, and particularly the fact that the principal assets of the Claimants' businesses appear to have been transferred out of the Claimant companies, possibly as early as 1 June 2018, without this being revealed at trial or at the hearing of 6 September 2018, and without any satisfactory explanation as to where those assets have gone or the whereabouts of the

proceeds of any sales, and given all of the other matters that I have set out above, I consider that it is just and appropriate to make an order that Mr Bennetts should be liable for 70% of costs of the claim together with the Claimants.