CARLISLE & CUMBRIA UNITED INDEPENDENT SUPPORTERS' SOCIETY LTD v CUFC HOLDINGS LTD

COURT OF APPEAL (CIVIL DIVISION)

Arden and Patten L.JJ. and Briggs J.: May 5, 2010, and June 9, 2010.

[2010] EWCA Civ 463; [2011] B.C.C. 855

H1. *Derivative claims—Costs—Indemnity for costs—Claim settled—Protracted correspondence after derivative claim dropped and before court order stayed action—Application for costs—Judge ordered cut-off of claimant's costs after protracted correspondence began—Appeal—Basis of costs in derivative claim—Whether judge right to introduce cut-off—Whether company entitled to reimbursement of defendant's costs paid by company.*

H2. This was an appeal against an order for costs in a derivative claim that was settled and for costs of the appeal itself.

H3. The company on behalf of which the derivative claim was brought owned and operated a football club and was owned as to 93 per cent by "Holdings". The claimant was a trust which held 25 per cent of the shares in Holdings. The second defendant to the proceedings, "S", held just under 75 per cent of the shares in Holdings and was a director of it. The trust commenced proceedings on behalf of itself and other shareholders in Holdings other than S, seeking a permanent injunction restraining S and Holdings from causing or procuring the club company to carry out a disposal of some floodplain land for no consideration to "C", as had been agreed between S and C. It was clear that the transaction would have involved a breach of duty by S as a director of Holdings. The trust applied for an interim order to stop an extraordinary general meeting ("EGM") of the company which had been convened to approve the sale, but this relief was refused and the resolution approving the sale was passed, with Holdings abstaining, but the sale did not proceed. The trust contended that the resolution was invalid and the action remained in being but dormant on the basis of undertakings given by the company, Holdings (together "the companies") and S to the trust, which were renewed from time to time as necessary. The trust issued an application for leave to continue the proceedings as a derivative claim. S decided to accept defeat to prevent further costs and on January 3, 2008, his solicitors wrote to the trust agreeing that the sale should only take place in accordance with professional advice as to the mode and date of sale. The trust was unhappy with some points, particularly the identity of the valuer. Protracted correspondence ensued between January and April 2008 but the negotiations foundered largely on whether the trust's choice of valuer had a conflict of interest. The trust requested a hearing date for the application to continue the derivative claim and at the hearing the judge encouraged the parties to continue compromise negotiations and adjourned the application. The parties came to a compromise agreement but were unable to agree who should bear the costs of the action and so applied for the action to be stayed and for an order as to costs.

H4. The costs in issue were (1) as between the trust and S; and (2) as between the trust and the companies ("trust/companies costs"). The trust sought an order that S pay all the costs so as to recoup

the trust's expenditure and preserve the financial position of the companies, but it did not seek to recover costs relating to its unsuccessful application to stop the EGM. As the action was a derivative action on behalf of the club company, the trust had an expectation of receiving its proper costs from the companies on an indemnity basis if the action had gone forward on the basis of *Wallersteiner v Moir (No.2)* [1975] Q.B. 373. The judge stayed the action with a Tomlin order dated May 14, 2008, but on costs refused to go into the merits of the whole derivative claim. He introduced a cut-off date so that the trust was awarded its costs against S on a standard basis and against the companies on an indemnity basis only down to January 16, 2008, when there had been a "sea change" in S's position and he had accepted that any sale had to be at market value; the trust should pay S's costs on the standard basis between January 16, 2008, and the date of the Tomlin order. The judge disallowed all the trust's costs after the cut-off date on the grounds that the trust had, after that date, unreasonably held out against any sale to C, not just one at less than market value. The trust appealed against the introduction of the cut-off date and for an order that S pay the costs as between the companies and himself.

H5. Held, allowing the appeal in part:

H6. 1. The judge was entitled to proceed in the way he did with his approach: it would have been wrong to allow what was intended by the parties to be a short application to the judge to turn into some full-blooded enquiry into the whole history of the events that had been in issue and the correctness or otherwise of the parties' legal arguments in the proceedings.

H7. 2. However, it was not open to the judge on the approach he took to decide that only some of the matters agreed by the defendants had to form part of the parties' compromise. January 16, 2008, did not mark the date by which the trust had achieved all that it gained by the Tomlin order: the trust was successful on a number of points after that date. Notwithstanding the wide ambit of discretion given to the judge, he erred in principle in making his order. In the circumstances the judge's imposition of the cut-off date could not stand and must be set aside so that it fell to the Court of Appeal to exercise the discretion as to the trust/S costs and the trust/companies costs as with respect to the costs which arose after the judge's cut-off date.

H8. 3. The correspondence after January 3, 2008, was excessively detailed and long drawn out. If the correspondence had dealt with matters appropriately, it would probably have been unnecessary to apply to the court for leave to continue the derivative claim; it would only have been necessary to apply to the court for approval of the Tomlin order and the making of orders as to costs. Accordingly deductions should be made to take account of the waste of costs caused by the correspondence and inappropriate application for permission to continue the derivative claim. Using a broad brush, the trust should have its costs of the action against S on a standard basis and as against the companies on an indemnity basis save for (1) 70 per cent of the costs of the correspondence from January 16, 2008, to the date of the Tomlin order; and (2) the costs of its application to the judge in so far as they exceeded the costs that would have been incurred by it if the terms (save as to costs) had been agreed before the application was relisted. What was to be excluded were costs of and incidental to the application made to the judge incurred on or after February 20, 2008, which would not have been incurred if the application had been merely one for approval of the terms contained in the Tomlin order. It was unreasonable to incur costs additional to those.

H9. 4. The trust was in reality making an application for an order for costs on the companies' behalf. No distinction should be drawn between the two companies: the parties by implication by making the compromise agreed that the trust was not disqualified from bringing the derivative action by reason of being a shareholder of Holdings only. The respondents submitted that the companies were entitled to incur costs in a derivative action, for instance by participating in an application for

permission to continue a derivative action. However, although there were or may be limited occasions on which a company could incur costs even in a derivative claim brought on its behalf, in this case there were no details of any such costs incurred by the companies, and, even if the costs which the companies incurred were only costs which were properly incurred by them in this action, that would not mean that they could not recover those costs from the person whose actions caused them to incur those costs. Given that the action arose out of a proposal by S to cause the club company to sell the floodplain land for no consideration in connection with some arrangement he personally had made with C, and given that he accepted that the transaction could not properly proceed on those terms, he should pay the costs of both Holdings and the club.

H10. 5. The companies had already paid some of S's costs. The appellant trust submitted that the same rule should apply in a derivative claim as in a minority shareholder's petition under s.994 of the Companies Act 2006 that the defendant should not have recourse to the funds of the company on whose behalf the derivative claim was brought. That was correct in principle, although, unlike a minority shareholder's petition in most cases, a derivative action was brought to enforce a claim that belonged to the company and not a personal claim, and consequences may flow from that difference. S was not entitled to the payment of his costs by the companies and so accordingly, the costs payable by S should include reimbursement for the totality of the costs which the companies or either of them paid on his behalf in or towards the discharge of his costs of defending this action.

H11. 6. The appellant substantially won the appeal and he should receive the costs of the appeal subject to a deduction of 20 per cent to reflect the justice of the case.

H12. Cases referred to:
Bartlett v Barclays Bank Trust Co Ltd (No.2) [1980] Ch. 515
Wallersteiner v Moir (No.2) [1975] Q.B. 373

H13. *Robin Hollington QC* (instructed by Withers LLP) for the appellant.
Daniel Lightman (instructed by Burnetts, Carlisle) for the respondent, Mr Story.

JUDGMENT (MAY 5, 2010)

ARDEN L.J.:

1. This appeal is concerned with the order for costs made by Peter Smith J. and dated July 27, 2008, in a derivative action that had been compromised. As at the date of this order, from which the claimant now appeals, the costs of the claimant were some £160,000, and those of the defendants some £55,000.

Background

2. The company on behalf of which the action was brought is the Carlisle United Association Football Club (1921) Ltd (referred to below as "the club"). The club owns and operates the Carlisle United Football Club, and it is 93 per cent owned by the first respondent, CUFC Holdings Ltd (referred to below as "Holdings"). The claimant (referred to below as "the trust") is a shareholder in Holdings: it holds just over 25 per cent of its shares. The trust commenced these proceedings in May 2007 on behalf of itself and all other shareholders in Holdings, other than one of its directors, namely Mr Norman Frederick Story, the second defendant and sole respondent appearing on this appeal. Mr Story held just under 75 per cent of the shares of Holdings. The club was made a defendant because the relief sought was sought on its behalf. I refer to Holdings and the club together as "the companies".

3. In these proceedings the trust sought a permanent injunction restraining Mr Story and Holdings from causing or procuring the club to carry out a disposal of land ("the floodplain land") for no consideration to a Mr Courtenay. It appears Mr Story had agreed with Mr Courtenay that he would seek to achieve that outcome. The terms of compromise of the action dispels any doubt but that to procure a transaction on these terms would have involved a breach of duty by Mr Story. The trust made an application for an interim order to stop an extraordinary general meeting ("EGM") of the club which had been convened to approve the sale. Lindsay J. refused this relief and the resolution approving the sale was passed, with Holdings abstaining, but the sale did not proceed. The trust contends that the resolution was invalid. The action remained in being but dormant on the basis of undertakings given by the companies and Mr Story to the trust, which were renewed from time to time as necessary. The trust issued an application for leave to continue the proceedings under CPR r.19.9, but this was done in November 2007 after the commencement date (October 1, 2007) of the new statutory provisions applying to derivative actions contained in ss.260–264 of the Companies Act 2006. Accordingly, those provisions applied to this action subject to the saving in para.20(3) of Sch.3 to the Companies Act 2006 (Commencement No.3 Consequential Amendments, Transitional Provisions and Savings) Order 2007 (SI 2007/2194). Nothing, however, turns on that point in this appeal.

4. In early 2008, Mr Story decided to accept defeat to prevent further legal costs being incurred. Burnetts, the solicitors acting for all three defendants until December 2009, wrote to the trust's solicitors on January 3, 2008, agreeing that the sale of the floodplain land should take place in accordance with professional advice as to the mode and date of sale. The trust was unhappy about a number of points, in particular the identity of the valuer. There then followed protracted correspondence during the period January to April 2008. A number of points were agreed but the negotiations foundered largely over what may well have been a misunderstanding as to whether the person who was the trust's choice of valuer had a conflict of interest. Ultimately, the trust decided to relist its application to the court for leave to continue its proceedings. When I use the word "relist", I do so in the way it is used by Mr Robin Hollington QC, for the trust, that is, request a hearing date before a judge of the Chancery Division. It is therefore not necessary to consider whether there had been a previous hearing of this application before a judge.

5. When the matter came on for hearing, Peter Smith J. very sensibly gave the parties some encouragement to continue the compromise negotiations and granted an adjournment for this purpose. This enabled the parties to come to an agreement as to how any sale of the floodplain land should be handled. The compromise went further than the judge had envisaged and contained additional detailed terms governing the disposal of the floodplain land. However, the parties were not able to agree who should bear the costs of the action. Accordingly, when the parties applied to the court for approval of a Tomlin order, this provided (as is usual) for the action to be stayed save for the purpose of enforcing the terms set out in the schedule. It also provided for the judge to make orders as to costs on the basis of written submissions. The resulting orders as to costs are the subject of this appeal. The terms of the order are explained below.

The terms of the compromise

6. The terms of the Tomlin order are set out in App.1 to this judgment. (Lest this Tomlin order should be considered to be any sort of precedent, I express no view on the enforceability of para.7 in App.1). It is important to note that the terms of the compromise went beyond a simple acceptance by Mr Story and the companies that no sale of the floodplain land would take place except in accordance

with professional advice as to the timing and mode of sale. The trust secured, among other provisions, the following additional provisions:

(i) the professional valuer would be the person chosen by the trust, namely Mr Jason Wall of Knight Frank Rutley ("KFR") or some other person agreed by the trust;
(ii) KFR would advise on all matters, not just the mode and timing of sale;
(iii) the club would not only seek but would actually follow the advice of KFR;
(iv) KFR would be entitled to take legal advice about overage provisions (deferred consideration related to the realisation of development value) or similar provisions;
(v) the club would take decisions in relation to the sale at board level and the director nominated by the trust would not be excluded;
(vi) the parties would share information obtained from KFR relevant to the sale;
(vii) the parties agreed not to take any action to undermine the sale;
(viii) if the club wished to sell the floodplain land otherwise than in accordance with the advice of KFR, the club would have liberty to apply to the court for permission to proceed with the sale.

The three categories of costs in issue

7. There are three categories of costs in issue: (1) as between the trust and Mr Story ("trust/Story costs"); (2) as between the trust and the companies ("trust/companies costs"); and (3) as between the companies and Mr Story ("companies/Story costs").

8. The trust primarily sought an order that Mr Story pay all the costs so as to recoup the trust's expenditure and preserve the financial position of the companies, but it did not (and does not) seek to recover costs relating to its unsuccessful application to stop the EGM. As the action was a derivative action on behalf of the club, the trust had an expectation of receiving its proper costs from the companies on an indemnity basis if the action had gone forward: *Wallersteiner v Moir (No.2)* [1975] Q.B. 373.

The judge's order

9. The judge's order dealt with the first two elements of costs by introducing a cut-off date: the trust was awarded its costs against Mr Story on a standard basis and against the companies on an indemnity basis only down to January 16, 2008. The judge ordered that the trust should pay Mr Story's costs on the standard basis between January 16 and the date of the Tomlin order. The judge disallowed all the trust's costs after the cut-off date on the grounds that the trust had, after that date, unreasonably held out against any sale to Mr Courtenay, not just one at less than market value. On the cut-off date there had been a "sea change" in Mr Story's position, and he accepted that any sale had to be at market value.

10. The judge did not deal with the third category of costs at all. It had emerged in January 2008 that the club was paying all Mr Story's costs as well as its own. Thus the third element of the costs in issue comprised: (a) costs incurred by the companies, and (b) costs incurred by Mr Story but paid by the companies.

11. There is no appeal by the paying parties but the trust appeals against the introduction of the cut-off date and for an order that Mr Story pays the third category of costs. The companies have chosen not to be represented on this appeal.

Discussion

The approach to costs following agreement of the compromise

12. The judge declined to go further into the merits of the derivative claim than was apparent from the Tomlin order, and any matters which were common ground. He refused therefore to allow the parties to argue the merits of the whole action. I agree with him that this was an appropriate and proportionate approach, particularly given the early stage that this litigation had reached. The judge was in my judgment entitled to proceed in this way. It would have been wrong to allow what was intended by the parties to be a short application to the judge to turn into some full-blooded enquiry into the whole history of the events that had been in issue and the correctness or otherwise of the parties' legal arguments in the proceedings.

13. The question then arises how the judge should deal with costs that were spent agreeing terms that the judge did not consider a necessary part of any compromise. In this case, the judge took the view that once the defendants had made it clear that they would agree that any sale had to be on professional advice as to its mode and timing the claimant should have been able to come to an agreement. But, as shown below, the trust did not have confidence in Mr Story and wanted further protection on a number of detailed points to which the defendants were prepared to agree. The defendants were not compelled to agree. If they had not been prepared to agree, they could have brought the correspondence to an end and themselves sought a stay of the action on the terms that they were prepared to offer. It may be that if they had not agreed they could have shown that the trust was seeking to go beyond what a claimant in a derivative action should properly insist on. But, the defendants having agreed to further matters, the judge should in my judgment not seek to impose his own view as to what was required to make further pursuit of the action pointless but should (in the absence of some good reason not to do so) proceed on the basis that the further matters that were agreed were properly sought and were within the scope of the action.

The cut-off date

14. The trust submits that January 16, 2008, was not an appropriate date for any limitation on its recoverable costs.

15. The negotiations leading to the Tomlin order were lengthy. We have been shown a bundle containing nearly 80 pages principally of solicitors' correspondence with attachments spanning January 3 to May 9, 2008. The letters are complex and often convoluted. Mr Hollington provided an analysis, which I have amended and set out in App.2 to this judgment to show in very summary form the principal points taken.

16. It is apparent from App.2 that January 16, 2008, does not mark the date by which the trust had achieved all that it gained by the Tomlin order. The trust was successful on a number of points after that date. As Mr Lightman, for Mr Story, submits, the trust's demands display a preoccupation with concerns about Mr Courtenay and Mr Story's relationship with him, and a failure to realise that it would be a breach of duty for the directors of the defendants to tie the companies' hands so that they could not accept an offer which was in the companies' best interests, even if the land was auctioned, and even if the offer came from Mr Courtenay and even if the offer was made forthwith rather than at a later date when the land had greater development value. However that may be, there were significant concessions made by the defendants after that date. The Tomlin order shows that the defendants agreed in the end for example to instruct KFR and that KFR should have access to legal advice, which were points made in the course of this correspondence. Furthermore, the defendants

only offered a relatively nominal sum towards the trust's costs, and so the compromise was by no means assured on January 16, 2008.

17. As I have already explained, I do not consider that it was open to the judge on the approach he took to decide that only some of the matters agreed by the defendants had to form part of the parties' compromise. In the circumstances, I have reached the conclusion that the judge's imposition of the cut-off date cannot stand and must be set aside. Notwithstanding the wide ambit of discretion given to the judge, I consider that he erred in principle in making his order.

18. On that basis, it falls to this court to exercise the discretion as to the trust/Story costs and the trust/companies costs as with respect to the costs which arose after the judge's cut-off date.

19. In my judgment, although the trust made gains in the subsequent correspondence, the correspondence was excessively detailed and long drawn out. The complete set of the terms on which the trust was prepared to settle should have been put forward in clear terms at the start. Moreover the trust's solicitors' letter of February 20, 2008, was discourteous and unconstructive. If the correspondence had dealt with matters appropriately, it would probably have been unnecessary to relist the application to the court for leave to continue the action; it would only have been necessary to apply to the court for approval of the Tomlin order and the making of orders as to costs. I would accordingly make deductions to take account of the waste of costs caused by the correspondence and inappropriate relisting of the application for permission to continue the derivative action.

20. Using a broad brush, as the court must inevitably do when dealing with questions of costs, I would therefore order that the trust should have its costs of this action (excluding the costs of the application to Lindsay J. which it is agreed should be left out of account) against Mr Story on a standard basis and as against the companies on an indemnity basis save for (1) 70 per cent of the costs of the correspondence from January 16 to the date of the Tomlin order; and (2) the costs of its application to Peter Smith J. in so far as they exceed the costs that would have been incurred by it if the terms (save as to costs) had been agreed before the application was relisted. The precise date of the relisting is not the material factor. What is to be excluded are costs of and incidental to the application made to Peter Smith J. incurred on or after February 20, 2008, which would not have been incurred if the application had been merely one for approval of the terms contained in the Tomlin order. In my judgment, it was unreasonable to incur costs additional to those that I have allowed.

The companies/Story costs

21. The first question was whether the judge had an application before him about these costs at all. I do not accept Mr Hollington's submission that such an application was fairly raised by his skeleton argument in support of his application, but it was raised in his skeleton argument in reply. Before the judge, Mr Story did not file submissions on this point, but he has been able to do so on this appeal.

22. The trust was in reality making an application for an order for costs on the companies' behalf. I draw no distinction between the two companies: the parties by implication by making the compromise agreed that the trust was not disqualified from bringing the derivative action by reason of being a shareholder of Holdings only. Mr Lightman submits that the companies were entitled to incur costs in a derivative action, for instance by participating in an application for permission to continue a derivative action. I accept that there are or may be limited occasions on which a company can incur costs even in a derivative action brought on its behalf. However, in this case, we have no details of any such costs incurred by the companies, and, even if the costs which the companies incurred were only costs which were properly incurred by them in this action, that would not mean that they could not recover those costs from the person whose actions caused them to incur those costs. Given that

the action arose out of a proposal by Mr Story to cause the club to sell the floodplain land for no consideration in connection with some arrangement he personally had made with Mr Courtenay, and given that he has accepted that the transaction cannot properly proceed on those terms, in my judgment he should pay the costs of both Holdings and the club.

23. The basis sought in the appellant's notice for an order against Mr Story is the standard basis and not the indemnity basis. The standard basis is the usual basis on which a defaulting trustee is ordered to pay costs to the trust (*Bartlett v Barclays Bank Trust Co Ltd (No.2)* [1980] Ch. 515). There is a close analogy between the position of a trustee and a director in this regard. There are exceptions to the standard basis in the case of a defaulting trustee, such as where the trustee has acted wholly unreasonably. However, Mr Hollington has not submitted that those exceptions apply or taken us to the contemporary material to substantiate a proposition that Mr Story's conduct fell within these exceptions.

24. Should those costs payable by Mr Story include repayment of (the totality of) the sums that the companies have already paid towards his costs? Mr Hollington submits that the same rule should apply in a derivative claim as in a minority shareholder's petition under s.994 of the Companies Act 2006, and thus the defendant should not have recourse to the funds of the company on whose behalf the derivative action is brought. In principle, this is correct although, unlike a minority shareholder's petition in most cases, a derivative action is brought to enforce a claim that belongs to the company and not a personal claim, and consequences may flow from that difference.

25. Mr Lightman submits that Mr Story was entitled to be indemnified by the club for his costs under art.21 of the club's articles of association, conferring a right of indemnity for acts done in the course of acting as a director of club as follows:

> "21. Subject to the provisions of and so far as may be consistent with the Statutes but without prejudice to any indemnity to which a Director may be otherwise entitled every Director … of the Company shall be entitled to be indemnified by the Company against all costs charges losses expenses and liabilities incurred by him in the execution and/or discharge of his duties and/or the exercise of his powers and/or otherwise in relation to or in connection with his duties powers or office including (without prejudice to the generality of the foregoing) any liability incurred by him in defending any proceedings, civil or criminal, which relates to anything done or omitted or alleged to have been done or omitted by him as an officer or employee of the Company and in which judgment is given in his favour (or the proceedings are otherwise disposed of without any finding or admission of any material breach of duty on his part) …"

26. It suffices to say that this article must by implication be limited to expenditure that a director has reasonably and properly incurred, and that in this instance the terms of the Tomlin order amount to an admission that the transaction that was originally proposed for the sale of the floodplain land for nil consideration to implement a personal arrangement with Mr Courtenay would have constituted a material breach of Mr Story's duty as a director.

27. We are not told how much the companies have paid on account of Mr Story's costs. However, the sums are potentially significant and we must take note of the fact that there are minority shareholders in both companies.

28. In my judgment, Mr Story was not entitled to the payment of his costs by the companies. Accordingly, I would order that the costs payable by Mr Story should include reimbursement for the totality of the costs which the companies or either of them has paid on his behalf in or towards the discharge of his costs of defending this action.

Disposal of this appeal

29. For the reasons given above, I would allow this appeal to the extent set out above and direct a minute of order to be settled by counsel for the trust and agreed between counsel. If it cannot be agreed, the parties can file written submissions within three days of the delivery of this judgment, and the court will deal with the matter on paper.

BRIGGS J.:

30. I agree.

PATTEN L.J.:

31. I also agree.

(Appeal allowed)

JUDGMENT (JUNE 9, 2010)

ARDEN L.J.

Ruling on costs and consequential matters

1. The costs of the action were dealt with in the judgments handed down on May 5, 2010, and accordingly, contrary to the submissions of Mr Hollington QC (Bundle p.83, para.7), it is too late to ask this court to deal with the costs of settling the order before Peter Smith J. They will therefore only be recoverable if they form part of the costs of the action.

2. The appellant substantially won the appeal and so on the face of it should receive the costs of the appeal. However, the respondent Mr Story points out that the appellant did not succeed on all arguments put before the court and he asks for the costs to be reduced by one third. The court agrees that, having regard to the matters in the judgment of Arden L.J., with which Patten L.J. and Briggs J. agreed, and in particular [19] and [20] thereof, some discount should be made. The court however, considers that the deduction of 20 per cent would reflect the justice of the case.

3. No further order is made as to the costs of the appeal. The club was not represented on the appeal and there is therefore no need to make any order in its favour about the costs of the appeal.

4. The court does not consider it appropriate to make an order about interest on costs.

5. On a straightforward application for orders as to costs following an appeal, such as in this case, it is not appropriate for this court to make an order for an account.

6. As to an interim payment in favour of the appellant, the appellant seeks the single figure of £150,000 as the interim payment for all its costs in this action, together with the appeal. The parties agree that the interim payment of £20,000 made by Mr Story pursuant to the order of Peter Smith J. should be released to the solicitors for the appellant. The court approves this release, and accordingly the figure that the appellant seeks is £130,000. The appellant states that its total costs of the action and the appeal are £297,000. The court considers that, judged by the costs of the appeal, stated to be £150,000 (inclusive of a success fee of £57,000), the appellant's costs are likely to be found excessive. This was a straightforward appeal on costs alone, and, the figures advanced by the appellant far exceed what the court would in its experience have expected for a one-day appeal of this nature. In the circumstances, the court orders Mr Story to make a further interim payment of £60,000. Furthermore this court has in any event reduced the percentage of costs to which the appellant is entitled whereas the appellant's application is made on the basis of a 100 per cent entitlement. The interim payment

ordered by this court is for the avoidance of doubt (a) exclusive of the £20,000 already paid, (b) in respect of the costs of the action, including the appeal, and (c) is to be paid within 21 days of the date of this ruling.

7. Mr Story is to pay the corporate defendants' costs on a standard basis as stated in the judgment of Arden L.J. It is not appropriate to ask Mr Story to pay to the appellant any additional costs ordered to be paid by the corporate defendants, should they be unable to pay them.

8. The court orders Mr Story to make an interim payment of £55,000 to the corporate defendants within 21 days of the date of this ruling. Mr Story does not oppose this order (Bundle, p.92). This relates to the costs of the action.

9. All costs ordered by this court are to be paid on the standard basis, save that the club shall pay the trust's costs of the action and the appeal on the indemnity basis. Costs recoverable by the appellant against the club in respect of its costs of the appeal shall also be limited to 80 per cent.

10. The court makes no special order about the costs incurred in making the submissions on the above matters. The amount of such costs payable by Mr Story will be a matter for the costs judge, but again, for the assistance of the costs judge, we would state that in our judgment, the appellants could have dealt with the matter far more simply and there was no need to file another bundle.

11. Costs which this court orders to be paid by one party to another shall if not agreed be the subject of a detailed assessment.

12. Counsel for the appellant shall within two days of the date of this ruling prepare a minute of order reflecting the judgment of May 5 and this order and place the same before counsel for Mr Story for him to approve within three days thereafter. If Mr Story's approval is not obtained within that time, counsel for the appellant may lodge his version with the Associates of the court, identifying in as brief a manner as possible which provisions of the order have not been agreed, and why.

(Order accordingly)

Appendix 1 Terms set out in the schedule to the Tomlin order dated May 14, 2008

"1. The Third Defendant will not seek to transfer or otherwise dispose of [the floodplain land] or any part thereof or interest therein save pursuant to an arm's length sale for full market value in which Jason Wall (or any other person agreed between the parties if he shall be unable or unwilling to act) of Knight Frank is instructed by the Third Defendant to act on its behalf and to advise it as to all aspects of such sale, including for the avoidance of doubt the timing of such a sale having regard to prevailing market conditions.

2. The Third Defendant shall seek and follow the advice of Knight Frank as to all aspects of such a sale.

3. Knight Frank shall have the right at the Third Defendant's expense to obtain independent legal advice from competent lawyers as to any legal issues relating to overage or the retention for the benefit of the Third Defendant of any uplift in value due to any future change in planning controls in relation to the Land, and arising in such a sale upon which they would desire to have legal advice PROVIDED that Knight Frank shall before doing so seek to obtain the consent of the Third Defendant to the obtaining of such advice (furnishing to the Third Defendant such information as it shall reasonably require for this purpose), such consent not to be unreasonably withheld.

4. Any decision or decisions to be made by the Third Defendant with regard to the instructions to be given to Knight Frank shall be made by the full board of the Third Defendant from which the Claimant's nominee shall not be excluded.

5. It is of the essence of this agreement that all parties shall be on an equal footing as to knowledge of all information of whatsoever nature which is material to the said sale and the advice to be sought from Knight Frank and to that end the Claimant shall be entitled to receive from the Defendants and Knight Frank all such information including for the avoidance of doubt the content of all communications (oral or in writing) between the Third Defendant and Knight Frank PROVIDED that any communication from the Claimant to Knight Frank shall be in writing and the Third Defendant shall be entitled to receive a copy of any such communication and any communication from Knight Frank to the Claimant.

6. The parties and each of them hereby undertake not to take any action which is calculated to jeopardise or undermine a proper sale at arms length of the Land or any part thereof in a sale conducted by and in accordance with the advice of Knight Frank.

7. If the Third Defendant shall wish for commercial reasons to proceed with the sale in circumstances in which Knight Frank do not advise the sale to proceed, it shall have liberty to apply to the Court for permission to proceed with the sale in such circumstances."

Appendix 2 Inter-solicitor correspondence re settlement of proceedings

B = Burnetts, solicitors for the defendants
W= Withers, solicitors for the Trust
KFR= Knight Frank and Rutley, valuers instructed by the Trust.
Mr Steel = director of the Club nominated by the Trust.

Date	Summary	Comment
3.1.08 B to W	Offer by defendants – Sale in accordance with advice of H&H Bowe as to mode and date of sale – each side pay own costs	H&H Bowe were the local agents previously instructed by Mr. Story, and they had provided a lower valuation of the floodplain land than KFR in their report dated October 2007
14.1.08 W to B	(1) The Trust questions the need for immediate sale. Settlement must not be "a ruse to transfer it to Mr Courtenay at the lowest possible price". (3) Not opposed to sale of land on terms which are in interests of the Club (4) Propose KFR, not H&H Bowe (6) Entitled to costs, other than before Lindsay J.	

Date	Summary	Comment
16.1.08 Board meeting of Club	Mr Story proposed and board resolved to sell at auction for best price. Mr Story advised the meeting that he would personally compensate Mr Courtenay. Mr Steel confirmed that if KFR were instructed to deal with the sale then the Trust would not object to the sale.	Comments by Mr Hollington: (1) Mr. Story was proposing to sell the land by auction, contrary to the advice of KFR (2) Mr. Steel (director nominated by the Trust) clearly stated Appellant's position viz: no objection to sale if KFR instructed—no stipulation of no sale to Mr Courtenay
18.1.08 B to W	This letter, and letter of 3.1.08, subject to board approval. Sale of land is intended to remove a "bone of contention "and raise cash. Will instruct KFR and follow their advice, as a timing, method of sale etc. subject to proviso that land to be sold within next year Parties to bear own costs – there is no possibility of Mr Story agreeing to pay any costs	
23.1.08 W to B	Entitled to costs, given withdrawal of threat of gift of land to Mr Courtenay	
30.1.08 W to B	Referred to draft minutes of board meeting on 16.1.08, and asked for clarification of Club's intentions as regards sale to Mr Courtenay. Subject thereto, Trust agrees to discontinue the derivative action.	
7.2.08 B to W	(first letter). Offer of £10,000 on account of Trusts's costs.	
7.2.08 B to W	(second letter) Offered undertakings in the terms by Mr Story and the Club not to transfer the floodplain land to Mr Courtenay unless he was highest bidder at an auction conducted by KFR. Parties to pay their own costs.	
20.2.08 W to B	Undertaking offered rejected as "completely inadequate" and as designed to leave open possibility of sale to Mr Courtenay: auction inconsistent with advice from KFR and the Companies should not be bearing the costs. Action will continue	Letter makes various accusations, e.g. "Your offer confirms that your clients are not prepared and cannot be trusted to act in good faith in this matter."

Date	Summary	Comment
25.2.08 B to W	(1) Story will abide by the advice of KFR as to mode of sale "previous reference to an auction included at solicitors" instigation (2) Counsel now advised that undertaking was not appropriate because it was inappropriate to rule out a sale to Mr Courtenay. (3) Inappropriate to continue action. (4) But no offer on costs.	
5.3.08 W to B	Para 5: Offer to accept one of 2 alternatives- *Either* no disposal other than at arms length to someone other than Mr Courtenay or Mr Story. *Or* no disposal save on terms essentially the same as the terms of the consent order of 14.5.08 save that (1) KFR to have "conduct of the sale". (2) Trust to have liberty to apply to the court to stop any sale other than one at arm's length in which neither Mr Courtenay nor Mr Story was interested. (3) Trust's costs were to be paid by the Companies if the court approved the order.	
27.3.08 but not sent until 1.4.08 B to W	Story offered undertaking not to sell save in accordance with advice of KFR as to mode of sale But: - KFR should not have the right to take independent legal advice on overage clause (p.45) - terms whereby the Trust would have only limited involvement with the obtaining of advice from KFR.	Comments by Mr Hollington: (1) The offer to abide by the advice of KFR was withdrawn on April 4, 2008 (see below). (2) The undertaking did not cover advice as to the timing of any sale as set out in the Tomlin order. (3) Substantial limitations were placed on the involvement of the Trust in the obtaining of advice from KFR, in contrast to what was achieved in the Tomlin order. (4) Still no offer on costs
4.4.08 B to W	Story would be amending undertaking so as to replace KFR with another surveyor as the Trust had suggested that KFR had after all a conflict of interest.	
7.4.08 W to B	The conflict of interest only arose while the parties were not agreed on the terms of the compromise.	

Date	Summary	Comment
9.4.08 B to W	Reply – intend to instruct Smiths Gore instead of KFR	
10.4.08 W to B	Reiteration of points, many of which were reflected in the Tomlin order.	