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Judgment: approved by the Court for handing down

Delivered: **17/11/2014**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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2014 No. 80596

IN THE MATTER OF THE PREMISES "DRENAGH" ON THE DRENAGH ESTATE 15 DOWLAND ROAD, LIMAVADY, COUNTY LONDONDERRY, BT49 0HP AND OF THE LANDS ON THE DRENAGH ESTATE, COMPRISING FOLIOS 10210, 10211, 10212, 9508, 11244 LY87764, , LY92615, LY92617 AND LY98772 COUNTY LONDONDERRY

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BETWEEN:

CONOLLY McCAUSLAND

Applicant

and

DRENAGH FARMS LIMITED (IN ADMINISTRATION)

Defendant

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EX TEMPORE JUDGMENT

MR JUSTICE HORNER

Introduction

[1] This matter came on before me on 9 October 2014. It was intended to be an ex-parte application by Mr Conolly McCausland, the applicant, to prevent the Administrators selling part of the lands owned by Drenagh Farms Limited ("Drenagh") which had been placed in administration because of the substantial debts due to the Clydesdale Bank. However both the Administrators and the proposed Purchaser, Francis Connon, who I will refer to as the Purchaser, heard of the application and were represented. The status quo was effectively preserved until the date fixed for the hearing. On the date fixed for hearing, Sheelagh McCausland, the wife, was also represented by Senior and Junior Counsel. I listed the matter for a contested hearing on 7 October. The case did not conclude on that date and the

hearing recommenced on 13 October. I indicated after the hearing that because of other matters I would deliver an extempore Judgment.

[2] First of all, I should record my debt to counsel for the submissions both oral and in writing which I have received in this case. It is fair to say that the applicant has had representation from a number of different firms of solicitors. Lately he has relied on the solicitors who are acting for him in the matrimonial dispute with his wife. Mr Beattie QC has only been involved in the last few weeks. It is true that he and the rest of the legal team have left no stone unturned in seeking to protect their client's interest. New claims have been pursued and others have been abandoned. Very sensibly Mr Beattie no longer pursues the claim of mis-selling loans by the Bank to Drenagh as grounds for resisting not only the appointment of the Administrators but also for the sale of the land. New parties have been joined as defendants. I have been generous, some would say overly generous. I have permitted the applicant to make amendments not only as to who are the parties to the claim but also in respect of the claim itself and to permit further affidavits to be filed. I have done so in order to ensure that I have as complete a picture as possible of what had happened and what was happening so that I am able to deal fairly with all the issues that arise in this dispute. It is undoubtedly a complicated one and has been made more so by the rancorous and acrimonious matrimonial contest that also rages between the applicant and his wife.

<u>The Background</u>

[3] The plaintiff holds 17,100 shares in Drenagh Farms Limited, which I will refer to as Drenagh. There is one other shareholder, his wife. She owns 100 shares. The plaintiff and his wife are directors in Drenagh together with Jonathan Moore and Richard Houston. The Administrators were appointed as Administrators of Drenagh when it went into administration at the instigation of Clydesdale Bank pursuant to a Debenture dated 23 December 2009. The Bank is owed substantial sums of money by Drenagh. The main asset of Drenagh is 960 acres, together with the mansion house and nine other properties. Drenagh was incorporated on 3 January 1966, I imagine as part of some tax planning scheme although the Court has never been given a reason for the incorporation of the company and the transfer of assets to it. The plaintiff and his wife have four children. They separated in April 2010. There is a total absence of trust between them so far as the Court could judge and the wife has obvious and serious doubts about the applicant's business acumen. The Court on the evidence is in no position to judge as to whether they are well founded. There has been much debate about the commercial viability of an anaerobic digestion system which the applicant wanted to operate on Drenagh's lands. The Court passes no comment on it and is not in a position to make an objective and independent assessment of this investment opportunity. Attempts have been made to refinance the loans from the Bank without success. On 3 December 2013 the Bank demanded £2,405,672. On 9 December 2013 Fixed Charge Receivers were appointed. On 25 March 2014 Joint Administrators were appointed pursuant to the Qualifying Floating Charge. In April 2014 Simon Brien Residential

were appointed Estate Agents to market the estate. In the Administrators' report to Creditors on 16 May 2014 they stated that it was in the interest of the Creditors to trade the business to improve the prospects of the sale of the lands and properties and it was anticipated that Secured Creditors, Preferential Creditors and Unsecured Creditors would be paid in full. The Administrators thought that the objective A of the administration as detailed in paragraph 3(1) of Schedule B1 of the Insolvency Order 1986 would be achieved, namely to rescue the company as a going concern. Another company run by the applicant, Fruithill Estates Limited ("Fruithill"), runs a marquees business hosting weddings on the estate. Fruithill has not been asked to sign either a lease or a licence. There is no evidence of Drenagh receiving any benefit from Fruithill's activities on its lands and the applicant chose not to place before the Court any information about Fruithill's profitability or future income stream. I disregard Fruithill's interests in looking at the issues before this Court.

[4] The applicant has been variously represented by Carson McDowell, St John's Law and Downey Property in respect of the proceedings, other than the matrimonial ones. John Boston & Co, as I recorded, represented him in those proceedings and have from 9 October 2014 represented him in these proceedings originally against Drenagh and now against Drenagh and the Administrators. Proceedings were taken by the Administrators against the applicant in order to allow the Administrators to obtain vacant possession of the lands so that they could sell the estate or such part of it as was agreed for sale. The applicant defended those proceedings solely on the ground that the Bank had mis-sold loans to Drenagh and that the appointment of the Administrators was challenged. At that time the applicant claimed the legal costs of the Administrators were £600,000. I am now told they are likely to be much higher after these proceedings have been terminated.

[5] On 9 October 2014 the applicant lodged proceedings under paragraph 75 of B1 seeking to halt the proposed sale of part of the lands to the purchaser which had been agreed on 3 October 2014 with a completion date of 20 October 2014 being fixed. A non-refundable deposit of £200,000 had been paid by the Purchaser with the balance of £4,800,000 on completion which was fixed for sale, as I said, at the end of the month. The sale did not include the mansion house and part of the lands. There are two matters of note:

(i) Firstly, the Contract drew attention to Cautions which had been registered against the lands by the applicant and that if not removed then the Purchaser was to accept a Deed of Assurance from the Bank as Mortgagee transferring the property on the contractual completion date;

(ii) Secondly, the applicant, through his Solicitors, St John's Law, was told that proceedings had to be issued not later than close of business on 23 September 2014. A draft Order and draft affidavit were sent by email to St John's Law on 23 September 2014 but these were never issued out of the High Court. Indeed, no proceedings were issued until 9 October 2014. The excuse offered for the delay was that St John's Law had gone into administration. On

8 October 2014 Mr Beattie was instructed by the applicant. He consulted on 9 October 2014 for the first time. Proceedings were issued pursuant to his directions. The applicant never saw the letter of 25 September 2014 from CFR which was undoubtedly seen by St John's Law stating that unless proceedings were issued by noon of the following day they would proceed with the sale of the lands to the Purchaser.

[6] It is necessary to complete the rest of the picture and that involves some limited details of the matrimonial dispute. In January 2014 the Bank had been made aware that Barclays were prepared in principle to refinance. In March 2014 the wife objected to this offer. Barclays withdrew the offer. The applicant then secured from Barclays an offer which he wanted the Administrators to accept. This was strictly private and confidential. It involved the establishment of a new company. The acquisition of Drenagh was to be by way of a share for share exchange. The new company would buy the assets for £9.625m. The consideration would be £4.5m of cash and the balance of £5.15m was to be satisfied by way of a Loan Note for £5.125m. This proposal for rescuing Drenagh would leave it effectively as a shell company, stripped of all its assets and holding a Loan Note from a new company whose assets would be charged to Barclays Bank. The Administrators had made it a condition that the wife consented to this proposed offer because if she refused to do so and litigation ensued other interested parties would be likely to drift away. The Administrators had every reason to believe that such a proposal was totally unacceptable to the wife and that she would have instigated Unfair Prejudice proceedings to protect her position as minority shareholder in Drenagh and alternatively or in conjunction issued a Mareva Injunction. In any event, the Administrators anticipated any attempts by them to accept such an offer would result in the administration becoming mired in litigation. In light of the comments and submissions of Ms Danes, Queen's Counsel on behalf of the wife, they had every reason and every right to be apprehensive and to try and ensure that the administration was concluded as soon as possible and so keep a lid on costs.

[7] It is against that background which I have sketched very briefly that the applicant moved to restrain the sale of part of the estate owned by Drenagh to the purchaser. There are a number of matters which I want to draw attention to:

(a) Firstly, the lands are not owned by the applicant or by Mr McCausland or by the McCausland family. While they may have be owned by his predecessors from 1680, they have been, since the incorporation of Drenagh, owned by a limited liability company. They are no longer the applicant's lands to do with them as he wishes. I do sense that he still feels entitled to do so. This comes across strongly from the affidavits which have been filed on his behalf.

(b) Secondly, the fact that the parties' solicitors may have failed to act with reasonable care or may have delayed unduly does not excuse the party represented by those solicitors from the consequences of their error or delay. The solicitor is their agent and they remain liable for the solicitor's breach or

tardy behaviour. The parties have a remedy, that is to sue the solicitor. It is not and should not in normal circumstances allow them to defeat the claim of a blameless third party.

[8] Now that brings me to the meat of the case. Should the court grant an interlocutory injunction in favour of the applicant in light of all the affidavits which have been filed? The Court is well placed to assess the merits of the plaintiff's claim taking the plaintiff's case at its reasonable height. In the case of American Cyanamid v Ethicon [1975] 1 All ER 504, the House of Lords set out the approach which the court should take in respect of any application on Notice for a prohibitory injunction. The guidelines require a court to consider the following before granting an injunction:

(i) Is there a serious question to be tried?

(ii) Are damages an adequate remedy to either side?

(iii) Where does the balance of convenience lie?

(iv) Is this a special case to which different considerations apply?

[9] These guidelines are in place to assist the Court in trying to determine whether the granting or withholding of an injunction will produce a more just result. There is some dispute as to what 'serious question to be tried' means. There has been much discussion about this issue: see 3.15 and 3.16 of Bean on Injunctions (10th Edition). Bean says in dealing with this question:

> "3.15 The claimant does not need to show a prima facie case, in the sense of convincing the court that on the evidence before it he is more likely than not to obtain a final injunction at trial. *The evidence available to the court at the hearing of the application for an interim injunction is complete.* It is given on affidavit and has not been tested by all cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical role forbidding its exercise if on that incomplete untested evidence the court evaluated the chances of the claimant's ultimate success in the action at 50% or less but permitting its exercise if the court evaluated his chances at more than 50% … There is no such rule … The court no doubt must be satisfied that … there is a serious question to be tried ..." (American Cyanamid at 406G-4067G.

[10] Lord Diplock went on to say at 409B:

> "If the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account, in tipping the balance of the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent on the facts disclosed as to which there is no creditable dispute, then the strength of one party's case is disproportionate to that of the other party. The Court is not satisfied in embarking in anything like a trial of the action on conflicting affidavits in order to evaluate the strengths of either party's case."

[11] Bean on Injunctions commented at 3.16 that this had led the courts to proceed on the basis that there was a new technical rule put in place to replace the old one. The new rule was that once the claimant showed a serious question to be tried, any further reference to the relative strength of the party's cases was prohibited. Obviously such an approach could lead to an injustice where a plaintiff enjoyed a weak but arguable case. In Series 5 Software v Clarke [1996] 1 All ER 853 Laddie J set out what he said was the proper approach after the American Cyanamid decision. It was:

> "(1) The grant of an Interim Injunction is a matter of discretion and depends on all the facts of the case.
>
> (2) There are no fixed rules as to when an injunction should or should not be granted and leave must be kept flexible.
>
> (3) Because of the practice adopted on the hearing of applications for interim relief, the Court should rarely attempt to resolve complex issues of fact or law.
>
> (4) Major factors the Court can bear in mind are:-
>
> (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay,
>
> (b) the balance of convenience,
>
> (c) the maintenance of the status quo, and
>
> (d) any clear view the Court may reach as to the relevant strength of the parties' cases."

As Bean on Injunctions has pointed out there is considerable merit in the parties having an early, non binding view of the merits of a particular dispute from a judge and that such a view can assist in the resolution of the entire action.

[12] Quite frankly it does not matter in this case the basis upon which I approach this application.

[13] In order for the applicant to succeed, he must be able to make out a case that he has a claim as a member of Drenagh under paragraph 75 of Schedule B1 of the Insolvency Order which states:-

> "A creditor or a member of a company in administration may apply to the High Court claiming that the Administrator is acting or has acted so as unfairly to harm the interests of the applicant or the Administrator proposes to act in a way which would unfairly harm the interests of the applicant."

[14] It is necessary therefore for the court to look briefly, at the role of the Administrator. He is a professionally qualified statutory functionary, he is an officer of the court, he is an agent of the company, he has to be candid with the court and he has a duty to act speedily and responsibly. He is and will be afforded a degree of deference by the court and the court should not try and second guess his commercial judgment. I refer to Lightman and Moss on the Law of Administrators and Receivers at 12/008. It also reflects the undoubted fact that licensed professionals are much better placed than the court to formulate and implement commercial strategies which accord with the circumstances in which a company finds itself.

[15] I do not intend, in this ex tempore judgment, to review the ambit of what can and cannot constitute unfair harm. There has been plenty written about it elsewhere. It clearly involves two elements, namely unfairness and harm. Taking the applicant's case at its height, the applicant asserts that the approach of the Administrators in selling off part of the estate will devalue the balance of the land which is left by omitting to have regard to many matters which are set out at length in the affidavit of Mr Burrows, the Planning Expert, retained on behalf of the applicant.

[16] It is possible to say what unfairness is not. In Re: Charnley Davies (No 2) [1990] BCC 605, Mr Justice Millet made it clear that the Administrator who is negligent in the sale of the company's assets would be guilty of misconduct only and that did not constitute an allegation that the Administrator had managed the affairs in a manner which was unfairly prejudicial to the creditors. Now I appreciate that was a decision under the previous legislation and the current legislation is somewhat differently phrased. However, unfairness and reasonable care are and remain different animals and just because an Administrator has acted negligently

does not mean that he has acted unfairly. The claim made by the applicant at its very height is that the Administrators had mismanaged the sale and left the company with a rump of land and assets which are now worth less than they would have been if the sale had been managed with greater care. It is alleged that this error occurred because the Administrators failed to seek adequate advice before the sale. This is a claim for carelessness. It is one that the company will be able to make when it is returned to the hands of the members. It does not constitute unfair harm.

[17] The complaint is that the Administrators chose to sell to the purchaser and not to go with the offer made to the applicant. There are a number of matters which need to be said:

(i) Firstly, such an issue involves a commercial judgment. The court should stay well clear of making such judgments. It is not unfair simply because a decision is taken which turns out not to be in the best commercial interests of a company.

(ii) Secondly, the pre-condition that the wife should consent was reasonable. It was almost guaranteed that there would have been an application for an injunction if the Administrators had gone down the route suggested by the applicant. There is every chance the purchaser would have been lost and the real risk that the court might have intervened to protect the wife, either as a member of the company or in a position as his wife.

(iii) Thirdly, the offer did not fulfil the statutory purpose of the administration. It did not produce a going concern. If the applicant's offer had been accepted there would have been a shell company holding a loan note in the new company up to its eyes in debt which was secured to Barclays Bank. It was not unfair for the Administrators to choose a commercial option which fulfilled the statutory objective. The recent offer made, on the first day of trial by Barclays to lend the company money was made far too late. The applicant's claim therefore must fall at the first hurdle, namely he has failed to make out a case of unfair harm. On the basis of the evidence before the court the applicant's claim for unfair prejudice seems destined to fail.

[18] Next, we then move to the question of damages. I do consider that these are an adequate remedy for the company even if I accept that damages may be difficult to assess, about which I entertain some doubts. This seems to me to involve a straightforward valuation exercise and I cannot see any court having difficulty if the necessary evidence is put before it in assessing what the Company's loss is from what is alleged was a negligent strategy. These damages, as assessed, should adequately compensate the applicant and its members. Further, there is no evidence that the applicant is in a position to give a cross undertaking. If he did give a cross undertaking, then it seems unlikely that he would be in a position to satisfy it, if so required to do. He has chosen to put no financial information forward as to his present financial resources.

[19] I then go on to consider the balance of convenience. This raises a different issue in relation to the purchaser. He has a binding contract which he can specifically enforce. He has a beneficial interest in the property, the subject of the sale. Mr Beattie's ingenious argument is that the applicant is a member of Drenagh. He has a claim to have the contract set aside under paragraph 75, and he registered cautions against the land. The purchaser has notice of the cautions and therefore he takes subject to the interests of the applicant who is a member of Drenagh. This argument is fatally flawed for a number of different reasons. First of all, the purchaser has a specifically enforceable Contract, giving him a beneficial interest in the lands, the subject of the sale. Damages are not an adequate remedy for the purchaser in respect of the acquisition of land. Secondly, the interest in respect of which the applicant registered an interest was a claim for damages as a creditor and had nothing to do with the lands being sold. Thirdly, 'interested', in my view, refers to an interest in the land and that means having or claiming to have some interest in the land. It does not mean interest in the sense of 'concern'. There is no basis upon which the applicant can claim to have any interest, whether legal, beneficial or otherwise in the land and in any event, he has certainly no interest in the land which binds the purchaser. Fourthly, a caution only relates to dealings by the Registered Owner and cannot delay any dealings which override the registered land: see 5.2 of Moir on Land Registration. Lastly, if I am wrong, and it does bind the purchaser, and the sale does not proceed, then ultimately the applicant will have to pay compensation to the company. But there is no evidence that he has any assets to discharge any award. The overwhelming balance of convenience favours the refusal of an injunction.

[20] There are two other matters which I wish to draw attention to and which will prevent the court from granting an injunction regardless of the issues referred to above. Firstly, is delay in acquiescence. Regardless of whose fault it was, and the applicant did not know there was a cut-off date, the applicant still bears responsibility for his solicitor's inactivity. I refer to 2.16 of Bean on Injunctions. The applicants did delay and permitted the Administrators to enter into a contract with the purchaser after having been given adequate warning about the Administrators' intention. The applicant's tardiness has meant that he has forfeited his right to seek relief. Secondly, the applicant failed to draw a number of matters to the court's attention when he made the original application. He should not be permitted to profit from his lack of candour:

(i) He should not have proceeded on an ex parte basis. He had been warned by the clearest of terms in the letter of 19 September.

(ii) The grounds relied upon at paragraph 23 of his Affidavit of 9 October 2014 have long since been abandoned.

(iii) His claim that without warning, he was served with proceedings for possession, is not correct. He was given adequate warning.

(iv) He failed to disclose that he knew there was a cut-off date for him to issue proceeding to prevent the sale proceeding which he permitted to pass. The claim that the Administrators agreed that they would not proceed with the sale to the third party and I quote:

> "If I lodged an application for an injunction, however they have breached this agreement and are proceeding with the sale."

is not only wrong, it is misleading. At the very least the applicant or his Solicitors could, by making a simple enquiry to the Chancery Office, have satisfied themselves that no application for an injunction had been made to the Court. So even if the applicant does have a claim for an interim injunction, which I have found that he does not, the Court would have refused to grant it because of his acquiescence and conduct.

Conclusion

[21] I also consider in the overall scheme, given that matrimonial proceedings are outstanding and, there is much to be said for the parties being given an early non-binding view as to the merits of this claim. Very substantial costs have been incurred to date. It is certainly not in the applicant's interest or that of his wife to incur further substantial costs in a claim that is bound to fail. So, it is for all these reasons that I refuse to renew the injunction.

Costs

[22] Following submissions I propose to give a ruling on the issue of costs and if anyone wishes to seek leave to appeal then I will provide a written judgment amplifying my reasons. In this application for costs it is important to exercise care with the Authorities relied upon, especially the up-to-date Authorities because some of these relate to actions in England and Wales in which the CPR Regime applies. The relevant provisions under our Rules are Order 62, Rule 3(2) which says:

> "No party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under order of the Court".

[23] Then Rule 3(3):

> "If the Court in the exercise of its discretion, sees fit to make any Order as to the costs of any proceedings, the Court shall order the Costs to follow the event except where it appears to the Court that in the circumstances of

> the case some other Order should be made as the whole or any part of the costs".

Rule 3(4):

> "The amount of the costs which any parties should be entitled to recover is the amount allowed, after taxation on its standard basis unless it appears to the Court to be appropriate to order that for Costs be taxed on indemnity basis".

Rule 12(1):

> "On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all the costs reasonably incurred".

Rule 12(2):

> "On a taxation on an indemnity basis, all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Taxing Master may have as to whether the costs were reasonably incurred, or were reasonable in amount shall be resolved in favour of the receiving party".

[24] Therefore, costs normally follow the event. I have to point out that this is an Interlocutory application for an injunction and it has been presented as is the case on the basis of Affidavit evidence. It is impossible for me in respect of some matters of factual dispute to resolve one way or the other who is in the right. That will probably require a trial of the action and the parties to be cross examined and their evidence tested while under oath. So I am not in a position to make a final determination on many issues in relation to credibility. Normally, in an Interlocutory application, I would award costs in the cause or reserve costs to the Trial Judge. I have considered all the points made by the applicant in the helpful Skeleton Argument but I do not think it appropriate given the Rejoinders from the plaintiff to make an assessment on some of the contentious issues in dispute.

[25] But, in this particular case however, I am satisfied as to the legal merits and they lie with the Administrators and I am going to make an Order that costs follow the events and give the Administrators the costs of this application. I have been asked to award Indemnity costs. I have to assess whether such an award is appropriate. Having reviewed all the matters I do not consider that there has been something in the conduct of this application or its circumstances which take it out of the norm in a way which justifies an order for Indemnity Costs especially as this is

an Interlocutory application and there are a number of issues in respect of which I am not in a position to make a final determination. I do not propose to rehearse all the circumstances. I have been critical of the plaintiff in my judgment. But it is important to appreciate that firstly the matter did not proceed on an ex parte basis. Secondly there can be little doubt that the plaintiff was grievously handicapped by the loss of his English Solicitors who went into administration and it seems, on the basis of the plaintiff's evidence which hasn't been tested, that he was misled by them as to the issuing of proceedings and further, his present legal team came into this matter very very late in the day and had to operate under constraints of time without access to all the papers. Lastly, although the plaintiff is not the owner of the estate there is an emotional attachment to the estate which goes back hundreds of years through his family and I would point out that he does own the vast majority of shares in the Company. In those circumstances, I am not inclined to exercise my discretion and award Indemnity costs. In any event, it is a distinction which made very little difference in any event that the Administrators' will recover all the costs of the administration, including the costs of these proceedings. The applicant owns 17,000 shares and is a majority shareholder, the wife owns 100 shares, so the applicant will bear almost exclusively those additional costs. Costs will not fall on the wife except to a very limited degree as a minority share holder. I do accept that this will reduce the size of the matrimonial assets but that is the matter then for the Master to determine how these assets should be apportioned in the circumstances, which will include the plaintiff's decision to go to litigation and the background to that. This is a matter in which the Master is admirably equipped to exercise his judgment under the relevant provisions of the 1978 Order. That is something that the Master will obviously have to bear in mind in due course. The Administrators were well represented by Ms Hilliard QC and Mr Donaghy. The Notice Parties were represented at their own risk and will be responsible for their own costs. The Third Party and the wife could have offered to file Affidavits on behalf of the Administrators. In effect these points could have been made on Affidavit through the Administrators, although their evidence did add to the overall picture. I do not consider that it would be appropriate to depart from the normal rule and make an Order for Costs in favour of Notice Parties.

[26] So, the result of all that, is that the Administrators are to have their costs on the standard basis and that is to include two Counsel. The Notice Parties are to be responsible for their own costs and an order for taxation of their costs will be made, if required. I do appreciate that time is at a premium and that is why I have given an ex tempore judgment. So thank you again to all counsel for their helpful submissions, both oral and written.