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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **26/10/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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BETWEEN:

SEYMOUR DUGAN
AND
DORA DUGAN

Plaintiffs;

-and-

PORTER PROPERTY LIMITED

Defendant.

_____

HORNER J

INTRODUCTION

[1] The defendant owns land at Carnreagh which it has been developing as a residential development known as Farriers Green. This development is behind land owned by the plaintiffs which the plaintiffs also intend to develop. The land developed by the defendant was subject to a requirement on the part of the defendant to provide access to the plaintiffs' development site. It was accepted by both the plaintiffs and the defendant that the amended layout of the defendant's development did not permit access to the plaintiffs' land. The result was that it was agreed between their respective solicitors that the plaintiff should be permitted to access their development through sites 11 and 12 of the Farriers Green development. That was back in May 2012. No progress has been achieved. Both the plaintiffs and the defendant are locked in battle about the access which the plaintiffs claim they should be permitted over the defendant's development and in particular over sites 11 and 12.

[2] The plaintiff's claims are for declarations that, inter alia, they are entitled to access the development at Carnreagh over a particular private access road over Farriers Green, the defendant's property. Further that the defendant is obliged pursuant to an agreement to construct that private access road at its own expense. There are also claims for injunctions and damages.

BACKGROUND FACTS

[3] The plaintiffs are the former owners of the lands comprised in Folio DN139300 County Down ("the defendant's lands"). The plaintiffs sold the defendant's lands to Snoddons Construction Limited ("Snoddons"). The defendant's lands are now owned by the defendant and Coby Developments ("Coby"). The plaintiffs are the current owners of the adjacent Folio 4189 ("the plaintiffs' lands"). The Deed of Transfer dated 10 October 2005 which created Folio DN139300 County Down expressly reserved certain rights in favour of the plaintiffs. These reservations constrained the defendant's ability to develop Farriers Green as it wished. Negotiations were entered into between the parties resulting in an agreement which was set out in an open letter dated 30 May 2012 ("the May agreement") from the defendant's solicitor to the plaintiffs' solicitor.

The key provision in the agreement was at A.1 which provided:

> "That they will not object to an application by your client for detailed planning approval on your clients' retained land with access taken through sites 11 and 12 of our clients' Farriers Green development as shown on the attached map ('the Private Access Road') or across such other amended route through sites 11 and 12 (if any) as may in the reasonable opinion of Mr Hutcheson be reasonably necessary to make the Private Access Road suitable to serve the intended development on your clients' land or required to satisfy the statutory authorities. Our client understands that your clients' advisor Mr Hutcheson will submit your clients' application for planning approval as soon as practicable." (sic)

[4] It also provided at A3 that within a period of six months following receipt of notification of planning approval had been granted to the plaintiffs, the defendant would "at its expense lay out and make up the Private Access Road with sewers and services (other than lighting) ("the Services") to requisite private road standard to the reasonable satisfaction of Mr Hutcheson. The Services will be connected to the main source of outfall (with NI Water consent if required)".

[5] There was then a provision that upon the Private Access Road being completed ownership of the area of the Private Access Road would be transferred to the plaintiffs subject to such rights under or through the same as might be reasonably necessary "for the benefit of our clients' adjoining development".
[6] The plaintiffs have obtained planning permission for a private access road ("the plaintiffs' road") which differs from the private access road ("the defendant's road") which was shown on the attached map to the May 2012 agreement. The parties are at complete loggerheads and the decision-making of Mr Hutcheson who approved the plaintiffs' Private Access Road is the subject of a concerted challenge by the defendant.

THE CASES PUT FORWARD BY THE PARTIES

The plaintiffs' case

[7] The plaintiffs made the case that they had choices under the May agreement. They could either choose the defendant's road as a right of way which was shown on the May 2012 agreement. Alternatively they could choose an amended route through sites 11 and 12 "as may in the reasonable opinion of Mr Hutcheson be reasonably necessary to make the Private Access Road suitable serve the intended development on your clients' land or required to satisfy the statutory authorities". Accordingly the plaintiffs had the choice of the defendant's road or of a road identified by Mr Hutcheson as being reasonably necessary (or which was required to satisfy the statutory authorities).

The defendant's case

[8] The defendant disputes this interpretation of the May 2012 agreement. The defendant says that this agreement required the plaintiffs to make a planning application for the route marked as the Private Access Road on the map appended to the May 2012 agreement. It was a condition precedent to the rest of the clause coming into force at all. If planning permission was granted for that route, then "that must be the route to be used". In other words should planning permission be granted for the defendant's road, then Mr Hutcheson had no role to play and no discretion to exercise. What he thought about the suitability of the defendant's road was irrelevant. He became, in effect, functus officio once planning permission was granted for the defendant's road.

LEGAL ISSUES

[9] It is uncontentious that Mr Hutcheson as an arbiter under the agreement has to act reasonably and in good faith: see Chadwick LJ in *Brown v GIO Insurance Limited* [1998] Lloyds Report IR 201. As an architect he is well suited to this role. Architects carry out a similar function in JCT Building Contracts when they have to act as an arbitrator between, inter alia, the contractor and the employer in respect of various disputes that may arise during the course of the building contract, although

the architect would be paid by the employer. Indeed the May agreement refers to an amended route "as may in the reasonable opinion of Mr Hutcheson be reasonably necessary to make the Private Access Road suitable to serve the intended development on your clients' land or required to satisfy the statutory authorities".

[10] The court is entitled to review the exercise of Mr Hutcheson's discretion but it is not entitled to substitute its own. The court will be slow to interfere with Mr Hutcheson's exercise of his discretion unless it can be demonstrated that it should not have been exercised at all or that its exercise was obviously flawed. Of course, the court will require there to be "a genuine and rational, as opposed to an empty or irrational, exercise of discretion": see Potter LJ in *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ. 1287.

[11] The court's role in interpreting a contract is to ascertain "the common intention of the parties" to the agreement. There was some discussion about whether this agreement had to be construed contra proferentem the maker of the agreement, that is the defendant. However, firstly the doctrine of contra proferentem only applies where there is truly an ambiguity in the agreement. Secondly, it is of limited use in an agreement such as this where both sides have had an input into its final form. As Lord Neuberger said *K/S Victoria Street v House of Fraser (Stores Management) Limited* [2011] EWCA Civ 904:

> "… such rules are rarely if ever of any assistance when it comes to construing commercial contracts. Quite apart from raising abstruse issues as to who is the proferens (and, in particular, whether the issue turns on the precise facts of the case or hypothetical analysis), **rules** of interpretation such as contra proferentem are rarely decisive as to the meaning of any provisions of a commercial contract. The words used, commercial sense, and the documentary and factual context, are, and should be, normally enough to determine the meaning of a contractual provision."

[12] Mr Orr QC urged upon the court the need to interpret "necessary" in accordance with past decisions. He said that "necessary" had been defined judicially as "something which would be highly expedient …": see *Re Wreck Recovery and Salvage Co* [1880] 15 ChD 353 at 362. He further said that necessary had been equated with "essential": see *Kelsey v Minister of Trade* [2016] 2 NZLR 218 at [141] per Collins J. It does seem to be that Wynn-Parry J had a point when he said in *Re Naylor Benzon Mining Co Limited* [1950] Ch 567 at 572:

> "The words **reasonably necessary**, use as a phrase in which the adverb is designed to qualify the adjective, are meaningless. A thing is necessary or is not

> necessary. It may be regarded or treated as necessary in one context and not in another, but the context cannot be provided by merely preceding the word **necessary** with an adverb such as reasonably.
>
> As it stands, the phrase, to me, is a contradiction in terms."

In the present context it seems to me that "reasonably necessary" connotes that any amended access should be required in some way to make the Private Access Road suitable to serve the plaintiffs' intended development and that such an assessment should be rational and uninfluenced by collateral issues.

THE EVIDENCE

[13] Expert evidence was filed by both sides in this case. That expert evidence raised various issues although it was to some degree of marginal importance because it was the reasonable opinion of Mr Hutcheson which was deciding what was "reasonably necessary". Secondly, it was not suggested by any of the experts and more importantly by the defendant that Mr Hutcheson had acted unreasonably in not obtaining expert evidence. Or indeed that Mr Hutcheson's decision was flawed because it was made out with his discretion as a consequence of his failure to obtain expert evidence.

[14] Mr Donaldson, a planning expert, submitted a report on behalf of the plaintiffs. He did not give oral testimony. His report related to the plaintiffs' development of four houses at Carnreagh, Hillsborough on the plaintiffs' lands beside the Farriers Green development. This records that planning permission was obtained on 12 September 2014 for an access road for Farriers Green over sites 11 and 12. A new application was made by the defendant in February 2016 to which the plaintiffs objected. After various communications and representations permission was granted, subject to conditions on 3 October 2017. Mr Donaldson claimed that the original permission of 2014 represented an appropriate response to a development site. He considered the defendant's planning permission to be less attractive. Mr Loughrey, a planning expert, submitted a report on behalf of the defendant. He did not give oral evidence either. He complained that Mr Hutcheson had failed to apply for planning permission in accordance with the plan in the agreement of 30 May 2012 and that as he had provided a different access road through site 12 he had made the building of a dwelling house on this site "unbuildable". This is not accepted by the plaintiffs or Mr Hutcheson.

[15] Ms McShane, a chartered civil engineer in her report responded to the claims of Mr Donaldson. She said, inter alia, that the defendant's scheme provided two speed control bends. Whereas the plaintiffs' scheme had only one speed control bend and one tight bend.

[16] The planning experts met and there were many major disagreements on:

(a) Whether the defendant's road was dangerous to pedestrians and cyclists;

(b) Whether the plaintiffs' design required additional forward visibility;

(c) Whether a boundary hedge would have to be removed.

I could go on, but it is fair to say that they agreed on practically nothing, each side maintaining unwavering support for their own client's case. Mr Falloon, a chartered surveyor and valuer, gave evidence for the plaintiffs said that the defendant's scheme would result in a cost of £20,000 to the plaintiffs because of the reduction in the value of sites 1 and 2. Mr Turtle, chartered surveyor for the defendant, concluded that the plaintiffs' planning permission was detrimental to the defendant's lands causing a diminution in value of just over £100,000.

[17] Finally, there was a report from Mr Perry, chartered surveyor, for the plaintiffs who concluded the additional costs associated with the defendant's planning permission to be approximately £23,000 including VAT.

[18] Mr Brian Grahame, a chartered architect, commented on Mr Hutcheson's performance and included comments as to how he would have interpreted the agreement if he had been in Mr Hutcheson's position. This was a bridge too far. I refused to allow this report in evidence at all.

[19] The expert evidence was extensive, undoubtedly expensive and of little worth for the reasons which I have explained. It was never put to Mr Hutcheson that he should have:

(a) engaged a roads engineer; or

(b) that the expert evidence demonstrated that his conclusions were out with his discretion because they were wholly unreasonable.

If it was the defendant's case that Mr Hutcheson had failed to act in accordance with his role under the agreement, I would at the very least have expected him to be cross-questioned on this basis. Mr Hutcheson was entitled as a professional witness to have the opportunity to respond to any criticisms of his professional judgment, including the exercise of his discretion. On no occasion did the defendant criticise any part of Mr Hutcheson's decision making or the exercise of his discretion as being unreasonable or not reasonably necessary or unlawful under the May agreement when he gave sworn testimony.

[20] Mr Hutcheson is a chartered architect and a partner in the firm of Hutcheson Irvine. He was an impressive witness. I consider that the court could have confidence in his testimony having observed him give evidence. He was adamant that Mr Turtle's view that the plaintiffs' planning permission would have a negative effect on the defendant's land was simply wrong.

[21] In answer to Mr Orr QC's questions he said, inter alia:

(i) It was not his primary duty to see if the route attached to the map would work;

(ii) His starting point was to determine the intended development of the plaintiffs. He concluded that the proposed route appended to the May 2012 agreement was not suitable to serve the plaintiffs' development;

(iii) He considered that it was reasonably necessary to take the route of the plaintiffs' road because this, unlike the defendant's road, was suitable to serve the plaintiffs' development. He gave convincing reasons for this. Those reasons were not challenged by the defendant; and

(iv) He considered the route of the defendant's road did not properly serve the intended development of the plaintiffs and accordingly it was not a question of preferring one route to another. He said in giving his evidence that this was not "a judgment on which (route was) more suitable to deliver the same outcome. One road served Dugans' development; the other did not".

He then explained why it was necessary to ensure that the point of entry on to the plaintiffs' land was correct. The agreed map did not have a suitable point of entry for two reasons:

(a) The longer length of road was a drain on profits.

(b) The plaintiffs' road would enable him to deliver a larger site and make the site more attractive.

He went on to say that the plaintiffs' route obviated the need for a complex retaining wall and maximised the aesthetic appeal of the plaintiffs' development for those approaching it.

[22] Not only did he look at what was reasonably necessary from the plaintiffs' point of view he also looked at from the defendant's point of view. He has been criticised for doing this. However, he has given persuasive reasons as to why the plaintiff's route is also to the advantage of the defendant.

[23] Having observed Mr Hutcheson give his evidence, I was satisfied to the requisite standard that he had acted reasonably and honestly in giving his opinion and that he was entitled to conclude that the plaintiffs' road was "reasonably necessary to make the Private Access Road suitable to serve the intended development" on the plaintiffs' land. I considered that this exercise by Mr Hutcheson of his discretion was unimpeachable.

DISCUSSION

[24] Given my conclusion as to Mr Hutcheson's exercise of his discretion, the central issue that remains to be decided is whether the plaintiffs were correct in asserting that under the May 2012 agreement the plaintiffs were obliged to accept the defendant's road if this obtained planning permission regardless of how unsuitable it was to serve the plaintiffs' development. The exercise by Mr Hutcheson of any discretion did not arise in these circumstances.

[25] In *Al Sanea v Saad Investments Co Limited* [2012] EWCA Civ. 313 Gross LJ gave the following summary of the correct approach a court should take to the interpretation of a contract in the light of the decision of the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 when he said:

> "(i) The ultimate aim of contractual construction is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. The reasonable person is taken to have all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (ii) The court has to start somewhere and the starting point is the wording used by the parties in the contract.
>
> (iii) It is not for the court to rewrite the parties' bargain. If the language is unambiguous, the court must apply it.
>
> (iv) Where a term of a contract is open to more than one interpretation, it is generally appropriate for the court to adopt the interpretation which is most consistent with business common sense. A court should always keep in mind the consequences of a particular construction and should be guided

> throughout by the context in which the contractual provision is located.
>
> (v) The contract is to be read as a whole an **iterative process** is called for:
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> … **involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences.**"

[26] Adopting that approach to the present case, I am satisfied that Mr Orr QC, despite the ingenious arguments he makes, is simply wrong when he asserts that it is a condition precedent of the agreement that the plaintiffs would make an application for planning permission of the defendant's road as per the map exhibited to the May agreement and that if planning permission is granted "then that must be the route to be used". That is not what the agreement says. The agreement gave the plaintiffs the option of applying for planning permission on the basis of the defendant's road **or** of applying for planning permission for another route through sites 11 and 12 should Mr Hutcheson consider that this was reasonably necessary (or it was required to satisfy the planning authorities). The nature and ordinary meaning of the May agreement, and in particular A1, is that the plaintiffs had a choice, but of course that was a choice that could only be exercised if Mr Hutcheson exercised his discretion in favour of the plaintiffs in accordance with the agreement (or if it was necessary to satisfy the statutory authorities).

[27] The agreement does not in any shape or form give primacy to the defendant's Private Access Road. It gives a straight choice to the plaintiffs (in certain circumstances). If the meaning is as Mr Orr QC contends then one would have expected the agreement, drafted as it is by the defendant's solicitors, to set out that firstly a planning application had to be made by the plaintiffs for the defendant's road and then only if that was not successful, the plaintiffs could apply for such other route through sites 11 and 12 etc. That is clearly not what the agreement says. The wording is not ambiguous. It is clear. The plaintiffs were given a choice, albeit a choice restricted by the exercise of Mr Hutcheson's discretion (and the requirements of the statutory authorities). Mr Hutcheson is satisfied that the plaintiffs' road is "reasonably necessary to make the Private Access Road suitable" to suit the plaintiffs' development. He has given clear and convincing evidence as to why he formed this opinion. The defendant can have no grounds for complaint on this issue given the terms of the May agreement.

THE SLIVER OF LAND

[28] There was an issue which arose about a sliver of land of which the defendant retained ownership. This sliver of land bordered sites 10, 11 and 12 of the defendant's development. While the sliver is shown clearly on the map attached to

the release executed by the plaintiffs in January 2013 as bordering number 10, it is not shown bordering sites 11 and 12. It is common case that despite the configuration on the map, the defendant did retain a thin sliver of land immediately adjacent but out with sites 11 and 12 that has to traversed in order to enter sites 11 and 12 from the plaintiffs' land.

[29] This is an issue which occupied very little court time. The plaintiffs have emphasised it only appeared for the first time on the second amended defence. It was dealt with in the amended amended reply to that defence as follows:

> "20. In respect of the amended paragraph 9(c)(vi) of the Defence, the plaintiffs understand that reference is being made to the triangular sliver of land located to the rear of site 10. It is admitted that the plaintiffs' proposed route traverses that sliver of land. The plaintiffs however aver as follows:
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> (i) Nowhere in the agreement is this excluded.
>
> (ii) The covenant to build the road pre-dates the agreement and applied to the entirety of the land. The point of the agreement was to facilitate a partial release of building sites, save for sites 11 and 12, but it in no way affects the application of the covenants on the remaining land. Indeed, the deed of release dated 7 January 2013 specifically excludes the sliver of land. In signing this deed the defendant was explicitly acknowledging its obligation to construct a road over this area.
>
> (iii) The defendant's proposed route traverses this sliver of land. By arguing that its proposed route is reasonable in the context of the agreement it is unconscionable to then argue that the plaintiffs' proposed route is unreasonable for traversing the same sliver of land."

[30] The sliver of land was not referred to by the defendant in its closing submissions and understandably only in a somewhat cursory fashion by the plaintiffs in their closing submissions. I requested further specific submissions on this issue and this produced another further amended, amended, amended reply. The new paragraph 20A(i) provided that:

"Further to the pleading contained in paragraph 20, the plaintiffs aver that it was an implied term of the agreement that each and every route referred to in the agreement and contemplated by the parties to the agreement would traverse the triangular sliver of land ('the sliver') located to the rear of sites 10 and 11 and that the discretion afforded to Mr Hutcheson under the terms of the agreement permitted him to design a road which traversed the sliver in a manner chosen by him.

Particulars

(1) In the absence of the implied term compliance with the following express terms of the agreement is rendered impossible;

(a) The Private Access Road ('the road') could not reach the plaintiffs' land which is separated from sites 10 and 11 by the sliver. As a result its purpose of being 'suitable to serve the intended development' on the plaintiffs' land is rendered impossible.

(b) The road on the map would not be agreement compliant.

(c) The road for which the plaintiffs obtained planning permission would not be agreement compliant.

(d) The road for which the defendant obtained planning permission would not be agreement compliant.

(e) Mr Hutcheson's discretion under the agreement would be rendered of no effect.

(2) The plaintiffs aver that the net result of not applying the foresaid term would be to render the agreement meaningless which was not the intention of the parties to the agreement.

(ii) The plaintiffs aver that the defendant is estopped from denying the existence of the implied term by reason of the following;

(a) The fact of the defendant being on notice of the plaintiffs' planning application which involved the road traversing the sliver and choosing not to lodge an objection.

(b) The decision taken by the defendant's solicitors, when drafting the agreement, not to include any restriction on the sliver being utilised when designing the road.

(c) The decision of the defendant to apply for planning permission for a road which;

(i) Adopted the same route for which the plaintiffs had received planning permission over the portion of the sliver behind site 10.

(ii) As a result of (i) above deviating from the route contained on the map attached to the agreement (in the absence of the implied term the defendant is no more entitled to deviate from the route on the map than the plaintiffs, irrespective of ownership of the land).

20B Further and in the alternative, the plaintiff seek an order from the court that the agreement be rectified to include the following express term which said term is necessary of efficacy to the agreement and to the intentions of the parties to the agreement which said terms should be inserted at A1 of the agreement after the words '… statutory authorities', and should read 'in the exercise of its discretion, set out above, Mr Hutcheson is entitled to design a road which will traverse any part of the sliver of land which lies at the rear of sites 10 and 11'."

[31] There were further submissions made to the court both in writing and orally about the sliver of land. I have considered all the further arguments and intend to deal with this matter briefly.

[32] I am satisfied there is no substance to the sliver of land issue for the following reasons.

Firstly, the agreement of 30 May 2012 gave alternatives. Either the Private Access Road shown on the map or such other amended route through sites 11 and 12. There is no mention of the sliver of land that has to be traversed. However unless the amended route can cross the sliver of land the agreement is unworkable in the absence of the consent of the defendant. I am satisfied that if the parties had been asked at the time of making the May agreement whether the amended route could traverse the sliver of land contiguous with sites 11 and 12 they would have said "of course". This was the intention of the parties as collected from the words of the agreement and the surrounding circumstances. It was the obvious but unexpressed intention of the parties, I find.

Secondly, it is necessary to imply such a term to give business efficacy to the agreement. There was a presumed common intention of the parties to give the plaintiffs an alternative route through sites 11 and 12 which could only be done if the plaintiffs could traverse the sliver. In AG of Belize v Belize Telecom Limited [2009] UKP 10 the Privy Council said at paragraph [22]:

> "… In every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such provision would spell out in express words what the instruction read against the relevant background, would reasonably be understood to mean."

Lord Hoffman then went on to deal with the list of requirements set out in previous cases for the implication of a term. He said at paragraph [28] that the list:

> "is best regarded not as a series of independent tests which must each be surmounted but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually meant, or in which they have explained why they did not think that it did so."

Thirdly, I am satisfied that there is clear irrefragable evidence that the parties intended to permit the plaintiffs to access their development site over the sliver of land retained by the defendant on the border of sites 11 and 12. This sliver was not shown on the map dated November 2011 and annexed to the January 2013 land registry deed. Both parties mistakenly, I find, did not appreciate there was a thin sliver of land between sites 11 and 12 and the plaintiffs' land, which the defendant owned. Accordingly both sides considered the plaintiffs could access sites 11 and 12

from the plaintiffs' own land. If the parties had not been labouring under this common mistake, then access over the thin sliver of land would have been granted as a matter of course. The requirements set out for rectification of an agreement were "succinctly summarised" by Peter Gibson LJ in Swainland Builders Limited v Freehold Properties Limited [2002] 2 EGLR 71 at paragraph [33]. He said:

> "The party seeking rectification must show that:
>
> (1) The parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; there was an outward expression of accord;
>
> (3) The intention continued at the time of the execution of the instrument sought to be rectified;
>
> (4) By mistake, the instrument did not reflect the common intention."

These requirements are satisfied by the present circumstances.

[33] The issue of whether there was proprietary estoppel was not argued before me and therefore I do not need to reach a final conclusion on this issue. But I consider that prima facie the defendant would be estopped from preventing the plaintiffs having access over the sliver and on to sites 11 and 12 given the circumstances of their dealings and their mutual understanding of what was to happen.

CONCLUSION

[34] The reasons which I have set out, I conclude that:

(i) The plaintiffs are entitled to access their development by using the defendant's road.

(ii) The exercise by Mr Hutcheson of his discretion is unimpeachable.

(iii) There is no legal impediment to the plaintiffs traversing the sliver of land lying between the border of the plaintiffs' land and sites 11 and 12 given the basis of the bargain reached between the plaintiffs and the defendant.

[35] I will hear counsel on the issue of costs and the order for relief.