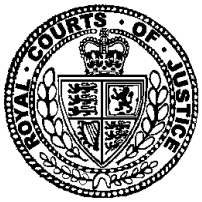

Neutral Citation Number: [2020] EWHC 1766 (QB)
Case No: QB-2007-000013
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/07/2020

Before:

THE HONOURABLE MRS JUSTICE LAMBERT

- -

Between:

Sandra Bailey and others	**Claimant**
- and -	
GlaxoSmithKline UK Limited	**Defendant**

- -
- -

Mr Niazi Fetto (instructed by Fortitude Law) for the **Claimants**
Mr Malcolm Sheehan QC, Mr Adam Heppinstall and Mr James Williams (instructed by Addleshaw Goddard) for the **Defendant**

Hearing dates: 12 and 13 May 2020

- -

Approved Judgment

.....

THE HONOURABLE MRS JUSTICE LAMBERT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:15am on Friday 3 July 2020.

Mrs Justice Lambert:

Introduction

1. This litigation has a long and chequered history. Most recently, the action was listed for a hearing of the first of the seven generic trial issues set out in Schedule 3 to my Order of 15 February 2019. Two working days before the hearing, and only following the Court's inquiry of the Claimants' legal team as to whether the Claimants were intending to be represented at the hearing, the Court and the Defendant were informed that the Claimants were submitting to judgment being entered in the Defendant's favour. This brought an end to the substantive issues in this long-running litigation.

2. The issues that occupied the Court in May 2020 and which form the subject matter of this judgment relate to the recovery of the Defendant's costs. Those issues are as follows:

   i) first, whether the general rule that the successful party should recover its costs should apply. The unsuccessful Claimants submit that the general rule concerning recovery of costs (CPR 44.2(2)(a)) should not apply and the appropriate costs order in this case is no order for costs, save for payment of £250,000 representing the Defendant's costs of an application for summary disposal. This argument is advanced on the basis that neither party complied with the duty imposed in CPR 1.1 to further the overriding objective in enabling the Court to deal with the case justly and proportionately by seeking a pre-trial ruling from the Court on the lawfulness of the Claimants' case;

   ii) second, if the general rule should apply, the basis of the assessment: the Defendant submits that from 21 June 2018 (that being 28 days following the handing down of the judgment of Andrews J in *Colin Gee and others v Depuy International Limited* [2018] EWHC 1208 (QB)) the assessment of costs should be on the indemnity basis as from that point (if not earlier) the Claimants ought reasonably to have appreciated that the action was so speculative or weak or thin that it should no longer be pursued; and

   iii) third, if the Defendant should recover its costs on either basis, whether there should be a payment on account of costs.

3. At the hearing before me the Claimants were represented by Mr Niazi Fetto and the Defendant by Mr Malcolm Sheehan QC, Mr Adam Heppinstall and Mr James Williams. I am grateful to all involved for their considerable assistance and to Mr Fetto and Mr Sheehan for their clear and focussed submissions.

Procedural Background

4. This is an action for damages for personal injury brought by a group of Claimants alleging that the antidepressant drug, Seroxat, a prescription-only antidepressant and one of a class of Selective Serotonin Re-Uptake Inhibitors (SSRIs) is defective within the meaning of the Consumer Protection Act 1987 ("the CPA").

5. The full protracted procedural history of the litigation is set out in the judgment of Foskett J of 4 February 2016 [2016] EWHC 178 (QB), in my two judgments of February 2019 [2019] EWHC 337 (QB) and May 2019 [2019] EWHC 1167 (QB) and in the judgment of the Court of Appeal [2019] EWCA Civ 1924. The unexpurgated version of the history is not necessary for present purposes; however given that the parties' conduct of the litigation, set against their respective interpretations of the pleadings and various judgments, lies at the heart of the issues which I must resolve, I need to reference here, at least in outline, something of that history.

The Pleadings

6. The litigation dates back to December 2007 when Particulars of Claim were served. So far as relevant, the Particulars of Claim alleged that Seroxat was defective (within the meaning of the CPA) by reason of its capacity to cause adverse effects consequent upon discontinuance or withdrawal. It was alleged that those adverse effects were such as to prevent, or make more difficult, the ability of users to discontinue, withdraw from or remain free from taking the drug to an extent greater than other SSRIs. The Claimants also pleaded a secondary case based on a failure to warn of the risks associated with discontinuance. This "warnings case" was however no more than a corollary to the Claimants' primary case and, as such, I need say no more about it.

7. Before serving its Defence, the Defendant sought clarification of the Claimants' case in a Request for Further Information dated 19 February 2008. One of the questions posed was whether, in contending that Seroxat was defective, it was the Claimants' case that the benefits of Seroxat, as against other drugs of a similar nature for a particular Claimant, were material to be taken into account. To this question, the Claimants responded: "No."

8. In its Defence, the Defendant denied that Seroxat had a greater capacity to cause the alleged adverse effects on discontinuance when compared with other SSRIs. However, having been furnished with the clarification of the case it had to meet in the Claimants' Response to the Request for Further Information, the Defence also denied that a defect within the meaning of the CPA in a prescription only medicine could lawfully be established by comparing the incidence and/or severity of a particular adverse reaction associated with that medicine against the incidence and/or severity of that adverse reaction associated with another prescription only medicine. The Defendant pleaded that the only lawful approach to defect within the meaning of the CPA involved a much wider comparison of the relative risk/benefit profiles of Seroxat as against the medicines being compared, both generally and for the particular Claimant in question.

9. In the Reply, the Claimants joined issue with the Defence generally but did not seek to amend their case to allege defect on the basis of a broader comparison of relative risks/benefits of Seroxat and its comparators more generally.

10. The Defendant's interpretation of the Particulars of Claim, as clarified in the Response, was that the Claimants' case was limited to the risks of Seroxat relative to comparator SSRIs in respect of symptoms on discontinuation. This limited case attracted the tag: "worst in class case." The Defendant's consistent (and emphatic) position since service of the Defence has been that the pleadings did not permit the

Claimants to run a case based upon a wider examination of the relative risks and benefits of Seroxat compared with other SSRIs either generally or in respect of a specific Claimant ("the risks/benefits case" or "holistic case") and, further, that only the prohibited holistic approach to the assessment of defect was lawful.

11. Whether this interpretation of the Claimants' pleaded case was the correct interpretation was the impetus for my two judgments of February 2019 (the second pre-trial review) and May 2019 (following the Opening at trial). The issue was resolved by the Court of Appeal in November 2019 when Hamblen LJ (giving the judgment of the Court) observed that the pleaded case "*was always limited to the "worst in class case."*

Phase 1 of the Litigation:

12. Following close of pleadings, the litigation progressed in two distinct phases. During the first phase a Group Litigation Order ("the GLO") was made by Senior Master Whitaker on 29 October 2008. This GLO listed 11 common issues, the first two of which set out the relevant issues concerning defect:

> "(a) Does Seroxat have a capacity "to cause adverse effects consequent upon or following discontinuance (withdrawal) such as to prevent or make more difficult the ability of users to discontinue, withdraw from or remain free from taking" Seroxat to a greater extent than all other [SSRIs]?
>
> (b) Should the alleged defect in Seroxat, a prescription only medicine, be established by comparing the incidence and/or severity of adverse reactions associated with that medicine against the incidence and/or severity of adverse reactions associated with another prescription only medicine?"

13. Following the GLO, the litigation proceeded in a routine way with exchange of witness statements and expert evidence. However, this first phase of the litigation came to an abrupt halt only a few weeks before the trial of the GLO issues which was due to be heard by Mackay J in February 2011 when public funding was withdrawn on a merits basis. This led to the adjournment of the trial and, following the adjournment, the action was effectively stayed. 369 Claimants then discontinued their claims leaving the remaining 124 Claimants to challenge (unsuccessfully) the withdrawal of public funding.

Phase 2 of the Litigation

14. The second phase of the litigation started in 2015 when the remaining 124 Claimants sought to resurrect the action. By this stage, the Claimants had obtained commercial funding from a third party, Managed Legal Solutions Limited, and a wholly new counsel team had been instructed, led by Ms Jacqueline Perry QC. Until the autumn of 2018, when I took over as nominated trial judge, the litigation was case managed by Foskett J.

15. Over the course of his three-year tenure case managing the litigation, Foskett J gave 4 reserved judgments dealing with a range of issues. So far as relevant to the costs issues which concern me, I can focus upon two in particular: those of 4 February 2016 and 1 March 2017.

Foskett J's Judgment: 4 February 2016

16. Foskett J's judgment of 4 February 2016 followed a case management hearing in two parts: October 2015 and December 2015. At both of those hearings it had been submitted by the Defendant that the action should not be permitted to proceed and that the action should either be stayed indefinitely or struck out by the judge exercising his case management powers. One of the central planks of the Defendant's submission was the allegedly unlawful approach taken by the Claimants to the assessment of defect under s. 3 CPA. At [124] Foskett J declined to bring the proceedings to an end using his case management powers. He did not doubt that he had the power to do so (although he remarked that it would be an unusual course) but considered that he did not have sufficient information. He added: "*That does not mean that it may not be a step that could be taken at a later stage nor does it mean that, if so advised, the Defendant may not apply for summary judgment at some stage."*

Foskett J's Judgment: 1 March 2017

17. In March 2017, the action came before Foskett J once again. On this occasion the issue for his determination was the admissibility or otherwise of sections of one of the substituted expert reports served by the Claimants. In this context, he made the following important observations:

> (a) at [3] that he had given permission for experts to be substituted in order to enable the Claimants to put forward what should be the high point of their case on the generic issues as he had previously listed them;
>
> (b) at [11] it was common ground that he had summarised the essential nature of the case advanced on behalf of the Claimants accurately in his judgment of February 2016;
>
> (c) at [12] that the Claimants' primary and secondary case had been translated into the agreed issues set out in the GLO;
>
> (d) at [13] that Mr Gibson QC (for the Defendant) had characterised the primary allegation as being that Seroxat was "worst in class," in other words that Seroxat was the worst in the class of SSRIs because of the greater difficulty relative to other SSRIs of a user of Seroxat discontinuing his/her use of the drug and the consequent prolongation of discontinuation symptoms. Foskett J approved this characterisation of the Claimants' case, stating it to be accurate;
>
> (e) at [23] that no application had been made by the Claimants to amend the claim or the issues identified in his judgment of February 2016 and that any dispensation that he may have made in the Claimants' favour thus far had been purely to enable the effective resurrection of the issues as they had come to rest in 2011;
>
> (f) at [24] that it followed that any attempt by the Claimants to move the case outside those well-defined parameters would not have his approval;

> (g) at [27] that the litigation had proceeded in such a way as to enable the issues to be "*closely defined.*" Subject only to updating the disclosure exercise and the expert evidence in the light of it "*the parameters for the forthcoming trial have not changed*";
>
> (h) at [27] that the Claimants' new legal team had not sought to change things. He remarked however that "*although there was a hint in some of Mr Lambert's* (junior counsel for the Claimants) *submissions that there is now a desire to engage, at least to some extent, in a risk/benefit analysis. something which had previously been expressly disavowed. If there is any such a desire or intention, then the short answer to it is that it is now too late to do so."*

18. As Hamblen LJ subsequently recorded at [38] of the judgment of the Court of Appeal, Foskett J had made clear that the Claimants' pleaded case on defect was limited to the "worst in class" case as reflected in the GLO issues. He also made clear that he had permitted the case to go forward on the basis of those "*clearly and closely*" defined issues and that it was now too late for the Claimants to seek to expand their case to cover an analysis of risks/benefits.

19. The Claimants did not appeal Foskett J's ruling on the scope of their case; nor seek to clarify its meaning; nor set out (either to the Court or the Defendant) the view that Foskett J's characterisation of the issues in the case on the basis of his analysis of the pleadings was wrong.

20. I was appointed as trial judge in the autumn of 2018. During the course of submissions at the first pre-trial review in November 2018 I detected that, notwithstanding the careful case management of the litigation by Foskett J, the parties may yet be at odds with the issues to be determined at trial. I therefore directed that the parties add flesh to the issues identified in the GLO and provide me with a list of topics or questions which each contended I should determine at trial.

Judgment: 14 February 2019

21. At the further pre-trial review in February 2019, the Claimants submitted that their case was not limited to the "worst in class" case. They asserted that the pleadings enabled them to run a free standing case on defect: namely that the severity, incidence and duration of adverse effects on discontinuance in themselves rendered the drug defective, irrespective of the relative severity, duration or frequency of those effects when compared with other drugs of the same class. This was a submission which I had little difficulty in rejecting.

22. In the judgment I also dealt with an argument advanced by Mr Kent QC (who was, by this stage, instructed to appear with Ms Perry for the Claimants) concerning the pleadings. Whilst accepting that the relative risks/benefits of the drug should not form part of the scope at trial, Mr Kent submitted that this was not a consequence of the Claimants' pleading, but due to the Defendant having failed to plead a positive case as to the drug's relative benefits (either generally or for a particular claimant). I recorded that, given the Claimants' Response to the Request for Further Information and the, apparently unequivocal, statement that the benefits of Seroxat against other SSRIs for a particular Claimant were irrelevant to their case on defect, the Defendant had not been required to plead a positive case. I effectively re-iterated the words of

Foskett J in stating that: "*whether there are, or not, particular benefits associated with Seroxat will therefore not feature at trial and, as Foskett J ruled in March 2017, it is now far too late to expand the scope of the trial to include evidence of risks/benefits*."

23. During the course of his submissions, Mr Kent had observed that Foskett J's ruling on scope in March 2017 had not been reflected in an order and was therefore unappealable. For this reason, and for clarity, I directed that the issues for trial should be listed in a Schedule to be annexed to my Order. The first of those issues, and the issue which I was due to determine at the hearing in May 2020 was:

> "1. Is it appropriate in principle to assess whether the prescription only medicine Seroxat is defective pursuant to s.3 of the Consumer Protection Act 1987 by seeking to establish whether it is "worst in class" in that:
>
> a. it causes adverse effects on discontinuation which are (i) of a greater incidence (ii) a greater severity and (iii) a longer duration than the other medicines in the class; and that
>
> b. such adverse effects prevent or make more difficult the ability of users to discontinue, withdraw from or remain free from Seroxat than is the case with the other medicines in the class?"

24. The Claimants did not appeal my ruling of February 2019.

25. Notwithstanding the unappealed prior rulings, the Claimants' Opening Note included the following statements at paragraphs 57 and 58:

> "57 *It must be made clear from the outset that it is not and has never been the Claimants' case that a product can be shown to be defective within the CPA 1987 merely by identifying one negative and/or undesirable aspect of it whilst ignoring any advantages. It is a reductio ad absurdum on the part of the Defendant that fails to recognise the case being advanced by the Claimants.*
>
> *58. Rather, there is in truth no inconsistency between the 'comparative' and 'holistic' approaches. The Claimants' case is indeed inherently comparative; but it does not exist in a vacuum divorced from either the marketplace or clinical reality. Thus, what is being advanced herein is indeed a holistic approach, namely that whatever the benefits asserted by the Defendant for this product in these proceedings, they are outweighed by the risks and problems associated with DS, having regard to inter alia the existence of equally efficacious products which do not have those risks/problems*."

26. Given my ruling of February 2019 and that of Foskett J of March 2017, this was a truly startling articulation of the Claimants' case. It prompted a predictable (and predictably speedy) objection from the Defendant.

Day 1 of Trial

27. Given the issue which had arisen as a consequence of the Claimants' Opening Note, I permitted the Claimants to open her case orally at trial. During her opening Ms Perry told me that the "worst in class" case had been either a mischaracterisation or a misunderstanding of the Claimants case from the beginning. She said: "*we are not and have never said that Seroxat is demonstrably unsafe because it's worst in class, as if all we ever have to do or ever have had to do was come to court and … show you that ..Seroxat is the worst performance, ergo it becomes worst in class, ergo it is unsafe*." She went further, saying that she agreed that "*just because a product is per se the worst of five comparators*" does not make the product defective. She suggested that Foskett J had not drilled down into the issues sufficiently given that the hearing before him in February 2017 had been a case management hearing concerning the admissibility of sections of an expert report. She told me that the Claimants' case was (and by implication always had been) that the effects of Seroxat on discontinuance or withdrawal had to be considered by the Court against (as she put it) an otherwise "*level playing field*" of risks and benefits as between Seroxat and its comparators both generally and in respect of the individual patient. Viewed in this way, she submitted that there were "*no benefits*" associated with the drug but "*just burdens."*

28. The Claimants submitted once again that the pleadings supported their analysis of the claim as the Defendant had not pleaded a positive case on benefits and in this absence the Defendant must be taken to have conceded the point. Ms Perry reminded me that the Defendant had accepted in its Defence that the drug had no particular advantage or benefit in terms of its "efficacy" by which she understood the Defendant was referring to the drug's qualities over and above its quality as an anti-depressant or anxiolytic.

29. Given the position taken by the Claimants, I made a further (confirmatory) ruling, holding that the Claimants' case on defect was limited to the risks of Seroxat relative to comparator SSRIs in respect of discontinuation symptoms only (the "worst in class" case) and could not be extended to the relative risks and benefits of Seroxat and its comparators more generally and that the Claimants were not entitled to advance the case that Seroxat has no particular benefits relative to other drugs in the appropriate comparator group. I informed the parties of my decision on 2 May (with reasons to follow). On 3 May, I was informed that the Claimants had stood down their expert witnesses (apparently without consultation with the Defendant).

30. In the event, both parties urged me to adjourn the trial whilst the Claimants appealed my ruling. As Mr Kent put it, if unsuccessful on appeal: "*we do very much - we are perfectly frank about this – recognise that our case is a shadow of its former self, and therefore we would have to give certain very strong advice to the clients and anyone who's incurring any expense on their behalf*."

Court of Appeal Judgment

31. The Court of Appeal handed down judgment on 8 November 2019, Hamblen LJ giving the judgment of the Court. In dismissing the appeal he made the following observations in respect of the judgment of Foskett J of 1 March 2017:

i) at [38] that Foskett J had made it clear that the Claimants' pleaded case on defect was limited to the "worst in class" case, as reflected in the GLO issues; that the case would go forward on the basis of those clearly and closely defined issues and that it was now too late for the Claimants to expand their case to cover an analysis of risks/benefits;

ii) at [41] that Foskett J had set out his interpretation of the Claimants' pleaded case and, on that basis, had made determinations as to the legitimate ambit of expert evidence, had identified the issues for trial and had set out how the case was to be case managed going forward. He had stated in terms that he would not approve any expansion of the case. Unless and until therefore his decision as to scope was challenged the case had to be conducted and managed in the light of that determination. Hamblen LJ observed that if the Claimants were to challenge that approach that was the time to do so: the Claimants could have sought to appeal against the judge's decision as to scope but did not do so. There was no necessity for that ruling to be expressly reflected in the terms of the order made in order to be able to appeal. It was a decision "*fundamental to the case management of the case and was manifestly capable of being appealed, albeit that the prospects of a successful appeal against such a decision would have been slight;*"

Concerning my judgment of February 2019, he remarked:

iii) at [44] that I had ruled in terms that the risks/benefits case would not feature at trial and that it was now too late for it to do so. The list of issues had made it clear, as had the judgment, that any risks/benefits analysis would be limited to the "worst in class" case;

iv) at [46] that had the Claimants wished to challenge my ruling and my order as to the issues to be determined at trial, then this was the time to do so. On this occasion the decision as to scope was expressly reflected in the order made. No attempt was made to appeal against the decision or order and, as Hamblen J remarked, "*No doubt this was done advisedly*. *The prospects of succeeding on appeal in introducing a risks/benefits case, in circumstances where no such application had been made before the judge, and she had made it clear that it would be far too late to seek to do so, were obviously very remote;*"

v) at [47] Mr Kent had submitted on appeal that there was no need to raise the risks/benefits case as an issue because in the light of the pleadings it was effectively a non-issue. However, this involved ignoring the considered way in which the case had been case managed and the issues carefully defined and delineated. It also ignored the fact that it would necessarily mean the issue of particular benefits featuring at the

trial in circumstances where the judge had expressly determined that it would not.

vi) against the background of the unappealed prior rulings, it was "*plainly impermissible for the Claimants to seek to raise the risks/benefits case in opening their case at trial. Although this was done under the guise of an assumed "level playing field" with regard to the benefits and (by implication) the risks associated with Seroxat and its comparator drugs, this involved seeking to introduce the risks/ benefits case as an issue at trial and would have necessitated evidence relating to it. It is obvious that any issue of relative risks/benefits would raise a wide ranging factual and expert inquiry, which all parties accepted had not been carried out*;" (My emphasis).

vii) Further, I had been correct to decide that my judgment was merely confirmatory of the unappealed prior rulings. He agreed with the observation that if there was a concern arising from the judicial analysis of the claim, then the proper course would have been to have appealed the relevant rulings and that it was now too late to do so.

viii) Although not necessary for the determination of the appeal, Hamblen LJ confirmed that he was in "*complete agreement*" with the analysis of the pleadings carried out by both Foskett J and the judge. Given that no positive case as to risks/benefits had been raised by either party on the pleadings, there had been no need for the Defendant to do so in order to meet the Claimants' case. No conceded or agreed case on benefits could be inferred from the Defendant's failure to raise such a positive case. The pleaded case had always been limited to "worst in class".

32. The Defendant made an application in December 2019 that question 1 of the Schedule of Issues should be determined as a preliminary issue. In their skeleton response to the Defendant's application, the Claimants declined to engage with the substance of the argument pending the (unsuccessful) outcome of their application for permission to the Supreme Court, save to record that: "*They do not accept that it has become an unarguable case or that the claims could not succeed if the court in due course finds that the nature, severity and frequency of Discontinuation Symptoms associated with Seroxat was so marked and significant that the court could find the drug defective under the CPA on that basis alone (or in conjunction with inadequate warnings)*."

33. It is against this background that the action came again to be listed for hearing; this time on the Defendant's application for a trial of the first issue only. As I have said, shortly before the hearing, the Claimants submitted to judgment in favour of the Defendant, leaving the only outstanding issue of costs.

Should the Defendant Be Awarded its Costs of the Action?

34. I need mention three preliminary points. First, the Qualified One Way Costs regime does not apply to this claim as it started well before that regime came into effect in 2013. Second, the costs in issue relate principally to the costs incurred by the Defendant following the resurrection of the action in 2015. Although there is an

outstanding costs liability dating back to the period when the Claimants had the benefit of public funding, the Defendant accepts that it will be unlikely to be able to enforce that liability. The Defendant's Schedule of Costs for the purpose of an interim payment therefore relates only to costs incurred since 31 July 2015. That said, the costs figure is very high, running to just under £9.33 million. Third, the Defendant seeks an order for costs against the Claimants not to be enforced without the further order of the Court. I am informed that a further application may be made against the third party litigation funders MLS who have already been required to provide a security for the Defendant's costs under CPR 25.14(1) by making a payment into court in the sum of £1,750,000 pursuant to the Order of Foskett J of 11 December 2017. This sum was increased by £750,000 by a consent order dated 11 October 2018.

35. I turn then to the first issue for my determination which is whether the Defendant should be awarded its costs. I start with CPR 44.2 which sets out the court's discretion as to costs. The relevant paragraphs are as follow:

> "44.2
>
> (1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (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; but
>
> (b) the court may make a different order…
>
> (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 the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) …
>
> (5) The conduct of the parties includes –
>
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
>
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."

36. The Claimants acknowledge that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. The Claimants however seek a different order: no order as to costs (save for payment of a sum of £250,000 representing the Defendant's costs of an application for summary disposal).

37. Mr Fetto's argument can be put shortly. He submits that the general rule should not apply in this case because neither party has complied with the obligation to give effect to the overriding objective to deal with cases justly and at proportionate cost. From the outset of the litigation the Defendant's consistent position has been that the Claimants' approach to the assessment of defect was flawed and not legally tenable. However, at no stage, before issuing the application in December 2019, did the Defendant try to resolve the issue by making an application for summary judgment or to strike out the action, in spite of the Defendant's case that it would be dispositive of the entire case. Mr Fetto acknowledges that the Claimants likewise did nothing to resolve once and for all the question mark raised by the Defendant over the legal basis for the claim, but submits that this is reflected in the order which he seeks, namely, no order for costs: in short, both parties are equally at fault in failing to deal with the case proportionately.

38. Mr Fetto does not suggest that there was a duty on the Defendant to make an application for summary disposal. Rather he suggests that the failure to do so is conduct which I should take into account when I exercise my discretion in making the fair costs order. He described the "*catalogue of prompts and opportunities*" afforded to the Defendant to make the application over the course of the litigation since its revival in 2015. He drew my attention to the many occasions when the legal basis for the claim had been challenged by the Defendant in submissions and when the issue of summary disposal had been raised. For example:

> i) in 2015, at the two case management hearings before Foskett J which led to his judgment of February 2016, one of the major planks of the Defendant's submission that the claim should not be permitted to be revived was its poor prospects of success. There had however been no application for summary disposal, rather the Defendant had submitted that the Court should exercise its case management powers to either stay the action permanently or to strike it out.
>
> ii) In July 2016, the Court referred expressly to the Defendant making an application for summary judgment and Foskett J anticipated that the directions he was making may lead to an assessment by the Defendant about whether it would apply for summary judgment or not.

iii) The Order made by Foskett J in September 2016 provided for the possibility of the Defendant making a summary judgment application.

39. Mr Fetto submitted that by the time of the hearing in February 2017, the judgment of Hickinbottom J in *Wilkes v DePuy International Limited* [2018] QB 627 had been handed down and whatever doubt there may have been as to the lawful approach to the assessment of defect following the decision of Burton J in *A and Ors v National Blood Authority* [2001] EWHC QB 446 had been substantially resolved. *Wilkes* supported the Defendant's case that only a holistic assessment was an appropriate approach to safety under s.3 CPA. On the question of whether risk/benefit is a relevant circumstance Hickinbottom J had held that "*any assessment of its safety will necessarily require the risks involved in use of that product to be balanced against its potential benefits including its potential utility*" and that "*risk-benefit may lie at the heart of the question of appropriate level of safety of a medicinal product for the purposes of the Act.*" Although armed with both this judgment and Foskett J's ruling on the scope of the Claimants' case, the Defendant still did not make an application for summary disposal.

40. Mr Fetto makes two supplemental submissions. First, he draws my attention to the very substantial costs which had been incurred by the Defendant since 2015, making a comparison between the time, effort and cost involved in defending the case to trial and the time, effort and cost involved in making an application for summary disposal. He submits that the Court should take into account the vast saving that could have been made but was not. Second, he observes that although a formal application for the resolution of the issue was not made until after the judgment of the Court of Appeal had been handed down, the Defendant had invited me to resolve the issue as a preliminary point on Day 2 of the trial in May 2019.

41. I do not set out Mr Sheehan's submissions in detail here as they are largely woven into my conclusions. However, the central points which he made were (a) the responsibility for bringing a case and continuing to prosecute a case is upon the party who brings it, not his opponent (b) there is no authority for the proposition that a party facing a weak claim must make an application for summary determination, or else risk an adverse costs order and there are good reasons why no such authority exists and (c) the Claimants' submission does not reflect the reality of the case which they presented throughout this litigation (until finally submitting to judgment at the eleventh hour) which was that the Defendant's argument over the legal basis of the claim was without traction.

Decision on Application of General Rule:

42. The question for me in determining the Claimants' application is whether, in complying with its duty (under CPR 1.3) to help the Court to further the overriding objective the Defendant ought to have made an application for summary disposal of the claim. Although Mr Fetto was careful to emphasise that he was not suggesting that the Defendant was under a duty, as such, to make the application, nonetheless he identified the Defendant's failure to do so as conduct sufficient to justify the displacement of the general rule concerning recovery for costs and to penalise the Defendant by depriving it of the lion's share of its costs. Whether couched in terms of a duty, or a factor that the Court should examine critically and take into account, seems to me to make no difference or, if there is a difference, it is one without

significance. The Claimants submit that the Defendant culpably failed to make the application and that this failure should be the subject of a penalty.

43. Viewed in this way and, notwithstanding the low-key and attractive way in which Mr Fetto presented his submissions, I have no difficulty in concluding that, in this case, the general rule should apply and there should be an order that the Claimants bear the costs of the Defendant. I reach this conclusion for the three main reasons advanced by Mr Sheehan.

44. First, the duty to run the Claimants' case rests, and has rested throughout, on the shoulders of the Claimants' legal team. Throughout the lifetime of the resurrected action the Claimants have had the benefit of leading counsel, and in the period running up to trial, two leading counsel. The Claimants' solicitor has been involved in the action throughout its course and, as I understand the position, moved from the firm of solicitors originally instructed to Fortitude Law in 2015 (the firm having been recently recognised by the Solicitors Regulation Authority). As Foskett J explained in his judgment of February 2016, Fortitude Law is a claimant-based law firm with a civil litigation portfolio including product liability and professional negligence. Foskett J concluded that the firm had been created as a vehicle by which this litigation could be continued. There was therefore no shortage of expertise on the Claimants' legal team.

45. It was the responsibility of that team to evaluate and re-evaluate the merits of the action as the litigation unfolded and make decisions accordingly. In this case, the merits evaluation would no doubt take into account that public funding had been withdrawn in 2011 on the basis that the legal team then instructed had been unable to provide advice that the action justified public funding to trial. Whether the Defendant's argument that the approach taken by the Claimants was legally flawed was well founded, or mere sabre rattling, was a matter for that team's careful consideration. If the Claimants' legal team had considered that, following the judgment of Foskett J of March 2017, the scope of the pleadings as defined in that judgment coupled with the judgment in *Wilkes* presented an insuperable obstacle to the success of the claim, then it was the Claimants' responsibility to seek to determine the action, not the Defendant's.

46. Mr Fetto acknowledges that the Claimants could have made an application to the Court for a trial of the Defendant's objection to the claim as a matter of legal principle as a preliminary issue but did not do so. His point in response is that that is reflected in the order which he seeks, that is, no order for costs. He reminds me that he is not seeking an order that the Defendant bears the Claimants' costs.

47. However, this response fails to acknowledge or to acknowledge sufficiently that it was the duty of the Claimants' legal team to manage the litigation from their perspective as they considered it appropriate and proportionate. The Claimants were aware from an early stage of the revived litigation that the Defendant's costs were likely to be very substantial indeed.

48. Further, Foskett J could have, in exercising his case management powers, directed that the point be dealt with as a preliminary issue but did not think it right to do so, absent an application for summary disposal by the Defendant. The duty to further the overriding objective rests not only with the parties, but also with the Court and I have

no doubt that, from the outset, Foskett J was attuned to the issues in the case, as he was also aware of the costs involved. The fact that he did not consider it necessary in dealing with the case proportionately to order that the Defendant's issue of principle be litigated as a preliminary issue, choosing rather to leave that management decision to the Defendant, reflects an appreciation that there may be a number of good reasons why the Defendant might not wish to make an application for summary disposal. For example:

i) Although the approach to defect under s. 3 of the CPA was addressed by Hickinbottom J in *Wilkes*, I was told by Mr Sheehan (and accept) that all involved in the world of product liability were aware that the case of *Gee* was due to come on for trial in the autumn of 2017 and that it was possible that Andrews J may have disagreed with the approach of the Court in *Wilkes*, or added a gloss which may have assisted the Claimants. There was therefore (until *Gee* was handed down) at least an element of uncertainty or fluidity as to the lawful approach to defect militating against the Defendant making an application for summary disposal.

ii) As Mr Gibson informed me in the first pre-trial review, his client wanted to have all of the issues in this long-running litigation dealt with by the Court once and for all. Mr Fetto relies upon the fact that on Day 2 of the trial in April 2019, Mr Gibson apparently invited me to deal with Question 1 of the list of issues as a preliminary point. Having re-read the transcript, I am by no means certain that Mr Gibson was inviting me to proceed in this way. It is not clear. However even if he was, it would be scarcely surprising given that, by this stage, Ms Perry had, in her opening, accepted that if the Claimants' case was as characterised by the Defendant, it was doomed to failure or, as she put it "*Can I say at the start here we say we agree. Just because the product is per se the worst of five comparators doesn't of itself make it a defective product… that can't be right*".

iii) Also, again as Mr Gibson informed me in autumn 2018, the Defendant had chosen to buttress its legal argument with expert evidence touching upon the logic of the Claimants' pleaded approach to defect. As I understood the position running up to trial, the Defendant was submitting that the Claimants' approach to defect was wrong as a matter of law, logic and evidence.

49. I move on then to the second main reason why I am against Mr Fetto in his submission that the general rule should not apply. As Mr Sheehan correctly observes, there is no authority for the proposition that the Defendant should be penalised for failing to make an application for summary disposal of a weak claim. The case law is however replete with authorities for the contrary proposition, that claimants who continue to prosecute a weak or thin or speculative claim do so at the risk of incurring the penalty of indemnity costs (see below). There is good reason for the court not penalising a defendant for failing to make an application for summary disposal not least as it may lead to unsatisfactory results. For example: the claimant with a reasonable case but who is nonetheless unsuccessful at trial would bear the defendant's costs in accordance with the general rule; whereas the claimant with a

weak case who fails at trial may be able to avoid most of the costs of the action simply because the defendant did not try to obtain summary judgment against the claim which the claimant decided to prosecute despite its weaknesses. Also, if the court were to deprive parties of some or all of the costs to which they would otherwise be entitled because of a deemed failure to apply for summary disposal, this may lead parties to feel obliged to use court time and resources to make summary disposal applications to try to protect their position on costs, an outcome wholly inconsistent with the overriding objective.

50. Third, although not put in quite this way by Mr Sheehan, there was more than an air of unreality to Mr Fetto's submissions. Throughout the litigation, the Claimants' consistent position has been that the action should proceed to trial where the Claimants would be successful, notwithstanding the Defendant's objection to the way in which the case was formulated in the pleadings. Even following the handing down of the judgment of the Court of Appeal in November 2019, the Claimants' position (at least front of stage) was that the claim remained arguable. It was only two working days before the hearing of the first issue in May 2020 that the Claimants submitted to judgment: several months after the ruling of the Court of Appeal. As Mr Sheehan pithily puts it, this application is an application by the Claimants to have their cake and eat it. I agree.

51. For these reasons and recognising that my discretion as to the appropriate and fair costs order is broad, I refuse the Claimants' application that the general rule should be displaced in this case. There must be an order that the unsuccessful Claimants pay the Defendant's costs in the usual way.

Should the costs be assessed on the Indemnity Basis?

52. CPR 44.4(2) and 44.4(3) identify the two differences in substance between a standard order for costs and an indemnity order for costs. First, the party upon whom the burden falls to establish that the costs claimed are reasonable: where the costs are awarded on a standard basis then any doubt which the court may have as to whether they were reasonably or proportionately incurred or reasonable and proportionate in amount will be resolved in favour of the paying party. Where awarded on an indemnity basis, that doubt is resolved in favour of the receiving party. Second, the proportionality requirement is absent when costs are assessed on the indemnity basis. An indemnity order means that a party who has such an order in their favour is more likely to recover a sum which reflects the actual costs of the proceedings. In this case, I recognise that such an order will make a very considerable difference to the size of the costs bill to be paid.

53. I was taken by Mr Sheehan to the guidance provided in three cases addressing the operation of CPR 44.4 and the circumstances in which indemnity costs may be awarded.

54. In *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson and Others* [2002] EWCA Civ 879, Lord Woolf declined to provide further guidance on the basis that it would be dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the rules. He recorded only that the Court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that before an indemnity order

can be made, there must be some conduct or some circumstance which takes the case "*out of the norm. That is the critical requirement.*"

55. In *Three Rivers District Council & Ors v The Governor & Company of the Bank of England* [2006] EWHC 816 (Comm), Tomlinson J considered the circumstances in which indemnity costs may be awarded. His survey of *Excelsior* and other authorities led him to set out the principles which I summarise below, as relevant:

> (1) The court should have regard to all of 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 defendant's favour is that there must be some conduct or some circumstance which takes the case out of the norm.
>
> (3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation but rather unreasonableness.
>
> (4) The court should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to pursue particular allegations and the manner in which the claimant pursued its case and its allegations.
>
> (5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.
>
> (6) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings…
>
> > (g) Where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant and during the course of the trial of the action the claimant resorts to advancing a constantly changing case in order to justify the allegations it has made, only then to suffer a resounding defeat."

56. Finally, I was referred by Mr Sheehan to *Lejonvarn v Burgess* [2020] 4 WLR 43, where Coulson LJ at [51] considered out of the norm conduct and, in particular, whether pursuit of "*speculative, weak, opportunistic or thin claims*" could properly be described as out of the norm such as to warrant an order for indemnity costs. He noted the existence of a separate strand of authority concerning such claims and that it was well established that a defendant's eventual defeat of such claims can give rise to an order for indemnity costs. He referred to his earlier analysis in *Wates Construction Limited v HGP Greentree Alchurch Evans Limited* [2006] BLR 45 and in *Elvanite Full Circle Limited v AMEC Earth and Environmental (UK) Limited* [2012] EWHC 1643. In *Wates* he observed that there were plenty of cases which with hindsight, could be described as "unfortunate", or worse, and many claims which are discontinued. Although unusual for a claim to be discontinued on the first day of

trial, the mere fact that discontinuance occurred so late does not, of itself, mean that an order for indemnity costs is justified. The real question for the court is whether the conduct of the losing party was so unreasonable that costs should be assessed on an indemnity basis. In *Elvanite* he noted that the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, provided that the claim was at least arguable. But the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) may well lead to such an order. In *Lejonvarn* itself, Coulson LJ identified at [54] the critical issue bearing on the basis of assessment to be whether: "*at any time following the commencement of the proceedings, a reasonable claimant would have concluded that the claims were so speculative or weak or thin that they should no longer be pursued*".

57. Adopting the approach in *Lejonvarn*, Mr Sheehan submitted that following the judgment of Foskett J in March 2017, the Claimants should have appreciated that the scope of their case on approach to defect was limited to "worst in class." Further, the Claimants should have appreciated that there was no prospect of a successful application to amend the pleadings and expand their case to embrace the holistic case. This ruling in conjunction with the judgment in *Wilkes* ought to have led the Claimants to actively reconsider the merits of their case. Mr Sheehan listed a number of courses of action which might have been taken by the Claimants and which would have been within the norm following the judgment of Foskett J of March 2017. They could have sought permission to appeal the ruling or tried to clarify the judgment if it had been ambiguous. They could have raised with the Court and with the Defendant their view that Foskett J had misunderstood the scope of their case. However, none of these steps were taken.

58. Given the imminent judgment of Andrews J in *Gee,* it would have been reasonable for the Claimants' team to have "held fire" and delayed making any final decision as to the future of the litigation whilst considering their position generally. But once the judgment in *Gee* had been handed down, the action should have been discontinued. Mr Sheehan submitted that the assessment of costs incurred by the Defendant from 28 days following the hand down of the *Gee* judgment should be on the indemnity basis.

59. Mr Sheehan described the pursuit of the action beyond this point as out of the norm. On a proper analysis of the pleadings, the judgments of Foskett J and the case law, the action was so weak and thin that it should not have been pursued. The Claimants should have discontinued the action or sought to agree terms with the Defendant in such a way as might bring the action to an end. Instead, the Claimants persisted with the action to trial. Mr Sheehan suggested that the Claimants' lawyers deliberately flouted or ignored the Court's rulings on scope, running a case to trial which was inconsistent with those rulings, possibly because it was appreciated that permission to amend the case would not be forthcoming. The Claimants sought to shift their case by seeking to raise a free-standing case on defect before me in February 2019 and then by articulating a claim based upon the holistic assessment of risks and benefits in their opening which was described by Hamblen LJ as "*impermissible*" and done "*under the guise of an assumed "level playing field*" when it was obvious that any issue of relative risks and benefits would raise a wide ranging factual and expert inquiry which all parties at trial accepted had not been undertaken. Mr Sheehan also points to the loss of the trial as a result of the Claimants' shifting case and to the further delay in submitting to judgment following the issue of the application by the

Defendant in December 2019. All of these elements are out of the norm and buttress his case that costs from June 2018 should be assessed on an indemnity basis.

60. Mr Fetto submitted that the test which I should apply was one of reasonableness. He prefers to adopt the formulation of the test expressed in *Kiam v MGN* [2002] 1 WLR 2810 where Simon Brown LJ stated that indemnity costs were appropriate only where the conduct of a paying party was unreasonable "*to a high degree*" and that unreasonable in this context does not mean merely wrong or misguided in hindsight. He accepted that his submissions involved him walking a tightrope given the judgment of the Court of Appeal and that he was driven to accept that the Claimants were wrong in their interpretation of the pleadings, their interpretation of the judgment of Foskett J and of my judgment of February 2019. However, he submits that the fact that the Claimants' lawyers were wrong in this analysis does not make their conduct unreasonable to a high degree.

61. Mr Fetto emphasised that the Claimants' legal team had not deliberately flouted the Court's rulings. In opening the case as they did, their conduct had not been a cynical attempt to circumvent Foskett J's ruling of March 2017 or mine of February 2019. Their pleadings and the rulings had been carefully considered and, although the analysis was wrong, the Claimants genuinely believed that they were entitled to run the case on the basis of a level playing field of risks and benefits across the cohort of drugs of a similar nature.

62. Mr Fetto invited me to read Mr Kent's submissions to the Court of Appeal in detail in order to demonstrate the way in which the issue was understood by the Claimants' lawyers. He highlighted various extracts from the transcript to demonstrate the Claimants' interpretation of the pleadings and the judgments. These extracts included Mr Kent's submissions upon: the Defendant's failure to assert a positive case concerning the benefits of Seroxat; the Defendant's concession in the pleadings that Seroxat had no greater efficacy than other SSRIs; that Foskett J's analysis of the claim was within the context of case management and the analysis therefore not finely tuned; that Foskett J's analysis on scope had not been included in an order and was therefore not appealable; the Claimants' understanding that in my judgment of February 2019 I was somehow agreeing with the proposition that a "null position" had been taken by the parties in relation to risks and benefits (save in respect of discontinuation symptoms) and the Claimants' perception that there was a significant difference in my conclusions as between my ruling at trial and my ruling in February 2019.

63. Mr Fetto concluded by summing up his response to the application for costs to be assessed on an indemnity basis: "*this is a situation where the Claimants were wrong, one might even say misguided, but their conduct was not cynical or otherwise highly unreasonable. There was a basis in the pleadings for the position they took. There were reasons, ultimately held not to be sufficient, but legitimate reasons for their understanding of the position following Mr Justice Foskett's and your ladyship's rulings.*"

Decision on Indemnity Costs:

64. I start by stating the appropriate test which I should apply in considering the question of indemnity costs. Given the way in which the case for indemnity costs is put by the

Defendant, that is, the pursuit of a weak or thin or speculative claim, the appropriate question for me is that posed by Coulson LJ in *Lejonvarn*: whether at any time following the commencement of the proceedings a reasonable claimant would have concluded that the claim was so speculative or weak or thin that it should no longer be pursued. I bear in mind also that pursuing a weak, but arguable, claim would not in itself usually justify the penalty of indemnity costs. I see no tension between the test as formulated in *Lejonvarn* and that in *Kiam*, albeit the test is described in different ways in different contexts: pursuing a claim which the reasonable claimant would conclude was weak, in the sense referred to by Coulson LJ, would in my view connote unreasonableness to a high degree. I recognise that even if I find that the litigation was pursued beyond the point when it was arguable, or that the conduct of the litigation was at any stage unreasonable to a high degree, I still have a discretion as to whether indemnity costs should be ordered.

65. I find the issue a straightforward one to determine. Whether the pleadings bear the interpretation which Mr Kent sought to impress upon me and the Court of Appeal is incidental. The Claimants' difficulty here is the same difficulty which led the Court of Appeal to dismiss the appeal. In his judgment of March 2017, Foskett J set out his analysis of the pleadings, making clear that the Claimants' case was limited to the "worst in class" case and making equally clear that he would not permit the case to be expanded or amplified by any means. Foskett J identified the "*high point*" of the Claimants' case as that set out in the GLO and the GLO made no reference to any analysis of relative risks or benefits (other than the risks upon discontinuation). The judgment is crystal clear. It bears no ambiguity. It is wholly misplaced to suggest that the judgment should not be taken to be decisive of the scope of the Claimants' case because it was made within the context of a case management hearing when the topic in question was the admissibility of sections of the substituted expert's report. As the Court of Appeal remarked, the judge required (and demonstrated) a thorough understanding of the parties' respective cases.

66. Having, whether advisedly or not, made the decision not to appeal that ruling the Claimants' legal team was left with that judgment as the definitive statement of the limit of their case. Even if it is correct that the Claimants' lawyers wished to appeal Foskett J's decision and considered that they could not do so because the scope issue was not reflected in the Order, the Claimants still took no steps to bring their concerns to the attention of the Court or to inform the Defendant that they disputed Foskett J's (mis)characterisation of their case. Once Andrews J had handed down her judgment in *Gee*, which underscored the need for a holistic assessment of defect under s 3 of the CPA, then the Claimants were pursuing a case which was, quite simply, unarguable. Allowing for some time to take stock, it should have been discontinued within a short time following *Gee* or steps taken to attempt to compromise the litigation on favourable terms (if possible).

67. It is therefore against this short analysis that I pose the question of whether a reasonable claimant would or should have concluded in May/June 2018 that the claim was so speculative or weak or thin that it should be stopped. The answer to that is, yes, and compellingly so and from, at the latest, shortly after the handing down of the judgment in *Gee*. If I were to pose the question of whether the decision to pursue the litigation beyond 21 June 2018 was unreasonable to a high degree, again the answer is

yes, and compellingly so. I have no doubt that taking all of the circumstances into account, the Claimants' conduct beyond this point was out of the norm.

68. My conclusion above would be a sufficient basis for an award of indemnity costs. However, the Claimants' conduct after June 2018 and the associated delay until May 2020 in submitting to judgment compounds the problem. Rather than discontinuing, the Claimants sought to persuade me (in February 2019) that they were entitled to run a free-standing case on defect, shorn of any consideration of relative risks upon discontinuation. On the pleadings, this was another non-starter. The Claimants then argued (in February 2019) their analysis of the pleadings, requiring me to re-state that whether there are, or not, particular benefits associated with Seroxat, this issue would not feature at trial. Notwithstanding this ruling (and Foskett J's ruling of March 2017) the Claimants, again no doubt advisedly, opened the case in a way which was eye-catchingly inconsistent with two prior and unappealed rulings resulting in the waste of the trial costs. The Court of Appeal expressed its view that this course of action was "*plainly impermissible*." It described the Claimants using the "level playing field" as a "*guise*" to introduce the issue of risks and benefits, when "*it is obvious that any issue of relative risk/benefits would raise a wide ranging factual and expert inquiry, which all parties accepted had not been carried out*."

69. Mr Fetto invited me to consider Mr Kent's submissions to the Court of Appeal in support of his argument that the Claimants' interpretation of the case, although wrong, was nonetheless reasonable in the circumstances. I have read those submissions with care but, having done so, am unable to conclude that the Claimants' approach to the litigation was reasonable, or even understandable, given its history. I need express no view as to whether the Claimants' conduct at any stage in this litigation has involved a cynical disregard for the rulings of the Court and/or a wilfully strained misinterpretation of the pleaded case in order to maintain the litigation in the face of the clearest indication that no amendment would be possible. The award of indemnity costs does not require me to find conduct worthy of moral disapprobation: all that I need find is conduct which is out of the norm. Mr Fetto accepted that the conduct of the Claimants following Foskett J's ruling of March 2017 was misguided, to which I add my own conclusion that the conduct was also both unreasonable to a high degree and out of the norm.

70. In the light of the features I have set out above, I have stood back and considered whether, taking all of the circumstances into account, it would, in the exercise of what is acknowledged to be a very broad discretion, be fair and just to make an order that the Claimants pay costs assessed on an indemnity basis from 21 June 2018. Having done so, I have no doubt at all that such would be the fair and just order. The Claimants will therefore pay the Defendant's costs to be assessed on the standard basis until 21 June 2018 and on the indemnity basis thereafter, save for the appeal costs which are to be assessed on the standard basis.

Payment of Costs on Account

71. The Defendant seeks the sum of £5 million by way of payment on account of costs. Again, the Defendant does not seek immediate payment of that sum but wishes the question of payment be adjourned generally with liberty to restore, no doubt to tie up with any application for a third party costs order in due course.

72. I remind myself that under CPR 44.2(8) the Court will order a party to pay a reasonable sum on account of costs unless there is a good reason not to. Mr Fetto submits that there is a good reason, as the purpose of a payment on account is so that the Defendant is not kept out of its money. Here, pending the involvement of the third party funder, the Defendant does not seek payment and so the purpose of the payment on account is absent.

73. I make an order that there should be a payment on account of costs in the sum of £4.5 million. I accept Mr Sheehan's submission that the existence of a third party funder should not lead the Court to be deflected from the usual course of making such an interim payment; further that, in future dealings with the third party funder, there is a real practical advantage in a sum having been quantified by way of an interim payment. I award a sum rather less than that sought by Mr Sheehan and representing just under 50% of the figure in the costs schedule. I have adjusted the sum sought to reflect only that the award of indemnity costs is from a date rather later than that originally proposed by the Defendant in its written submissions and that it is acknowledged that the appeal costs are to be paid by the Claimants to the Defendant on the standard basis.

74. I invite the parties therefore to draw up the appropriate order to reflect my decisions that: the Claimants should pay the Defendant's costs of this litigation; those costs are paid on an indemnity basis from 21 June 2018 (save for the appeal costs which are to be assessed on a standard basis) and there should be a payment on account of costs in the sum of £4.5 million.