Case No: A2/2012/1725

Neutral Citation Number: [2013] EWCA Civ 235
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON CIVIL JUSTICE CENTRE
Mr Recorder Stephen Hockman QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/03/2013

Before :

LADY JUSTICE ARDEN
LORD JUSTICE BEATSON
and
MR JUSTICE RYDER

- -

Between :

(1) Nelson's Yard Management Company	**Appellants**
(2) Christopher Leverick	
(3) Susan Leverick	
(4) Alastair Munroe	
- and -	
Nicholas Eziefula	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Duncan Kynoch (instructed by **Sharpe Pritchard**) for the **Appellants**
Jonathan Davey (instructed by **Pinsent Masons**) for the **Respondent**

Hearing date : 12 March 2013

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Judgment

Lord Justice Beatson :

Introduction

1. This appeal concerns the approach of the court to the determination of liability for the costs of an action where the claimant has discontinued proceedings, and to departing from the "presumption" or "default" rule in CPR Part 38.6(1). CPR Part 38.6(1) provides that "unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant, against whom the claimant discontinues, incurred on or before the date on which notice of discontinuance was served on the defendant". This appeal in particular concerns the boundary between the "merits" of the claim, which, on the authorities, are irrelevant in this context, and the conduct of the defendant, which is relevant but is not determinative, and the position where important aspects of the factual position are disputed.

2. Nelson's Yard Management Company, the first claimant, is the owner of the freehold reversion of premises at 1 – 10 Nelson's Yard, Camden. Christopher and Susan Leverick, the second and third claimants, are the leasehold owners of 6 Nelson's Yard. Alastair Munroe, the fourth claimant, is the leasehold owner of 5 Nelson's Yard. The defendant, Nicholas Bartholomew Eziefula, is the freehold owner of adjoining premises, 11 and 13 Camden High Street. On 30 January 2008, the claimants issued these proceedings in respect of excavation work carried out by the defendant at 11 and 13 Camden High Street. At the direction of the Council, the work ceased on 23 January and the hole was partially filled in on 25 January 2007.

3. On 7 March 2012, the claimants served an application for permission to discontinue the proceedings and on 29 March 2012 served notice of discontinuance. They also applied for their costs. They did so because of what their solicitor described as "the defendant's obstructive and truculent behaviour throughout". I summarise the parts of the conduct of the defendant relied on by the claimants at [10] – [13] and [19] – [20].

4. On 20 June 2012 the learned judge, Mr Recorder Stephen Hockman QC, rejected the claimants' application and ordered them to pay the defendant's costs. They appeal against his order. In this court they are the appellants and Mr Eziefula is the respondent. But, since the focus of CPR Part 38.6(1) and thus of this appeal is on discontinuance by a claimant and the costs consequences of that for a defendant, I shall refer to them respectively as the claimants and the defendant. The question is whether, notwithstanding the generous ambit within which a reasonable disagreement is possible about the exercise of discretion, the learned Recorder erred in his approach to the exercise of the court's discretion as to whether to depart from this presumption or default rule.

5. It was submitted by Mr Kynoch, on behalf of the claimants, that the Recorder did not apply the correct principles and alternatively failed to take into account all relevant considerations. He relied on a number of aspects of the defendant's conduct before and after proceedings were instituted, and what he described as material changes of circumstances brought about by the defendant's conduct after proceedings were issued. His submissions at the hearing focussed on the Recorder's treatment of the defendant's failure to respond to the claimants' pre-action correspondence. He

submitted that, although the judgment refers to this (see [18(2)] below), the Recorder was wrong to give it no weight in considering whether to depart from the default rule in CPR 38.6(1). For the reasons I give at [42] – [43], I have concluded that the learned Recorder did fall into error in this respect, and that the appeal should be allowed. It is therefore necessary for this court to exercise the discretion afresh. On this I have concluded that, for the reasons in [44] – [46], the defendant should pay the claimants' costs until 30 May 2008, the date on which the defendant's defence was served, and there be no order for costs thereafter.

Factual and procedural background

6. The claimants' case is that the defendant's excavation in January 2007 was within about one metre of the rear wall of 5 and 6 Nelson's Yard. Accordingly, the defendant was required, as he was required to do by section 6 of the Party Wall etc Act 1996 ("the 1996 Act"), to serve notice upon them prior to commencing the work, but failed to do so. They also maintained that the work had been carried out without planning permission, and that the defendant had repeatedly refused many requests by the claimants for access in order to ascertain the state and condition of the rear wall and foundations of their properties. An email from Mr Lane, their structural engineer, dated 21 December 2007, the month before these proceedings were launched, referred to his inability to get access to determine the proper levels and stated he had "interpolated" the foundation level. The claimants claimed that, in the light of the extent of the work and the proximity of the work to the rear wall, there was a real risk that the excavation work had weakened or caused damage to their foundations. They sought injunctive relief to restrain the defendant from carrying out further development pending the agreement of an Award under the 1996 Act, and to require him to permit the claimants to have access so as to permit inspection of the foundations of the rear of their property. They also sought damages to be assessed.

7. When the defence, dated 30 May 2008, but in fact served on 3 May, it became clear that the defendant disputed many of the matters alleged. It was denied that the 1996 Act's notice provision applied to the excavations, *inter alia* because the defendant was not a "building owner" within the meaning of the 1996 Act, that is an owner of land desirous of exercising his rights under the 1996 Act and because he did not propose to "excavate within the meaning of section 6 of the Act." It was stated that in January 2007 the defendant's contractors had failed to carry out the works in accordance with his instructions and excavated closer to the claimants' premises than they should have done. It was also denied that the disputed work had been undertaken without planning permission, and that the defendant had not afforded appropriate access to the claimants.

8. It was, however, not in issue then or now that the defendant had not replied to four letters sent to him by the claimants or Sharpe Pritchard, their solicitors, between 18 May and 13 July 2007. Those letters raised the failure to serve notices in breach of the 1996 Act. All of them contain a request that the claimants' surveyor be permitted to have access to the site to ascertain the state and condition of the rear wall of 5 and 6 Nelson's Yard and its foundations. It is accepted that the defendant received these letters, and that he did not reply to any of them.

9. The first two letters, dated 18 May and 12 June, were written by the claimants themselves. The first letter gave the names and addresses of all the claimants. That and the second letter referred to what are described as "the Party Wall Regulations", which appears to be an erroneous reference to the 1996 Act, and the second letter stated that the claimants required the work to be undertaken in compliance with those Regulations.

10. The third letter, dated 21 June 2007, from Sharpe Pritchard, stated that the defendant had excavated in breach of the 1996 Act, had not served Party Wall Notices on the claimants, and had refused to permit a surveyor to have access to the site. This letter stated that the claimants reserved the right to seek immediate injunctive relief against the defendant.

11. The fourth letter, dated 13 July 2007, also from Sharpe Pritchard, reiterated the points made by the claimants and their solicitors in the earlier letters. It also stated that Sharpe Pritchard had instructions to issue proceedings and seek injunctive relief, and that they would do so if the defendant did not provide an undertaking within seven days to cease further development works pending the installation of appropriate works to safeguard the claimants' property.

12. After these proceedings were issued, there were a number of developments. Those relied on by the claimants are summarised at [19] and [20]. As will be seen, the disputes as to some of them mean that in the circumstances of this case it is not possible to rely on them in considering whether to disapply the default rule in CPR Part 38.6(1). Here I summarise those that I consider of most relevance to this appeal, although some of them fall into the "disputed matter" category.

    (1) In a letter dated 1 February 2008, Avadis and Co, the solicitors then acting for the defendant, stated that the defendant would agree to the claimants' expert inspecting the excavation work and the rear wall and foundations of the claimants' property. Subsequently, arrangements for inspection were made and inspection took place.

    (2) In a letter dated 9 April 2008 to Avadis and Co, Martin Redston, a structural engineer acting for the defendant, stated that trial holes that had been drilled under the supervision of the claimants' Party Wall surveyor revealed foundations estimated at a depth of at least 2.5 metres below ground level, that the excavation was approximately 1.5 metres from the adjoining property's wall, and before being partially back-filled, extended to a depth of 2.5 – 3 metres below ground level, and that it had been agreed with the local authority's building control officer that "under these circumstances, no possible damage could have occurred to the foundations, and that the construction of a retaining wall along the face of the Nelson's Yard foundation line will be acceptable".

    (3) In a letter dated 10 April 2008 Avadis and Co invited the claimants to discontinue these proceedings. They stated that if the claimants did not the defendant would consider making an application to strike the proceedings out. In emails dated 15 April 2008 between Avadis and Co and Mr Barnecutt, the claimants' solicitor, each invited the other to meet the costs of the

proceedings. Mr Barnecutt indicated that if the defendant agreed to pay the claimants' costs they could discuss terms for the withdrawal of the proceedings, and that they would be willing to discontinue provided that the defendant undertook to erect a retaining wall, and undertook not, in future, to break the terms of the 1996 Act.

(4) On 3 May the defence was served. I have summarised its contents at [7].

(5) In a letter dated 6 May Avadis and Co stated that it was apparent that neither party intended to meet the costs of the other. They also stated that they wondered if Mr Barnecutt wished them to suggest mediation to the defendant. During May there were exchanges about mediation. Mr Barnecutt *inter alia* asked what issues it was proposed should be mediated, Avadis and Co stated that the case was now solely about costs, and Mr Barnecutt stated that was not so, and that the claimants' main concern was to restore the support to the foundations of their property.

(6) By 13 June 2008 Avadis and Co were no longer acting for the defendant. In a letter dated that day, Sharpe Pritchard wrote directly to the defendant stating that he believed it might be possible to resolve the dispute without further court costs, suggesting a meeting of the parties' engineers, and offering mediation should the engineers not agree. It appears from a letter dated 24 May 2010 from McGrigors LLP, the defendant's present solicitors, that on 13 June 2008 these proceedings were stayed by consent until 31 October and that the stay was subsequently extended.

(7) On 5 August 2008 the defendant served a Party Wall Notice pursuant to section 6 of the 1996 Act. This stated that the defendant "intended to build within 3 metres of [the claimants'] building and to a lower level than the bottom of [the claimants'] foundations". The defendant maintains that this notice (and the later Party Wall Award: see [13(7)]) related to future works and not the works in January 2007.

(8) On 12 February 2009 the claimants and the defendant agreed a Party Wall Award which made provision for the manner in which the defendant's works were to be carried out.

(9) The letter dated 24 May 2010 from McGrigors to which I have referred stated that Sharpe Pritchard had not communicated with them for 18 months. It invited the claimants to discontinue the proceedings, and stated if they did not the defendant reserved his right to apply to have the claim struck out or for summary judgment.

(10) An email to McGrigors dated 18 February 2011 from Mr Barnecutt stated that the claimants had previously offered to engage in mediation but had not received a response. This must either be a reference to their exchanges with Avadis and Co in May 2008 or their letter dated 13 June 2008 to the defendant.

(11) A letter dated 11 August 2011 to the defendant from Sara Burr, his surveyor, records that the surveyors had agreed that the claimants be paid £850 compensation under the 1996 Act as a result of minor damage caused by the works. The defendant's position is that this related to works after the service of the Party Wall Notice and not those in January 2007.

(12) On 7 March 2012, the claimants served their application for permission to discontinue the proceedings and on 29 March 2012 served notice of discontinuance.

The legal principles

13. At the core of the submissions before the Recorder and his conclusion was the decision in the seven test cases heard by HHJ Waksman QC, sitting as a deputy High Court Judge, and reported *sub nom Teasdale v HSBC Bank PLC* [2010] EWHC 612 (QB), 4 Costs LR 543. In those cases the Deputy Judge reviewed a number of authorities including *Re Walker Wingsail Systems PLC* [2006] 1 WLR 2194, a decision of this court, *Official Receiver v Doshi* [2007] BPIR 1135, *RBG Resources plc v Rastogi* http://www.bailii.org/ew/cases/EWHC/Ch/2005/994.html[2005] EWHC 994 (Ch), *Maini v Maini* [2009] EWHC 3036 (Ch), *RTZ Pension Property Trust v ARC Property Developments* [1999] 1 All ER 532 and *Far Out Productions v Unilever* http://www.bailii.org/ew/cases/EWHC/Ch/2009/3484.html[2009] EWHC 3484 (Ch). He derived and stated eight principles from these cases.

14. There were appeals from two of the *Teasdale* decisions to this court. In the judgment given by Moore-Bick LJ (with whom Ward and Arden LJJ agreed) *sub nom Brookes v HSBC Bank* [2011] EWCA Civ 354 at [6] – [8] HHJ Waksman's statement of the principles was approved and his formulation was stated to be a fair summary of the effect of the authorities. Moore-Bick LJ, (at [6]), however, stated that that the eight principles formulated by the Deputy Judge could be reduced to the following six principles:

> "(1) when a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position;
>
> (2) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so;
>
> (3) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption;
>
> (4) the mere fact that the claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;
>
> (5) if the claimant is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he has not himself contributed;
>
> (6) however, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule."

The debate before us primarily concerned the sixth principle. There is further guidance from this Court as to the approach to disapplying CPR Part 38.6(1) in *Messih v MacMillan Williams* [2010] EWCA Civ 844. I refer to this at [31]. But it is common ground between the parties that the principles set out in the *Teasdale* cases and in *Brooks v HSBC* constitute the correct approach for the court to adopt when dealing with the issue of costs on discontinuance.

15. It is also necessary to refer to CPR Part 44.3 which sets out the circumstances the court is to consider when making an order about costs, and the relationship between it and CPR 38.6. Moore-Bick LJ's summary of the principles does not expressly refer to CPR Part 44.3 but his approval of HHJ Waksman's formulation must have encompassed the Deputy Judge's eighth principle. That is, that "the context for the Court's mandatory consideration of all the circumstances under CPR 44.3 is the determination of whether there is a good reason to depart from the presumption imposed by CPR 38.6".

16. CPR Part 44.3(4) provides that "in deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including (a) the conduct of all the parties … (c) any admissible offer to settle made by a party which is drawn to the court's attention".

17. CPR Part 44.3(5) provides that "conduct" 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 his case or a particular allegation or issue."

The judgment

18. The learned Recorder's judgment can be summarised thus:

    (1) The court's task was to decide whether the claimants had established that there is good reason to depart from what is described as the presumption imposed by CPR 38.6. This involved considering whether there was a change of circumstances connected with some conduct on the part of the defendant, and whether, taking into account all the other circumstances, a different order should be made: judgment, [3].

    (2) The excavations which had taken place in January 2007 were the cause of considerable concern to the claimants, who wrote to the defendant on four occasions between 18 May and 13 July 2007, but "regrettably the defendant chose not to respond to any of this correspondence": judgment, [9].

    (3) The Recorder stated he well understood why the claimants felt it necessary to issue these proceedings, and would not have been surprised had they done so rather earlier than they did. Had the matter proceeded to trial, they may well have succeeded in showing the defendant was in breach of his obligations under the 1996 Act, and he thought it likely that the defendant's defence

would have failed. However, in the absence of a hearing on the merits, he could not so conclude: judgment, [11].

(4) In the light of the decision in *Teasdale v HSBC Bank Plc*, the fact that the claimant would have, or might well have, succeeded at trial is not itself a good reason for disapplying the default rule. Once there is no trial, it is not the function of the court to attempt to decide whether or not the claim would have succeeded: judgment, [12].

(5) The Recorder referred to the following post-proceedings events:

(a) The indication by the claimants' solicitors on 15 April 2008 summarised at [13(3)] that they would be willing to discontinue provided that the defendant undertook to erect a retaining wall, undertook not, in future, to break the terms of the 1996 Act, and agreed to pay the claimants' costs: judgment, [13];

(b) The service by the defendant of a Party Wall Notice pursuant to section 6 of the 1996 Act on 5 August 2008, and to a Party Wall Award on 12 February 2009: judgment, [14].

(6) The Recorder rejected the claimants' arguments that the defendant's apparent determination to proceed with the works without complying with the Party Wall Act, and his ignoring the claimants' correspondence left them no alternative but to issue proceedings, and that it was only after the issue of proceedings that the defendant indicated he was prepared to comply with the 1996 Act: judgment, [16]. He did so because "it seems to me that if I were to accept this argument, I would be contravening the principle laid down by HHJ Waksman and subsequently approved by the Court of Appeal". As the defendant did not accept that he was proposing to act in defiance of the 1996 Act, or that the reason for his later agreement to do so was the result of the claimants' proceedings, he could not determine those questions in the claimants' favour in the absence of a hearing on the merits and, accordingly, the claimants' central case as to change of circumstances "is doomed to failure": judgment, [17].

(7) The Recorder held that if he had a general discretion under CPR Part 44.3 to disapply the presumption where some conduct by a defendant caused the change of circumstances, in this case he did not find any feature of the conduct which was of a sufficiently compelling nature to justify his doing so. He found nothing in the defendant's behaviour overall which was so clearly inappropriate and/or so clearly causative of the incurring of unnecessary costs as to justify his departing from the default position: judgment, [18] and [19].

The grounds of appeal

19. There are two grounds of appeal. The first is that the learned Recorder was wrong to find that there was nothing in the defendant's behaviour (or conduct) overall which was so clearly inappropriate and/or clearly causative of the incurring of unnecessary costs. It was submitted that he failed to give any weight to a number of matters. The first, and the one Mr Kynoch emphasised, was the failure of the defendant to respond

to the claimants' four pre-proceedings letters. The second was that the defendant did not afford the claimants' professional advisers access to investigate the stability of the claimants' flank wall. The third and fifth are that the defendant did not serve a Party Wall Notice and did not obtain an Award under the 1996 Act before the commencement of the excavation works and these proceedings. He also submitted that the learned Recorder did not give any weight to a number of matters. These were that the defendant had not instructed surveyors prior to the commencement of proceedings, the excavation had been carried out without planning permission, and that after proceedings were commenced the defendant had failed to carry out the works in accordance with the Party Wall Award agreed in February 2009.

20. The second ground is that the learned Recorder was wrong to find that there had been no "material change of circumstances" brought about by the conduct of the defendant after proceedings were issued (and to which the claimants did not contribute) which did not impact on costs. Mr Kynoch relied on a number of changes in the defendant's behaviour. One was the change from ignoring correspondence to engaging with the claimants through solicitors. Secondly, he submitted that, before the service of the defendant's defence on 30 May 2008 he had refused to explain his position adequately or at all and that it was an objective, non-contested fact that the first time the defendant did this was in his defence. Thirdly, it was only after the issue of proceedings and well after the defence was filed that the defendant instructed a surveyor to act for him on the Party Wall issues and that the defendant, on the advice given to him by his structural engineer, served a Party Wall Notice admitting an intention to build to a level lower than the bottom of the claimants' foundations. That intention had been denied in the defence: see [8]. He also relied on the agreement in the Party Wall Award, and the small sum the surveyors agreed was to be paid to the claimants by way of compensation. He maintained that these and other matters rendered the proceedings nugatory or academic, and that given them, it would have been a waste of costs and resources to continue to trial.

21. Mr Kynoch submitted that the matters relied on did not involve, as the learned Recorder considered (judgment, [17]), having to determine contested issues. They merely involved looking at readily observable changes of circumstances from the conduct of the defendant after the issue of proceedings. He maintained that it was no answer for the Recorder to state that he would have had to have determined the merits in order to have regard to these matters. He contended that the Recorder's treatment of them at paragraph [19] was unparticularised and a "throwaway and non-specific finding" (skeleton argument, paragraph 60).

22. In summary, the claimants' position before the Recorder and before us is that the egregious and unreasonable conduct of the defendant before and after the proceedings commenced meant that there were cogent reasons for the court, in the exercise of its discretion as to costs to depart from the default rule in CPR Part 38.1(1). They relied on the defendant's conduct before and after the issue of proceedings, one of the mandatory considerations in CPR Part 44.3. They contended that the defendant's conduct after the issue of proceedings constituted a "change of circumstances" rendering the proceedings nugatory or academic, and thus justifying departure from the default position. They contended that the defendant's conduct in ignoring the pre-proceedings correspondence was unreasonable and, even if the letters from the claimants and the solicitors did not comply with the exact letter of protocols, they

were clear and complied with their spirit. Notwithstanding that, the defendant ignored them. As to the principle that once there is to be no trial, it is not the function of the court to attempt to decide whether or not the claim would have succeeded so that the fact that a claimant would or might have succeeded at trial is not a good reason in itself for disapplying the default rule, Mr Kynoch submitted that the claimants were not relying on the merits of the claim. He submitted that for the court to consider the defendant's "conduct" in determining costs was wholly different from determining costs by reference to the "merits" of the claim, and that the learned Recorder fell into error by eliding the two.

The defendant's position

23. Mr Davey, on behalf of the defendant, submitted that in the circumstances of this case the judge was correct to apply the default rule as to costs on discontinuance. Alternatively, he submitted that the judge applied the correct principles and that his conclusion was within the scope of the reasonable decisions open to him in the exercise of his discretion. He relied on the margin appellate courts accord to a judge in the exercise of discretion, and in particular the judgment of Latham LJ in this court in *Solutia UK Ltd v Griffiths* [2001] EWCA Civ 736 at [11]. Albeit in a different context, he also relied on the statement of Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372H that "an appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself".

24. As to the first ground of appeal, Mr Davey' written submissions were detailed and his oral submissions put the defendant's case in an attractive and succinct way. He contended that many of the matters relied on by the claimants are contested assertions of fact, while others are not relevant to their pleaded case. Secondly, he maintained that it cannot be said that the Recorder gave no weight to the matters relied on by Mr Kynoch. The parties had made detailed submissions before the Recorder and adduced many documents. The claimants' arguments were before him and his judgment referred, for example, to the pre-litigation correspondence, the contact between the parties' professional advisers which led to the Party Wall Award, and the defendant's conduct before and after proceedings. Mr Davey submitted that under the first of the principles in the *Teasdale*/*Brookes* cases the burden of proof to displace the default rule lay squarely on the claimants, and the learned Recorder concluded and was entitled to conclude that the claimants had failed to discharge that burden.

25. Mr Davey submitted that it was wrong to characterise the question of access to the defendant's property by the claimants' advisers as a matter of "conduct". It was a disputed factual matter and part of the defendant's pleaded case. The question whether the claimants or the defendant would have prevailed on this point was a matter that would have fallen to be determined at trial. Mr Davey made a similar submission in respect of the claimants' reliance on the failure to serve a Party Wall Notice prior to the disputed works, and the absence of a Party Wall Award at that stage. He pointed to the defendant's evidence as to the planning permission position, which claimed he had planning permission for the January 2007 work. He submitted that in any event the absence of planning permission would not itself have provided a basis for the claimants to succeed.

26. In relation to the one undisputed matter, that the defendant did not reply to the claimants' four pre-action letters, Mr Davey submitted it was open to the Recorder to conclude that that while the failure to respond was regrettable it did not have the effect of displacing the default rule in CPR Part 38.6(1). He made this submission for two reasons. The first was that the letters did not comply with the provisions of the Practice Direction on pre-action conduct. He pointed to the fact the first two letters did not refer to the possibility of commencement of proceedings and none gave a date for response or the possible costs consequences of not replying as required by paragraph 2.3 of the Practice Direction. He also relied on the omission in all but the first letter to give the names and addresses of the claimants as required by paragraph 2.2(1) of the Practice Direction but was right not to press this since the names and addresses were all in the first letter. He also submitted that regard should be had to the fact that proceedings were commenced with no further notice only some seven months after the last of these letters, a year after the excavations, and long after the hole had been filled in.

27. Mr Davey's second reason was that the defendant's explanation for not responding to the letters, which was in evidence, enabled the learned Recorder to reach the conclusion that he did. The defendant's explanation (defendant's statement, paragraph 51(vi)) was that in February 2007 he had reached an agreement with the claimants' surveyor that he would serve notices if necessary once he had received planning permission, and he did not regard the letters as valid letters before action because they did not inform him of the consequences of not responding.

28. As far as the second ground of appeal is concerned, Mr Davey submitted that the matters relied on by Mr Kynoch (summarised in [20] above) are either contested, not changes of circumstances, or alternatively are part and parcel of the process of litigation and not matters which should chime in costs. It was contested that the defendant (a) did not permit the claimants' representatives access to the property prior to the launch of these proceedings, (b) only engaged professionals after they were launched, and (c) that the Party Wall Notice and the Award related to the works undertaken in January 2007. The engagement by the defendant's solicitors and the service of the defence were part and parcel of the litigation. Mr Davey's written submissions are detailed but his oral ones were succinct and, in view of my approach to the case, it is not necessary to say more about them.

Discussion

29. In this case Mr Kynoch faced two significant hurdles. The first is that a generous margin is given to a judge when exercising a discretion such as that in CPR Part 38.6(1). The test is similar to the well-known *Wednesbury* test in public law. An appellate court will only interfere with its exercise where the judge in the lower court has not applied the correct principles, has not taken into account all relevant considerations, taken into account an irrelevant consideration, or has reached a perverse decision, that is one which is outwith the ambit of reasonable decisions open to him or her on the facts of the case: see *Solutia UK Ltd v Griffiths* [2001] EWCA Civ 736 *per* Latham LJ at [10] - [11].

30. The hurdle to displace the default rule in CPR Part 38.6(1) is also a high one. A claimant who discontinues must (see Moore-Bick LJ's sixth principle in *Brookes v HSBC Bank*) generally show some form of unreasonable conduct on the part of the defendant which provides a good reason for departing from the rule. The height of this hurdle can be illustrated by two examples.

31. First, the mere fact that a claimant has got all or almost all he could reasonably hope to achieve from the proceedings has been said not to justify a claimant from relying on the avoidance of a trial which would be solely about liability to recover costs as justifying a departure from the default rule: see Patten LJ in *Messih v MacMillan Williams* [2010] EWCA Civ 844 at [28], [30] and [31]. In *Brookes v HSBC Bank*, after referring to what Patten LJ stated, Moore-Bick LJ observed (at [10]) that a claimant who seeks to persuade the court to depart from the default rule must provide cogent reasons and is unlikely to be able to satisfy the court that there is good reason to do so save in unusual circumstances. In *Messih's* case the achievement by the claimant of what he had sought from the proceedings by a settlement with one of a number of defendants did not justify disapplying the rule when he discontinued against other defendants.

32. The second example concerns the position of disputed material. It is clear that once there is to be no trial, it is not the function of the court considering costs to decide whether or not the claim would have succeeded: see *Re Walker Wingsail Systems PLC* [2006] 1 WLR 2194, *per* Chadwick LJ at [12], and HHJ Waksman's second principle in *Teasdale v HSBC Bank PLC*, [2010] EWHC 612 (QB) at [7(2)]. But it is also clear (see Moore-Bick LJ's sixth principle in *Brookes v HSBC Bank*)) that it is the function of the court to consider whether the unreasonableness of a defendant's conduct provides a good reason for departing from the default rule.

33. Does the fact that a defendant disputes the conduct on which a claimant relies preclude the court proceeding? Is the claimant obliged, absent an agreement as to costs, to proceed to a trial which in reality would be solely about liability to recover costs? Where the defendant's position is one deserving argument at trial, the general answer must be "yes".

34. What is the position where the conduct relied on by the claimant as a ground for departing from the default rule is unrelated to the merits of the claim or the defence? Such a scenario may appear far-fetched. But, leaving that aside, to require the claimant to proceed to a trial where the real issue concerns conduct of the defendant unrelated to the pleaded cases seems a waste of scarce court resources and the resources of the parties.

35. A more likely scenario is where a defence has no real prospect of success and the claimant has achieved what he could reasonably hope to achieve from the proceedings. Mr Kynoch's submission that only "properly contested matters" were to be left for the trial judge may reflect this category of case. But, leaving aside the trial judge, is the claimant required to apply for the defence to be struck out or for summary judgment, or can the matter be addressed in the context of an application to depart from the default rule in CPR Part 38.6(1)? In *Re Walker Wingsail Systems PLC* Chadwick LJ appeared to draw a distinction (albeit in the context of a claim rather than a defence) between such cases and those where a person's position is one

deserving of argument, but did not state whether, in the first category of case, the court can deal with the matter in the context of an application to depart from the default rule in CPR Part 38.6(1).

36. There is some support in *Dhillon & Bachmann Trust Co. Ltd. v Siddiqui* [2010] EWHC 1400 (Ch) for the court being able to deal with the matter where there is no question of having to resolve disputed questions of fact. Norris J (at [31]) was able to find that, despite the vehement denials of the defendants, "unusually" there was "sufficiently found fact" or "incontrovertible evidence" and (see [27]) "no scope for resolving disputed questions of fact". That, he stated, enabled him to conclude that the defendants' defences were totally unsustainable and that they should pay the costs of the claimant who had discontinued. Because of the complicated procedural history of that case and because all agreed that the claim had become totally academic and that the proceedings should be brought to an end, Norris J (at [26]) stated that "the precise procedural mechanics should not dominate a consideration of what is the just order for costs" and he rejected what he described as the defendants' "formalistic" approach. For that reason, he decided to approach costs by reference to the general considerations imposed by CPR Part 44.3 and not within the constraints imposed by CPR 38.6(1).

37. The present case, however, is very different from *Dhillon v Siddiqui.* Mr Kynoch accepted that the Party Wall Notice issue and some of the other disputed matters were "close to the merits". His submissions about the defendant's case on these, including the failure to serve a Party Wall Notice prior to the commencement of proceedings, his contention that he was not liable for actions by his contractors which were unauthorised, and whether he had not permitted access were powerful. But it cannot be said that they were supported by "incontrovertible evidence" or that the disputes on these matters could be resolved without "resolving disputed questions of fact". Accordingly, although it may be likely or very likely that the claimants' position would be sustained, absent a hearing on the merits and live evidence, a court could not conclude that it would be. On the points in issue, I therefore accept Mr Davey's submissions.

38. I turn to the defendant's failure to respond to the claimants' pre-action correspondence. Mr Davey's submissions had a formalistic and technical ring to them. It is clear from the four letters that the claimants were concerned about the danger to the rear wall and foundations of their property that resulted from the defendant's excavations on his adjoining property. The letters all raised the failure by the defendant to serve notices, which was said to be a breach of what, although wrongly described as the "Party Wall Regulations" in the first two letters, was clearly a reference to the 1996 Act. They all also asked that the claimants' surveyor be permitted to have access to the site to ascertain the state and condition of the wall and the foundations.

39. The learned Recorder stated that he well understood why the claimants felt it necessary to issue these proceedings, and would not have been surprised had they done so rather earlier than they did: see [19(3)], summarising judgment, [11]. When giving permission, Jackson LJ stated that the claimants had little choice but to issue proceedings in January 2008. Their frustration about the access position is evident from their surveyor's email dated 21 December 2007, which stated that he was unable

to get access to determine the proper levels, and had "interpolated" the foundation level.

40. Although complaint was made of the failure of the letters to specify a date by which a reply was required, or the possible cost consequences of not doing so, the procedural protocols are not to be followed slavishly but reasonably. The defendant showed no willingness to set out his position, to narrow the issues, or to discuss mediation or a settlement. In those circumstances (see White Book, vol. 1, p. 2567), the court may take into account non-compliance with the spirit of the pre-action protocol when making orders as to costs. One way of doing so is stated to be by disapplying the default rule in CPR Part 38.6(1). The example given in the White Book of such disapplication is where there has been a failure to respond, or respond appropriately, to pre-action correspondence, but after proceedings are instituted a good defence is served and the claimant seeks to discontinue. That is not this case. But the reasonable perception by the claimants that their property was at risk of collapsing, coupled with the failure of the defendant to respond to pre-action correspondence, and his subsequent conduct giving the claimants in substance what they had requested, make it analogous.

41. As to the defendant's position that, from February 2007, he had an agreement with the claimants, after receiving the letter dated 18 May 2007 he must have known that the claimants did not consider that they had an agreement with him, and that they wanted access. At that stage, he could have written to them and referred to his agreement. He did not. That failure also does not sit well with Mr Davey's submission that the defendant was always going to allow access. I observe that here it is the defendant seeking to rely on a disputed matter: the existence of any agreement is hotly denied by Mr Kirby, the claimants' surveyor. There is no pre-action documentary evidence that access would be allowed and Mr Kirby's email dated 21 December 2007, to which I have referred, suggests that access problems existed in the month before proceedings were launched.

42. The question of adherence in substance to the protocols was the subject of written and oral submissions before the learned Recorder. But the only references in the judgment to the pre-action correspondence are the expression that "regrettably", the defendant chose not to respond to it (see judgment, [9] and [16]. He does not address the question whether the failure to respond to the correspondence should, in the light of the guidance in the White Book, have led to the disapplication of the default rule in CPR Part 38.6(1). He rejected the claimants' arguments that the fact that the defendant ignored the correspondence left them with no alternative but to issue proceedings on the ground (see judgment, [17], summarised at [18(6)] above) that he would be contravening the principle laid down by HHJ Waksman and the Court of Appeal in the *Teasdale*/*Brookes* cases because, since the defendant did not accept that he was proposing to act in defiance of the 1996 Act, he could not determine that matter in the claimants' favour in the absence of a hearing on the merits. That may well have been so in respect of whether the defendant was determined to proceed with the works without complying with the Party Wall Act. But an assessment of the consequences of the undisputed failure of the defendant to deal with the pre-action correspondence did not involve pre-empting a hearing on the merits.

43. I have therefore concluded that, although the Recorder referred to the failure to respond to the pre-action correspondence, he erred in principle in concluding that consideration of the consequences of this would involve him in a consideration of the merits of the claimants' claim. Alternatively, he failed to take into account such failure, a matter which is undoubtedly a relevant consideration in the exercise of his discretion as to whether a claimant has satisfied the burden of showing that the default rule in CPR Part 38.6(1) should be disapplied. Accordingly, he was outside the generous margin of appreciation appellate courts accord to judges in the exercise of their discretion.

44. It therefore follows that the learned Recorder's order must be set aside. It was not suggested that this matter be remitted to him, and indeed, in my judgment it would not be proportionate or appropriate to do so. It therefore falls to this court to exercise the discretion as to whether to disapply the default rule in CPR Part 38.6(1) and, if so, how to do it. For the reasons I have given, I consider that the failure of the defendant to respond in any way to the four pre-action letters he received from the claimants and their solicitors is, in the circumstances, given the reasonableness of the claimants' perception of the danger to their wall and foundations, unreasonable conduct which justifies disapplying the default rule.

45. I turn to how to disapply the default rule. The failure of the defendant to respond to the pre-action correspondence meant the claimants had little choice but to issue proceedings. They were also entitled to protect their position and to continue to seek to ascertain the defendant's stance after proceedings were filed. The position changed when the defence was served. Once the defence was served, had the claimants considered that it was spurious, it was open to them to seek to have it struck out or to seek summary judgment. They did not seek to do so, perhaps because it was unlikely, given the nature of the matters in issue, they would succeed. For this reason, it would be inappropriate to order the defendant to pay all or a proportion or percentage of the claimants' costs of the action.

46. There are a number of alternative possibilities. Mr Kynoch referred to two. The first is that the defendant pay all the claimants' costs of the action to a given date pursuant to CPR 44.3(6)(c). He gave as an example the date on which the defence was served. The second is that the defendant pay all the claimants' costs of the action incurred before the proceedings had begun pursuant to CPR 44.3(6)(d). I have concluded that, for the reasons in [45], the appropriate order in this case is that the defendant pay the claimants' costs of the action to 3 May 2008, when the defence was served, and that there be no order for costs thereafter.

47. I would therefore allow this appeal and make the order pursuant to CPR Part 44.3(6)(c), to which I have referred.

Mr Justice Ryder

48. I agree.

Lady Justice Arden

49. I also agree.