Neutral Citation Number: **[2023] EWHC 609 (Ch)**

Case No: **BL-2022-000913**

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

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Rolls Building
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: **8 March 2023**

Before :

Mr Justice Edwin Johnson

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Between :

(1) HARRINGTON & CHARLES TRADING LIMITED (in liquidation) **(2) BRAMHALL & LONSDALE LIMITED (in liquidation)** **(3) HOLDWAVE TRADING LIMITED (in liquidation)** **(4) OC305234 LLP (in liquidation)** **(5) OCEANROAD GLOBAL SERVICES LIMITED (in liquidation)** **(6) CONNECOR (UK) LIMITED (in liquidation)** **(7) COLIN DISS (as Liquidator of the First to Sixth Claimants)** **(8) NICHOLAS STEWART WOOD (as Liquidator of the First to Sixth Claimants)**	**Claimants**

- and –

(1) JATIN RAJNIKANT MEHTA **(2) SONIA MEHTA** **(3) VISHAL JATIN MEHTA** **(4) SURAJ JATIN MEHTA** **(5) HAYTHAM SALMAN ALI ABU OBIDAH**	**Defendants**

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Ewan McQuater KC and Philip Hinks (instructed by **Hogan Lovells International LLP**) for the **Claimants**
Thomas Grant KC and Emily McKechnie (instructed by **Withers LLP**) for the **First, Second and Fourth Defendants**
Paul Adams (instructed by **Howard Kennedy LLP)** for the **Third Defendant**

Hearing date: **8th March 2023**

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RULING 3

Mr Justice Edwin Johnson **Wednesday, 8 March 2023**
(**15:11** pm)

Ruling by **MR JUSTICE EDWIN JOHNSON**

1. I now come to the judgment in the course of this hearing in which I deal with the incidence of the costs in relation to what I have previously referred to as the without notice applications, and also the incidence of the costs of the continuation application, and the discharge applications.

2. Just to make this clear (and to repeat); the introduction which I stated to the first judgment which I delivered at this hearing applies equally, and should be taken as read, as it were, in this particular judgment.

3. So far as submissions are concerned, it is probably as well to mention that the principal submissions in relation to these costs, on the defendants' side, were made by Mr Grant. Mr Adams sensibly adopted Mr Grant's submissions and added a couple of submissions of his own, which were particular to his client, the third defendant.

4. For the avoidance of doubt, I am not, in this judgment, dealing with the incidence of costs in relation to the order of 10 June 2022, and I am not in this judgment dealing with the incidence of costs of what I have referred to as the disclosure and passport applications, which were dealt with by the order of 11 July 2022, made by Judge Hodge KC. The incidence of those particular costs has yet to be dealt with.

5. In terms of the rival positions of the parties in relation to these costs, one matter which is agreed is that the claimants should bear their own costs of the applications for search orders, which were the subject of application at the May hearing, but which I refused. So, the costs of the search applications will be the subject, I assume, of no order as to costs.

6. So far as the remaining costs of the without notice applications are concerned, the claimants say that the defendants should pay their costs of the without notice applications, save for the costs of attendance at the May hearing, which should be reserved; that is to say, costs exclusive to the May hearing itself, excluding preparatory costs for that hearing, and any other costs not directly associated with the May hearing.

7. The defendants say that the costs of the without notice applications, excluding, of course, the search orders which I have mentioned, should be reserved to the trial judge.

8. Turning to the costs of the continuation application and the discharge applications, the claimants' position is that these costs should be paid by the defendants. The defendants' primary position is that these costs should be reserved to the trial judge. Their fallback position, if their primary position is not accepted, is that the costs should be reserved to the judge hearing the strikeout applications, save for the cost of the October hearing, which it is accepted on this secondary position should be paid to the claimants.

9. The defendants also have a tertiary position, if their primary and secondary positions are not accepted, which is that these particular costs should be paid to the claimants, but subject to some reduction in the light of the failure of disclosure which I found to have been established in the November judgment.

10. In considering the incidence of these costs, I find it easiest to consider these costs on a general basis, putting the costs of the without notice applications to one side, and then to come specifically to the costs of the without notice applications (excluding the costs of the application for search orders which the claimants accept that they must bear).

11. The starting point is CPR rule 44.2. By subparagraph (1) the court has a discretion as to whether costs are payable by one party to another, and as to the amount of those costs, and as to when they are to be paid. By subparagraph (2), if the court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs in the successful party, but the court may make a different order.

12. The defendants submit that this general rule does not apply in the case of interim injunctions, which are designed to hold the ring until trial. The defendants submit that the same general rule or principle also applies to freezing orders; in other words, there is not a distinction to be drawn between interim injunctions and freezing orders in this respect. The defendants submit that the general rule is that such costs should, as a matter of general principle, be reserved.

13. In support of this submission, the defendants rely on the recent decision of his Honour Judge Davis-White KC sitting as a judge of the High Court in *Al Assam v Tsouvelekakis* [2022] EWHC 2137 (Ch) as authority for the proposition that the costs of an application for a freezing order, including a contested inter partes application, should normally be reserved to the judge until trial. It is submitted that I should follow that decision.

14. Going to the decision in *Al Assam*, this was a lengthy reserved judgment given by Judge Davis-White KC. After dealing with the application for the freezing order itself, which the judge decided should be granted, the judge came, at [222] in the judgment, to the question of what should be done about costs. The judge had previously made an order reserving the costs of the application, and in this section of his judgment, the judge expanded upon the brief reasons that he had previously given for making the order reserving the costs.

15. The judge started, at [223], by referring to authorities concerned with cases of interim or interlocutory injunctions, which establish what the judge described as a well-established starting

point that the costs of such applications will usually be reserved, although there may be factors, or special factors, justifying some other costs order. In that context the judge cited the case of *Desquenne et Giral UK Ltd v Richardson* [2001] FSR 1 CA and *Picnic at Ascot Inc v Derigs* [2001] FSR 2 and the decision of the Court of Appeal in *Melford Capital Partners (Holdings) LLP and Others v Wingeld Digby* [2020] EWCA Civ 1647 [2021] 1 WLR 1553.

16. After citing from those decisions, the judge then turned to four previous decisions where the court had had to consider the question of the incidence of costs in the context of a freezing injunction, and where decisions had been made not to reserve the costs.

17. Just identifying the cases at the outset, the first is a case called *Bravo v Amerisur Resources plc* [2020] Costs L.R. 1329. The second case is *PJSC Pharmaceutical Firm "Darnitsa" v Metabay Import/Expert Limited* [2021] EWHC 1472 (Comm). The third case is *Rosler v Microcredit Limited* [2021] EWHC 1904 (Ch). Finally, there is *Kumar v Sharma* [2022] EWHC 1008 (Ch).

18. At [248] in his judgment, Judge Davis-White commenced his discussion of the costs order that he should make, or rather he commenced his discussion of the reasons which had caused him to reserve the costs rather than make a costs order against the unsuccessful party. This was after the judge had reviewing the four decisions which I have just mentioned. At the conclusion of his discussion the judge came to the conclusion that those decisions should not be followed.

19. In terms of the judge's ultimate reasons for declining to follow those four cases it is easiest simply to quote the judge's decision in *Al Assam* as set out in [264] to [266] of the judgment, which I will read:

> *"264. In this case, it seems to me that the general approach to costs which applies in the American Cyanamid context should be applied. In short, is it fair that the defendant should pay the cost of an injunction against him to assist in preserving assets and preventing*

improper dissipation so as a possible judgment against him will be satisfied if at the trial it turns out there is in fact nothing for which he is liable and no judgment against him? My answer is 'No'.

265. If I am correct in this, there are no relevant circumstances which arise which cause me to depart from the basic starting position. Although the defendant did eventually concede that there was a good arguable case, that was after the evidence had been put in against him which had to be prepared for the court anyway and which also had to be gone into for the very full debate before me as to risk of improper dissipation.

266. If I am wrong about the starting point, and the starting point is that the claimants should receive their costs as the 'winners', then in the circumstances here I would not make such an order and would still reserve the costs. That is because of the position in this case that the risk of dissipation is so closely tied up with the issue of the underlying factual issues said to establish the causes of action and which will have to be considered by the court at trial. The trial may throw a very different complexion on the issues canvassed on the application before me."

20. So, one can see that there were essentially two reasons why the judge made the decision which he did to reserve the costs. The first reason was that the judge considered that he should follow the case law in relation to interim injunctions generally, rather than the case law in relation to freezing orders, and specifically the four decisions which I have mentioned.

21. But, second, the judge also took the view that, on the particular facts of the case before him, it would still have been appropriate to reserve the costs, even if he had been wrong in adopting the starting point that the winner, as it were, should not receive its costs, but that the costs should be reserved.

22. That is just a fairly brief summary of the carefully reasoned judgment of the judge, Judge Davis-White, in particular in relation to the question of costs. I do, in particular, take on board the point made by Mr Grant, supported by Mr Adams, that this was a reserved judgment into which, it is quite clear, very considerable care had gone.

23. At the outset, however, there is an obvious point of distinction between *Al Assam* and the present case, because in the present case, there was, or there were, the applications to discharge the existing WFO (which I am referring to as the discharge applications), the outcome of which also had implications for the continuation application.

24. It was suggested by Mr Grant in his submissions that the discharge applications played a relatively minor part in the October hearing and the November judgment, and were -- these are my words rather than his -- essentially subsidiary to the question of good arguable case. It seems to me that that is not a correct characterisation, either of the arguments at the October hearing, or the November judgment. The reality is that the discharge applications occupied a very substantial part of the October hearing, and also occupied a very substantial part of the November judgment.

25. But coming back to the point of distinction, as I understand the position in *Al Assam*, there was no application for discharge, which had to be dealt with. So that is, as I have said, an obvious point of distinction between *Al Assam* and the present case.

26. Beyond that, however, I have the misfortune to disagree, with the utmost respect, with the reasoning of Judge Davis-White in the relevant part of his judgment in *Al Assam*. I say this for two reasons, one which is of general relevance, and one which is specific to this case.

27. The first reason is that it seems to me that, while it is correct to say that a freezing order holds the ring, it also seems to me that it is correct to say -- and I accept the submission of Mr McQuater in this respect -- that a freezing order holds the ring in a different way. In my judgment, in a substantially different way to an interim injunction.

28. As Mr McQuater pointed out, in the case of an interim injunction what is generally happening is that a court is allowing one party to enforce or rely on a right, or an obligation the existence of which has yet to be established. So, in that sense the court is allowing one party to behave as if the right has been established, in circumstances where the right still has to be established at trial and may not be established at trial.

29. In the case of a freezing order, things are rather different. The freezing order, as Mr Grant quite correctly pointed out, is an ancillary order in aid of the relief which is sought in the relevant case. There is no such thing as a final freezing order. Once the freezing order has been granted, and subject to any subsequent application to vary or discharge, the freezing order then remains in place until trial. It may well be that the freezing order is obtained on a basis which is found not to be well founded at trial, but that, it seems to me, does not go directly to the question of whether the freezing order was correctly granted; rather it relates to the underlying relief which is sought.

30. In relation to the freezing order, it seems to me that what happens if the claim fails at trial is that the freezing order is no longer required to hold the ring because there are no assets to be protected or ring-fenced, because there is no right of recovery.

31. In this context, I find compelling what was said by Martin Spencer J in the *Bravo* case. The relevant extracts from his judgment are conveniently cited in *Al Assam*. The relevant paragraphs in the judgment of Martin Spencer J are at [52] and [53], which I will quote:

"52. It seems to me that this is enough to show that the decision in Picnic at Ascot is not wholly apposite [in] claims for freezing orders where the balance of convenience is not an issue, and where in relation to the merits of the case the court has regard to the question of whether there is a good arguable case on behalf of the claimants or not. That is sufficient for the court to determine whether a freezing order should be made, and even if at the subsequent trial it turns out that the claims fail on the basis of the evidence due to that trial, it does not at all follow that this means that the court was wrong to find that there was a good arguable case. On the contrary, those two findings are wholly consistent with each other, or maybe wholly consistent with each other. Nor is there any reference to the balance of convenience. The question is whether it is just and convenient to make an order.

53. Therefore, I agree with Mr Lord that the regime for the making of freezing orders is different to the general position where interim injunctions are sought based upon balance of convenience and holding the ring pending the trial. There are, obviously, overlapping features, holding the ring being one of them. The purpose of a freezing injunction is to avoid a successful claimant being unable to enjoy the fruits of his success because there are no assets left against which the judgment can be enforced, but that is a different kind of holding of the ring to that which is involved in the usual interim injunction and balance of convenience type case."

32. I also find compelling the reasoning of Jonathan Hilliard KC in *Kumar v Sharma*. In that case, Mr Hilliard KC, who was sitting as a judge of the High Court, decided that the costs of the relevant return date should be assessed, but that the costs of the without notice application should be reserved. In relation to the costs of the return date, the judge set out nine considerations which led to his conclusion that there should be a costs order against the unsuccessful party in relation to the return date hearing. It is not necessary for me to set out

those nine considerations in full, but they are conveniently quoted by Judge Davis-White at [245] of the judgment in *Al Assam*. I would however, in particular, highlight the following points made by Mr Hilliard.

(1) The first point is that a freezing order does not hold the ring in the same way as other types of interim injunction. I agree.

(2) The second point is that the defendant has the choice of resisting continuance of a freezing order and thereby causing the costs of a return date to be incurred. I again agree.

(3) The test for a freezing order is different to the test for whether a claim should succeed at trial. Again, I agree.

33. Beyond that, and as I say, I am not setting each one of the points made by the judge, a particular point that was made by Mr Hilliard was that if it were otherwise, ie if the basic principle or general rule was that costs should be reserved, the result would be as follows (I quote):

> *"The defendant would have a free shot at opposing a freezing order continuance on a good arguable case ground, knowing it would not have to pay the costs if it ultimately succeeded at trial or unless and until the trial was decided."*

34. In relation to the free shot point, Mr Grant submitted that it is not a free shot at all, because all that is happening is that the costs are being reserved, and ultimately, depending on what happens at trial, the costs of the application for the freezing order may be recovered by virtue of a costs order made by the trial judge.

35. But that seems to me to miss the essential point, which is that if the general principle is that the costs of an application for a freezing order should be reserved, then the defendant does know that it is going to be able to oppose the freezing order, and possibly cause both parties to run up

very considerable costs in relation to the freezing order, without having to face the day of reckoning in relation to those costs, assuming that it is unsuccessful, until a trial, which may come along at a much later stage, or may not come along at all, which may in turn leave the parties to negotiate what is going to happen in relation to the reserved costs. In litigation there is a very substantial difference between a set of costs which must be paid there and then by a party, and a set of costs which are reserved off to an indeterminate date in the future.

36. So it is for all those reasons, which together encompass what I have referred to as my first reason, that I find myself in the unfortunate position of disagreeing with the reasoning of Judge Davis-White in *Al Assam*.

37. The second reason is this, and it arises in the specific context of the discharge applications. If you have a situation, as in the present case, where a freezing order has been granted on a without notice application, and the respondent then launches an all-out attack on the freezing injunction, on the basis of non-disclosure, it seems to me not unreasonable, at least as a matter of general or starting principle, that the respondent should pay the costs of that attack, if the attack fails.

38. The question of non-disclosure essentially requires a comparison between what the court was told on the without notice application and what the court should have been told. The judge who is best placed to decide that question is the judge who hears the application for discharge of the freezing injunction, on the basis of alleged non-disclosure, on the return date. The question is not one, as it seems to me, which depends, or at least depends substantially, on how matters turn out at trial, but rather depends on an examination of matters as they stand on the relevant return date.

39. I have described that second reason as arising in the specific context of this case and in the specific context of the discharge applications, but I am also bound to say that it seems to me that

those points can be said also to have quite substantial application to a case where there is simply an application for the continuation of a freezing order granted on a without notice basis, or simply an application for a freezing order where there has been no without notice application. Again, it seems to me not unreasonable, at least as a matter of general or starting principle that, if the respondent launches an all-out resistance to the continuation of the freezing order, and is unsuccessful, the respondent should have to pay the costs of that resistance. I am simply not persuaded by Mr Grant's submissions, characteristically eloquent as they were, that there is anything in the circumstances of freezing orders which requires that the starting principle should be that costs should be reserved.

40. I was referred to the decision in *Melford Capital Partners*. That, of course, is a decision of the Court of Appeal, which binds me, and that case is authority for the general rule that in the case of interim injunctions the costs should be reserved, for all the reasons which were explained by the Court of Appeal in the *Melford Capital* case.

41. But the *Melford Capital* case was not considering the position in relation to freezing orders, and accordingly I do not regard it as a decision which binds me in dealing with the discharge applications or the continuation application.

42. Beyond that, I was also helpfully referred by Mr Grant and Ms McKechnie in their skeleton argument to an extract from Halsbury's Laws of England at Volume 11 (2020 edition), at paragraph 22. This extract deals with a position where a judge at first instance is confronted with a situation where there are apparently conflicting decisions, and I quote:

> *"There is no statute or common law rule by which one court is bound to abide by the decision of another court of coordinate jurisdiction. Where, however, a judge of first instance, after consideration, has come to a definite decision on a matter arising out of a*

complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of coordinate jurisdiction should follow that decision and the modern practice is that a judge of first instance will, as a matter of judicial comity, usually follow the decision of another judge at first instance, unless he is convinced that the judgment was wrong.

Where there are conflicting decisions of courts of coordinate jurisdiction, the later decision is to be preferred, if reached after full consideration of earlier decisions."

43. Matters of judicial comity and judicial practice do, of course, deserve the very greatest of respect, but I am not persuaded, indeed I did not understand Mr Grant to submit -- but, if he did, I reject the submission -- that this passage binds me, as a matter of law, to follow the decision of Judge Davis-White in the *Al Assam* case.

44. Indeed, it seems to me that the passage in Halsbury is not directly in point in the present case because, as Mr McQuater pointed out, the passage in Halsbury refers to a judge of first instance who, after consideration, has come to a definite decision on a matter arising out of a complicated and difficult enactment. I may be dealing with a question that is not easy, but it is a question which relates to costs, where matters generally boil down to the discretion of a particular judge.

45. Indeed, I would be particularly wary, in the context of costs, of treating any decision as constituting a binding precedent, save insofar as it stated a matter of general principle. In any event however, it seems to me that both the decision of Judge Davis-White and the earlier decisions, the previous decisions which he was considering, are not decisions on a matter arising out of a complicated and difficult enactment, any more than my own decision is.

46. So, in those circumstances, I am not convinced that the practice which is set out in Halsbury's Laws actually applies. But if and insofar as I am wrong about that and the practice does apply, it is just a practice, and in circumstances where I have the misfortune to disagree with Judge Davis-White, I conclude that I am at liberty to prefer the approach taken in the previous four decisions.

47. One other matter that I would mention in this context, which I think is worth bringing out, is that, as tends to happen in counsel's submissions, I was addressed on the basis that a *"strong"* Court of Appeal had made a particular decision, that particular judges were particularly expert, or that the decisions of particular judges were deserving of particular weight. It seems to me one needs to be wary of this kind of submission. It does not seem to me it is appropriate to operate any sort of ranking system, either of Court of Appeal decisions, or decisions of first instance judges, on that basis.

48. I can see force in the point that a judgment which is a reserved judgment and is carefully reasoned may be thought to carry more weight than an unreserved judgment where a decision has had to be made in a hurry. But, beyond that, it does not seem to me that it's appropriate to try to operate some sort of ranking system.

49. But, be all that as it may, for the reasons which I have set out, I do not regard it as either appropriate or necessary for me to follow the decision in *Al Assam* in the present case. I say this by way of summary for three reasons, on which I rely individually, and collectively:

(1) I have the misfortune to disagree with the reasoning of the judge in *Al Assam* and for that reason I decline to follow the decision..

(2) The decision in *Al Assam* does no more than establish a basic starting position, see [264] and [265] of the judgment. If I was of the view that I should follow the decision, I would still

regard it as open to me, in all the circumstances of this case, to consider whether the circumstances of the present case justify a conclusion other than the reservation of costs.

(3) It seems to me, although this may be said to be a restatement of part of my second reason, that the decision in *Al Assam* is distinguishable in the present case. The circumstances are not the same as in *Al Assam*; in particular there was no discharge application in *Al Assam*. There are the discharge applications in the present case.

50. It follows that I regard myself as having the ability to make a costs order in relation to the costs of the discharge applications and the continuation application, which requires the defendants to pay some or all of the claimants' costs of the discharge applications and the continuation application, if such an order is appropriate.

51. As to what that costs order should be, I have no doubt that the defendants must pay the costs of the discharge applications and the continuation application.

52. The October hearing constituted a distinct fight between the parties, in respect of which the defendants took, as they were entitled to, every available point. The result was a lengthy, complicated, and expensive hearing. I do not say that by way of criticism of the defendants, but the fact is that the outcome of that hearing was that the defendants lost. It seems to me quite wrong that the defendants should be able to walk away from that result with the costs reserved to an indeterminate point in the future.

53. Accordingly, it seems to me as a matter of general principle -- I will come to some of the detail shortly -- that the defendants, in accordance with the basic rule in CPR rule 44.2, and as the loser in respect of the October hearing, should have to pay the claimants' costs of the discharge applications and the continuation application.

54. There is the secondary position of the defendants, which is that the costs should be reserved to the judge hearing the strikeout applications save for the costs of the October hearing, which it is accepted, on this secondary position, should be paid.

55. I reject this submission. It seems to me quite wrong that the costs should be reserved to the hearing of the strikeout applications. It is submitted that it is unfair to the defendants to make them pay all the costs, because some of the costs that were incurred in relation to the October hearing related to the preparation of the strikeout applications and it was only because time was limited at the October hearing that the strikeout applications could not be heard, and thus we are still in a position where the strikeout applications have yet to be heard.

56. I can see the point in principle, but the difficulty with that point is that in the October hearing, I heard all the arguments relating to the continuation application and the discharge applications, and I made a decision on those arguments. If and insofar as the arguments may overlap with the arguments to be advanced in the strikeout applications, it seems to me that it cannot be right that one reserves all the costs of the discharge applications and the continuation application to the hearing of the strikeout applications on that basis.

57. If the point goes anywhere, it seems to me that it could really only go to a part of the costs of the discharge applications and the continuation application, and that only a relatively small part of the costs. Indeed, the only point which has really given me pause for thought here was the point made by Mr Adams that time and money was spent preparing for an argument that the way in which the claims were brought, pursuant to the Grant Thornton scheme, was an abuse of process, and it would be wrong if the defendants ended up paying for the costs of that preparation in relation to a hearing where that particular argument was not heard.

58. I can see some merit in that argument, but ultimately I am not persuaded that that point, limited as it is, should cause me to revise the view that I have reached, which is that the defendants should pay the claimant's costs of the discharge applications and the continuation application. It seems to me it would work a substantial injustice to the claimants if all of these costs, save for the October hearing, got shuffled off to the hearing of the strikeout applications where, at least so far as the three defendants are concerned, the points that they are going to be taking remain to be set out.

59. There is also the point that when the strikeout applications come to be heard, they will generate a distinct set of costs which no doubt will be the subject of argument in due course, including argument as to the costs which properly belong in the strikeout applications.

60. I also reject the tertiary position of the defendants. This is a limited point, although not necessarily a bad one for that reason. What is submitted is that I did find, in the November judgment, that there had been a failure of disclosure of the Kroll 2014 report at the May hearing, and it is said that the duty of disclosure is an extremely important one, and that the court should either mark its disapproval of that or take that into account by making some adjustment to the costs order.

61. I am not persuaded that it is appropriate to take that course because, in the November judgment, I came to the conclusion that the failure to disclose the Kroll 2014 report was not a matter which should cause me to accede to the discharge applications, nor was it a matter which I regarded as one which should affect my decision in relation to the continuation application. In other words, without in any way failing to pay appropriate respect to the rule of full and frank disclosure, and without in any way downgrading the failure to disclose the 2014 Kroll Report, it was the case that, for the reasons I set out in the November judgment, I was not persuaded that that particular

failure should affect the ultimate decision. Equally, it seems to me that it should not affect the ultimate decision on costs.

62. Pausing at this stage, therefore, the decision which I reach is that as a matter of general principle the defendants should pay the claimants' costs of the discharge applications and the continuation application.

63. I said, however, that I would come back to the cost of the without notice applications, and I now do so.

64. Dealing with the costs of the without notice applications is, I confess, rather more difficult. The submission of Mr McQuater is a simple one, and it is that what one should do in this situation is that one should reserve the costs of the May hearing itself, but if one looks at the preparatory work that was done, the evidence that was prepared, all of that preparatory material went into the October hearing and was the subject of consideration and argument in the October hearing. In those circumstances, so Mr McQuater submits, it is not appropriate to reserve all the costs of the without notice applications. The reservation should only apply to the May hearing itself. And in that respect, Mr McQuater bases himself on what was said by Sir Michael Burton in his judgment in the *Darnitsa* case, where, at [2] of the judgment, Sir Michael Burton said this:

> *"I was however persuaded that, not least because it appears that in Bravo there was no prior ex parte hearing, the proper course was to sever off the ex parte application and the costs which were specifically attributable to appearing at that ex parte hearing, while taking account that all the preparation and evidence for that ex parte hearing was used for the inter partes hearing. The order I made was that the costs limited to appearance on the ex parte should be reserved, but that the balance of the costs, including the inter partes hearing should be assessed and paid by the unsuccessful Defendant."*

65. Mr McQuater submits that I should adopt the same approach in the present case. One might think that slightly odd, given what appeared to be common ground between the parties. If the defendants had decided not to make a fight of the existing WFO but rather if, once served with the existing WFO and after they had had an opportunity to consider what had happened at the May hearing, the defendants had then decided to accept that the existing WFO should remain in place until trial, in those circumstances it appeared to be common ground before me that the appropriate thing to have done with those costs would have been to reserve the costs of the without notice applications to trial.

66. If that is right as a matter of general approach, it might be thought rather odd that the defendants should then be required to pay the costs of preparing for the May hearing, when those costs were incurred before the defendants became involved in the case and before the defendants had had an opportunity to decide what stance they should take in relation to the existing WFO.

67. Mr McQuater's submission was that that was a different situation, effectively, and while costs could have been reserved, if that had been the situation, that was not the situation. The defendants decided to make a fight of the existing WFO, combined with the discharge applications, and as such they put themselves at risk not only as to the costs going forward, but also in relation to some of the costs already incurred so far as those costs were in relation to work which was relevant to the October hearing.

68. For the defendants, Mr Grant submitted that that was unfair to the defendants, essentially for the reason which I have just articulated. As he submitted, it could not be right that the defendants could be required to pay for costs which they would have avoided if they had agreed to the existing WFO remaining in place. If one was asking the question: well, when were they at risk

as to costs, and if one was justifying ordering them to pay costs because they had become on risk as to costs, it was both unfair and odd, Mr Grant submitted, that the defendant should end up having to pay for costs incurred prior to the point at which, to use the expression which I am adopting for this purpose, they came on risk as to costs.

69. This is not an easy question to resolve, because it seems to me there is a considerable tension between those two competing considerations and, looking at the authorities to which I have been referred in relation to this particular part of the costs argument, they do not seem to me to give any specific guidance on this point.

70. Ultimately, I am persuaded that Mr Grant is right on this point. The essential point seems to me to be this, and it is the point made by Mr Grant which I have just set out. It seems to me the logic behind making the defendants pay the costs of the discharge applications and the continuation application is that they decided to make a fight of those applications. They launched the discharge applications themselves, and they chose to make a fight of the continuation application.

71. They did so at their own risk as to costs, and, having lost, I have decided that that risk now falls to be realised by an adverse costs order. But if that is the logic behind the costs order which I am proposing to make -- and that is, indeed, the logic -- then it seems to me inconsistent with that logic, and unfair to the defendants, that they should be made to pay for costs incurred prior to the point when they came on risk, even though I accept that those costs were incurred in relation to the preparation of evidence which was employed and argued over and considered at the October hearing.

72. So, in those circumstances, it seems to me right that the costs of the without notice applications, as I am calling them, should be reserved to be dealt with by the trial judge after it is known what the outcome of this action is.

73. That may not be entirely accurate in terms of the order which I am proposing to make, because it seems to me that what is required, for the purposes of my order, is an identification of the point at which the defendants came on risk, after which, as it seems to me, and for the reasons I have already set out, the defendants should be required to pay the claimants' costs of the discharge applications and the continuation application.

74. The identification of that date is obviously not a scientific exercise, and has to be carried out in a somewhat rough and ready manner. Mr Grant submitted that 6 July 2022 was an appropriate date, because that was the date on which the discharge applications were made. I bear in mind that, when the documents in relation to the without notice applications were served on the defendants, along with the proceedings themselves, the defendants would have received a considerable quantity of material in a very short space of time and, as it seems to me, would have been entitled to a reasonable amount of time in which to take legal advice and to consider what their stance should be in relation to the existing WFO.

75. In those circumstances, I accept Mr Grant's proposal of 6 July 2022 as the appropriate date.

76. What that means, in terms of my order, is that I decide that the costs of the without notice applications should be reserved to be dealt with by the trial judge, but that the costs of the discharge applications and the continuation application should be paid by the defendants to the claimants. I am not, at this stage, considering matters such as interim payment or basis of assessment in relation to the costs to be paid by the defendants, but those costs will be payable

as from 6 July 2022. It is my intention that 6 July 2022 should operate, as it were, as the watershed date.

77. If therefore, for some reason, there are costs of the without notice applications incurred after 6 July 2022, or costs of the discharge applications or the continuation application which fall before 6 July 2022, then they will either be reserved or payable, depending upon whether they were incurred before or after the critical date of 6 July 2022.

78. That concludes my judgment.