Neutral Citation Number: [2021] EWHC 3852 (Ch)

Case No: PT-2019-MAN-000132

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN MANCHESTER
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Manchester Civil Justice Centre,
1 Bridge Street West,
Manchester M60 9DJ

Date: 2 June 2021

Before:

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

- -

Between:

WIGAN BOROUGH COUNCIL

Claimant

- and -

(1) SCULLINDALE GLOBAL LIMITED
(2) CRAIG BAKER
(3) AMIR MADANI

Defendants

- -
- -

MR MARTIN HUTCHINGS QC (instructed by **DWF Law LLP**, Leeds) appeared for the **Claimant.**
MR ANDREW LATIMER (instructed by **Jolliffe & Co LLP**, Chester) appeared for the **Defendants.**

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APPROVED JUDGMENT

Approved on 6 April 2023 without access to any of the papers

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

HIS HONOUR JUDGE HODGE QC:

1. This is my extemporary judgment on the hearing of consequential matters arising following my handing down of a reserved judgment on Maundy Thursday, 1st April 2021, following the trial, over ten days in February and March 2021, of litigation between Wigan Borough Council (as claimant) and Scullindale Global Limited, Mr. Craig Baker and Mr. Amir Madani (as defendants) under case number PT-2019-MAN-000132. The neutral citation number of my reserved judgment is [2021] EWHC 779 (Ch).

2. The dispute between the parties arose out of the exercise - which in the event I held to be valid - of a landlord's break clause in a long lease of hotel premises known as Haigh Hall and situated in a country park within the local authority area of Wigan Borough Council, the Council being the freehold owner of Haigh Hall.

3. The majority of issues were decided in favour of the Council as claimant. I found that the long lease had been validly determined by Wigan pursuant to the service of a break notice, and that Wigan was entitled to vacant possession, and to close the leasehold title at the Land Registry. I rejected submissions that Wigan had acted in repudiatory, or any, breach of the lease by serving its break notice; and I found that Scullindale, the first defendant, had been in breach of the lease in failing to give vacant possession of Haigh Hall on 22 November 2019. However, I dismissed a claim by Wigan for mesne profits, or damages for trespass, and for double value against Scullindale. I also dismissed Wigan's claims against the second and third defendants, as guarantors of the lease; and a counterclaim by Scullindale against Wigan for damages.

4. Pursuant to an agreement between the parties, I was invited to determine the amount payable to Scullindale by Wigan on the termination of the lease pursuant to clause 9.3 thereof. In the light of the revised calculations of the parties' expert valuers, it is now common ground that the relevant sum payable on the termination of the lease by Wigan to Scullindale is £4.922 million, being the open market value of Haigh Hall determined in accordance with clause 9.3 (a) of the lease, plus £920,000 representing the value of Scullindale's fixtures and fittings, which will remain in place at Haigh Hall pursuant to an undertaking given on behalf of the defendants that those fixtures and fittings will remain in place and be delivered up to the claimant when possession is given up.

5. There are a number of matters that I now have to determine following the handing down of my reserved judgment; some of them are quite easy to deal with.

6. The first concerns the appropriate way of dealing with the closure of the leasehold title. So far as that is concerned, what I propose to direct is that Wigan should be entitled to close the leasehold title and remove the note of the same from Wigan's freehold title; that Scullindale will answer any requisitions raised by the Land Registry in connection with the closure of the leasehold title and the removal of the note of the same from Wigan's freehold title, but on the footing that Wigan pay the reasonable costs of Scullindale in answering any such requisitions.

7. So far as the date for possession is concerned, together with the mechanics of giving possession of Haigh Hall, it is now agreed that vacant possession of Haigh Hall

should be given by Scullindale to Wigan by 1 o'clock on Friday, 18 June 2021. Subject to Scullindale delivering up vacant possession to Wigan by 1 o'clock on 18 June, together with the fixtures and fittings, and subject to any agreement between the parties, the sums due to Scullindale from Wigan are to be transferred to Scullindale by bank transfer within banking hours on 18 June 2021. Under the terms of the lease, the payment should have been made on termination of the lease; but at paragraph 72 of my judgment I observed that it would not be fair or just for Scullindale to be entitled to claim any interest on the payment which was due to it pursuant to clause 9.3 of the lease in circumstances where the delay in receiving payment had been due to Scullindale's own conduct in failing, in breach of the covenant in clause 4.9 of the lease, to deliver up vacant possession of the premises on the termination date of 22 November 2019. I observed that Scullindale could not complain that it had been kept out of the payment due to it in such circumstances. I accepted that, to the limited extent only of liability to pay interest on the termination payment, any obligation to make that payment was effectively suspended until after the determination of the present litigation, and the delivery up of vacant possession in accordance with the terms of the lease.

8. It seems to me appropriate that the obligation to make payment should be linked to the delivery of vacant possession. In addition, given that there is an undertaking, independently of the terms of the lease, to deliver up fixtures and fittings to Wigan, the payment should also be linked to delivery up of the fixtures and fittings. Hopefully, the provision in the order that I have indicated that possession will be delivered up by 1 p.m. on Friday 18 June, and that the sums due to Scullindale from Wigan will be transferred during banking hours on that day, will achieve that end.

9. Mr. Latimer, in his skeleton argument for the defendants, has raised the question of the return of a gate and the treatment of four other chattel items. Those have been discussed before me and hopefully no issue will remain outstanding in relation to them. If any issues do arise, then they will be capable of being addressed pursuant to the permission which is to be given to the parties to apply as to the implementation and working out of this order.

10. There is no application by either party for permission to appeal and therefore I do not need to address that in this extemporary judgment.

11. That, I think, leaves outstanding the question of costs. Inevitably in litigation of this kind the issue of costs looms large. The claimant's present approved costs budget is in the order of some £307,000. The defendants' approved costs budget is in the order of some £195,000. Those budgets were on the basis of a ten-day trial, whereas in fact up to 13 days has been occupied with the trial of this litigation, including the day set aside for dealing with these consequential matters.

12. The first issue that arises in relation to costs is an informal application by Wigan to increase its approved costs budget. Wigan says that it should be entitled to claim additional costs to those in its approved costs budget on account of the additional expert costs resulting from Scullindale's late disclosure, and the increased length of the trial.

13. At the pre-trial review in this matter on 25 January 2021, by paragraph 1 of my order, I had given each of the parties permission to file and serve a supplemental expert

valuation report in order to provide up-to-date valuations of Haigh Hall Hotel. In addition, I had provided that the claimant's supplemental report might address as necessary: (1) the draft trading account for Haigh Hall Hotel to June 2020, which had been disclosed by the defendants only on 12 November 2020; (2) appendices D and E of the defendants' schedule of loss, which had been served only on 20 January 2021; and (3) the figures contained in the second head of loss set out in the defendants' schedule of loss, namely, the loss of profit consequential upon the cancellation of events.

14. By paragraph 15 of my pre-trial review order, I had directed that the issue of whether any additional costs had been occasioned to the claimant, and, if so, in what amounts, and who should bear any costs relating to the late disclosure of documents by the defendants, including costs relating to any parts of the claimant's supplemental expert valuation report said to have been occasioned by the late disclosure, should be reserved to the trial.

15. Mr. Hutchings, for the claimant, submits that if the information referred to in the draft trading accounts and the appendices had been disclosed, as they ought, in accordance with the order made at the costs and case management hearing, then Wigan's expert valuer would not have been put to the additional costs of that part of his supplemental report, and also of the joint statement. Wigan seeks to vary its approved costs budget to add a further £3,578.50 in respect of experts' costs and solicitors' time attributable to that work. Wigan also seeks to revise its costs budget to include additional costs attributable to the fact that the trial extended some two days over the original trial estimate, and that there has been this further day for consequential matters. The original trial estimate envisaged that the trial would be completed in ten days, including judgment. In the event, the trial took 12 days, plus this additional day for judgment.

16. The trial overran for a number of reasons. During the first week of the trial, Mr. Hutchings considered a redacted report to Wigan's Council and caused Wigan to disclose a less completely redacted version of that report; and this led to one of Wigan's witnesses, Mr. McKevitt, being recalled for some 20 minutes on day 4. During day 5, there was an application by Mr. Latimer, inspired by suggestions from the bench, to amend the defence, which was opposed, unsuccessfully, by Mr. Hutchings. Mr. Hutchings took about half a day longer in cross-examination of the defendants' witnesses in total than had originally been envisaged. About an additional day was spent with the evidence of the expert witnesses. I consider that those were all the sort of unforeseen events that occur during the course of any hotly contested commercial litigation. The responsibility for them does not lie exclusively with either of the parties or their legal representatives. All of those matters should form part of the trial costs that may be allowed on detailed assessment.

17. I accept Mr. Latimer's submissions that, given that the trial has now been concluded, it is not appropriate to seek a variation of the claimant's approved costs budget under CPR 3.15A. Mr. Latimer has referred me to observations of Coulson J, at paragraph 39 of his judgment in the case of *Elvanite Full Circle Ltd v Amec Earth & Environmental (UK) Ltd.* [2013] EWHC 1643, reported at [2013] 4 AER 765. At paragraph 39 of his judgment, Coulson J described an application to amend an approved costs budget after judgment as a contradiction in terms. He explained that it would mean that the exercise cannot be a budgeting exercise and would instead be

based on the actual costs that had been incurred. He also observed that it would make a nonsense of the costs management regime if, at the end of a trial, a party could apply to double the amount of its costs budget. The certainty provided by the new costs budgeting regime would be lost entirely if the parties thought that, after the trial, the successful party could seek retrospective approval for costs incurred far beyond the level approved in the costs management order. Similar observations have been made more recently by Master Kaye in the case of *Persimmon Homes Limited v Osborne Clarke LLP* [2021 EWHC 831 (Ch). At paragraph 204 of her judgment in that case, Master Kaye said that costs budgeting was about setting prospective costs, and CPR 3.15A was to enable the court to approach the questions of variations and amendments in a practical and purposive way, and not to oust the role of the costs judge.

18. In my judgment, the appropriate way of dealing with the effect of the late disclosure of documents by Scullindale, and the consequent need to direct additional expert and solicitors resources to that, and to deal with the unforeseen increase in the length of the trial, is to include in the court order a recording that the court is satisfied that there is good reason to depart from the approved budgeted costs in respect of: (1) the late disclosure of documents by the defendants, and the costs relating to those parts of the claimant's supplemental expert valuation report occasioned by such a late disclosure, and the need to update the statement of issues from the experts; (2) the site visit; and (3) an increase of up to three days in the length of the trial. The court should record those facts in its order for the benefit of the costs judge, who will then have to exercise his or her discretion under CPR 3.18 (b) to depart from the approved costs budget for the claimant on the basis that the trial judge has indicated that there is good reason for doing so in those specific respects.

19. That then brings me to the costs of the litigation as a whole. Mr. Hutchings submits that the claimant, Wigan, as the successful party, should be entitled to recover its costs in full, or at least no less than 90% of those costs. He also submits, on the basis of a without prejudice save as to costs letter that was written by Wigan's solicitors, DWF Law LLP on 21st January 2021, that from seven days after the date of that letter, those costs should fall to be assessed on the indemnity, rather than the standard, basis.

20. Mr. Latimer submits, for the defendants, that the costs should be allowed to Wigan only to the extent of 80% of its costs; and that such costs should, throughout, be assessed on the standard basis.

21. I have to approach the issue of costs having regard to the provisions of CPR 44.2. The court has an ultimate discretion as to costs, but the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. In this case, it is acknowledged by Mr. Latimer that it is Wigan that is the successful party.

22. However, by CPR 44.24, in deciding what order to make about costs, the court will have regard to all the circumstances of the case, including the conduct of all the parties, whether a party has succeeded on part of its case, even if that party has not been wholly successful, and also any relevant admissible offers to settle. The court has the power to make orders for costs on a number of different bases, including a power to order costs relating only to a distinct part of the proceedings; but the court is invited to consider whether it would be preferable to make an order for payment of a

proportion only of the successful party's costs. There is a general steer in favour of a proportionate costs order rather than directing a costs judge to undertake the difficult exercise of seeking to apportion costs to particular issues in the proceedings.

23. Mr. Latimer, as I say, invites the court to award Wigan only 80% of its costs. He points to the fact that Wigan lost on its claim to mesne profits. It quietly dropped its claim to double value, which Mr. Latimer says was misconceived from the start. It lost on its claims against the second and third defendants, Mr. Madani and Mr. Baker, which Mr. Latimer says it had joined to the proceedings only for tactical reasons.
    Most importantly, Mr. Latimer says that Wigan failed to recover as much as £1 million, which it was claiming to avoid having to pay as compensation for the termination of the lease. In the course of the expert evidence, Mr. Latimer points to the fact that the claimant's expert abandoned his resistance to the defendants' discounted cash flow approach to the assessment of the termination payment.

24. In short, although Wigan was the victor, it will have to pay £1 million more to recover back Haigh Hall. Although it secured a large victory, it was not a complete victory. Even though the failure of the claim to recover mesne profits was due to the effect of the coronavirus pandemic on the hospitality industry, that effect had been apparent since the Prime Minister's lockdown announcement on 23 March 2020. Notwithstanding Mr. Hutchings's attempts to justify the joinder of Mr. Madani and Mr. Baker as defendants, the reality was that even if Wigan succeeded in the litigation, it was always going to have to make a payment to Scullindale, even if the amount of that payment was to be determined by the independent expert mechanism afforded by the lease rather than, with the parties' agreement, by the court. Therefore, there was never any justification, in financial terms, for joining Mr. Baker or Mr. Madani as co-defendants.

25. Mr. Latimer points out that, strictly speaking, Wigan should be paying the costs of the second and third defendants, although he recognises that it is pragmatic to make an order in relation to the defence costs as a whole; and he suggests an 80/20 split on that basis.

26. Mr. Hutchings submits that when one looks at the case as a whole, this is simply an example of the typical situation where a claimant is successful, but does not win on each and every point in the litigation. He submits that there is no good reason to depart from the general rule that costs should follow the event just because Wigan lost on what he describes as relatively peripheral issues. He submits that those issues on which Wigan lost did not take a lot of time at trial, or in the trial preparation. The failure of the mesne profits claim was because it had been impossible for Scullindale to trade during the period of the coronavirus pandemic. The double value claim had not been pursued; and it involved merely a pure point of law.

27. Mr. Madani and Mr. Baker had been joined to the litigation because, absent agreement between the parties, the court would have had no jurisdiction to assess the termination payment, and therefore a money judgment might have needed to be enforced against the guarantors, who had given an indemnity, as well as a guarantee, because of difficulties of enforcement in relation to the first defendant as a company registered in the British Virgin Islands. For those reasons, and for the other reasons set out in his written skeleton, Mr. Hutchings submits that there should be no

deduction from the costs to be awarded to Wigan. If deduction there is to be, it should be no more than 10%.

28. I approach the question of costs, first, without reference to the admissible offer to settle contained within DWF Law's letter of 21 January 2021. Had it not been for that letter, I would have awarded Wigan 80% of its costs, to reflect the issues on which it had lost. In particular, I would have made a 20% deduction to reflect the fact that Wigan failed to secure roughly a £1 million deduction from the termination payment for which it was contending. In my judgment, and in the exercise of the court's discretion as to costs, it is appropriate to make a discount on the costs recoverable by Wigan to reflect its failure on that point.

29. However, it then becomes necessary to consider the effect of the without prejudice save as to costs offer. The letter made it clear that Wigan was willing to settle the entire proceedings, including the counterclaim, on the following terms: (1) the defendants accept that the lease terminated on 22 November 2019, and that Scullindale has no ongoing interest or right of occupation; (2) Scullindale would deliver up vacant possession of the property, including any heritage and loan items that remained at the property when Scullindale took occupation, by 4 p.m. on 5 February 2021; (3) pursuant to clause 9.3 of the lease, Wigan would pay to Scullindale £4.3 million by electronic transfer within 14 days of acceptance of the offer; (4) Scullindale would pay the claimant's costs of £128,000, to be deducted from the settlement sum prior to payment; (5) Scullindale would pay Wigan mesne profits in the sum of £236,000 in respect of its occupation of the property since 22 November 2019, again to be deducted from the settlement sum prior to payment; (6) the terms of settlement were to be kept strictly confidential; and (7) a joint statement to the press would be agreed by the parties so as to ensure a uniform approach to the media, and that any statements made were agreeable to all the parties in light of the confidentiality provision above.

30. The terms of the offer were stated to have the effect of Wigan making payment to Scullindale of the total sum of £3,936,000 in full and final settlement of all matters. Under the heading "Failure to accept" the letter concluded: "Your client is aware that our client’s costs are set to double within the coming weeks as trial preparation and the trial itself commences. If your client does not accept this offer, and our client is successful at trial in obtaining an outcome that is equally or more advantageous than this offer, we will be seeking an order for your client to pay our client's costs on an indemnity basis. The offer outlined above is perfectly reasonable given the strength of our client's position and the significant weaknesses in your clients’ case. We advise your clients to consider the offer with care as our client will make no further offers of settlement after this date. We look forward to hearing from you."

31. The defendants' solicitors, Jolliffes, put forward a counter without prejudice save as to costs offer on 28 January. Its terms were that the lease was to continue in existence, with Scullindale remaining in possession and occupation of the property; and it involved payment to Scullindale of £500,000 within 14 days from acceptance, together with Scullindale's reasonable legal costs. That offer was extremely optimistic to say the least.

32. The effect of the valuers' revised statement, bearing in mind that the fixtures and fittings, which they value at £920,000, are to remain in the property and pass to

Wigan, is effectively that Scullindale is to receive £3,936,084, disregarding the fixtures and fittings. That is effectively what the defendants have achieved from this litigation. However, the defendants had been offered £3,936,000 on 21 January 2021 on the basis that they would retain the fixtures and fittings, valued at £920,000. The net effect of the rejection of DWF's without prejudice save as to costs offer is that Scullindale has effectively secured an additional £84, but has incurred its legal costs of pursuing the claim to trial which, on the basis of the approved costs budget, are probably in the order of £100,000, and, but for the effect of the Calderbank offer, it has incurred a liability for Wigan's costs in the order of 80% of an approved costs budget of some £307,000, which is likely to be assessed at about that level, and of which probably a half would not have been incurred had the Calderbank offer been accepted.

33. It is clear to me that Scullindale would have been considerably better off had it accepted the without prejudice save as to costs offer in January 2021. I do not accept that its failure to accept that offer was so unreasonable as to justify an order that costs be assessed on the indemnity, rather than the standard, basis after the end of January 2021. Mr. Latimer has referred me to the observations of Rix LJ, speaking for the Court of Appeal, in the case of ***Epsom College v Pierse Constructing Southern Ltd*** [2011] EWCA Civ 1149, and reported at [2012] 3 Costs Law Reports 451, at paragraphs 71-72. Rix LJ, speaking with the agreement of Tomlinson LJ and Sir Mark Waller, made it clear that the general requirements before indemnity costs are imposed are that the case in question falls outside the norm, and that the conduct must be unreasonable to a high degree. Rix LJ acknowledged that that test might be met where there had been an unreasonable failure to accept an offer of settlement, or a party had unreasonably resisted a sensible approach to finding a solution to the proceedings.

34. In my judgment, it was not so unreasonable of the defendants to refuse the without prejudice save as to costs offer as to justify assessment of costs on the indemnity basis from a date seven, or more likely 21, days from the date of that offer; but, in my judgment, it was sufficiently unreasonable to accept that offer in the light of the eventual outcome of the litigation that the deduction of 20% from Wigan's costs that I would otherwise have been prepared to make should fall to be ignored.

35. In short, whilst I would have been prepared to limit Wigan's costs to 80% of those costs had DWF not made the without prejudice save as to costs offer which it did on 21 January 2021, in the light of that offer, and the defendants' refusal to take it up, in my judgment, it is appropriate to award Wigan all of its costs of this litigation. I do so because I have had regard to the admissible offer to settle, and my conclusion that it was an offer that should have been accepted, and would have saved the parties the further costs of this litigation had it been accepted. The defendants would have been better off to the extent of their own post-January 2021 legal costs, in the order of some £100,000, and to the extent of what would have been its 80% liability for Wigan's costs after that date, in the order of a similar sum or rather more.

36. By CPR 44.28, where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs unless there is good reason not to do so. There is no good reason here, and it is not suggested that there is any such good reason.

37. Mr. Hutchings has referred me to the approach of Birss J in the case of *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 3258 (Ch), at paragraph 60, where he awarded 90% of the approved budgeted costs of the receiving party by way of interim payment. I acknowledge, as Mr. Latimer submits, that that lays down no rule of law; but given that there is an approved costs budget, and given that it is one that is likely to be exceeded on detailed assessment, given my recording that there is good reason to allow certain additional costs on top of the approved costs budget, it seems to me appropriate to follow Birss J's approach in the present case and to award 90% of the existing approved costs budget by way of interim payment on account. In order to produce a figure in round terms, the resulting figure will be £270,000.

38. That therefore concludes this extemporary judgment, unless I am directed to any matters that I have omitted to address.

(After further submissions)

39. Having delivered my extemporary judgment, Mr. Latimer has now sought clarification as to whether the 80/20 split of costs which I would otherwise have applied to costs up to and including trial, but for the terms of the without prejudice save as to costs offer, should apply up to the date of the offer, with full liability for costs only commencing from the rejection of the offer of 21 February 2021. Mr. Latimer submits that I should not apply the consequences of the without prejudice save as to costs offer retrospectively. He points to the fact that would punish the paying party for having declined the offer in relation to costs that had already been incurred by the receiving party. Mr. Latimer makes the point that the paying party cannot change what is past. Mr. Hutchings, in response, submits that, as part of the court's broad discretion in deciding the overall incidence of costs throughout the course of the litigation, the court is entitled to have regard to the without prejudice save as to costs offer, and to take it into account in relation to the totality of the costs that fall to be borne by the paying party.

40. I had hoped, in my earlier extemporary judgment, to have made it clear that I am having regard to the effect of the admissible offer to settle on the overall incidence of the costs. Had there been no such offer, I would have discounted the costs payable by the defendants by 20%. However, as a result of the refusal to accept the admissible offer to settle, the unsuccessful party incurred further costs going forward; as did the successful party. Those costs would have been avoided entirely had the offer been accepted. I see nothing wrong in exercising the court's overall discretion as to costs in saying that a discount that I would have applied had there been no admissible offer to settle should no longer be applied, even in relation to costs incurred prior to the date of the admissible offer to settle.

41. The court has to have regard to the totality of the circumstances as they appear at the date the court comes to make its decision as to costs. Even though the court would have applied a 20% discount, had an admissible offer not been made, there is no reason why it should refuse to apply that discount, even to costs incurred prior to the rejection of the admissible offer to settle. The fact is that had the offer been accepted, each of the parties would have ended up not having incurred substantial, post-January 2021 costs, including the costs of what is now a 13-day hearing.

42. I do not consider that there is any injustice in what Mr. Latimer described as refusing to apply a discount to the costs already incurred by the time of the admissible offer to settle. I have to look at the position as it is now, and in the light of all that has transpired. I therefore reject Mr. Latimer's additional submission that I should only refuse to apply the 20% discount prospectively, from the time when the admissible offer to settle was rejected.

43. I also take the opportunity of making it clear, as I should have done in my original extemporary judgment, that I see no lack of clarity in the terms of the without prejudice save as to costs offer, in terms of fixtures and fittings. The letter said nothing about fixtures and fittings; therefore, the reasonable reader would infer that the letter is not seeking to assert any claim over tenants' fixtures and fittings, which would otherwise be capable of being removed from the premises. If there was any lack of clarity, it is something on which the recipient could have sought clarification. As it was, the letter made it clear that any heritage and loan items that had been at the property when the defendant took possession were to be included in what was to be delivered up; but there is no similar reference to tenants' fixtures and fittings. Therefore, the reasonable inference would be that they were not to be left at the property and delivered up to the landlord. If, however, there were any uncertainty about that, it is something on which the recipient of the letter could have sought clarification; in the event it did not. I simply take this opportunity to clarify that point.

44. That concludes this second extemporary judgment, or addendum to the previous one.

(This Judgment has been approved by HHJ Hodge QC.)

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Telephone No: 020 7067 2900 DX: 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com