



Neutral Citation Number: [2019] EWHC 3220 (Ch)

Case No: BL-2019-000730

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

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 3/12/2019

**Before:**

**MASTER CLARK**

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**Between:**

**(1) MR MICHAEL SHEINBERG**

**Claimant**

**- and -**

~~(1) MS CAROLINE ANNA ABDON~~  
**(2) MS CATHARINA ADRIANA VAN DOORN**  
**(3) MS JACQUELINE MARGARET REDWOOD**  
**(4) 50 WESTBOURNE GARDENS RESIDENTS**  
**ASSOCIATION LIMITED**

**Defendants**

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**Christopher Wilkins** (instructed by **Warner Goodman LLP**) for the **Claimant**  
**Alexander Robson** (instructed by **Clintons**) for the **Second and Third Defendants**

**Hearing date:** 5 November 2019  
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**Approved Judgment**

This is the approved judgment handed down on the above date and is to be treated as authentic.

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**Master Clark:**

1. The issue for my determination is whether the court should exercise its power under CPR 38.6 to disapply the default rule that the claimant, having discontinued his claim against the second and third defendants, should pay the costs of the claim against them.
2. The claim concerns the fourth defendant, 50 Westbourne Garden Residents Association Limited (“the company”), the freehold owner of and management company for the property 50 Westbourne Gardens, London W2 5NS, which is divided into 5 leasehold flats. The claimant, together with his wife, Lynda Burton, occupy 2 of those flats and they each hold one share in the company. The claimant is also a director. His wife, who is not a party to the claim, is not a director.
3. The first, second and third defendants each occupy a flat, hold 1 share in the company, and are each directors. The third defendant is also the company’s secretary. The claim against the first defendant was resolved by consent and she is no longer a party. I refer therefore to the second and third defendant as “the defendants”.
4. The claim arises out of a long-running and ill-tempered dispute between the parties as to how the affairs of the company should be managed, and in particular, the cost of refurbishment in 2014-2016 of the communal areas of the property, and the consequent treatment of the cost of that refurbishment in the company’s statutory accounts. The amount involved is about £55,000, although not all of that is in dispute. The parties’ combined costs of the claim are over £37,000.
5. The claim was made by part 8 claim form dated 15 April 2019. The relief sought was:
  - “(1) an immediate order requiring the Defendants to instruct the accountants in the terms of the draft letter of instruction sent under cover of his solicitor’s letter of 2 April 2019; and
  - (2) directions pursuant to section 306 Companies Act 2006 for the holding of a General Meeting of the company to resolve the issues pertaining to the company’s accounts and ongoing corporate governance including the appointment of an independent third party to supervise the conduct of the General Meeting.”
6. The correspondence before me starts on 4 July 2018, when Clintons, solicitors acting for the defendants, wrote to the claimant, apparently responding to his having given notice of a General Meeting. The letter states that adequate notice has not been provided of the meeting; and also asserts that the resolutions proposed by the claimant (including, in particular, a resolution to appoint Ms Burton as a director of the company) would crystallise claims by the defendants under section 994 of the Companies Act 2006. The letter enclosed proposed revised articles of association of the company, which, amongst other things, removed the claimant and Ms Burton’s entitlement to hold 2 shares and restricted them to holding of one share between them.

7. In a further letter of 6 July 2018, Clintons stated that their clients were only prepared to attend a General Meeting if the resolution for the appointment of Ms Burton as a director was formally removed from the agenda.
8. On 31 August 2018, the third defendant sent certain financial documents, referred to as “feeder documents” (“the Original Feeder Documents”) proposed to be the basis for the company’s then accountants, Jones Avens, to prepare the company’s statutory accounts for the year ending 31 December 2017 (“the 2017 accounts”). There is no explanation in the evidence before me as to why the preparation of the accounts was left to such late stage.
9. On 7 September 2018 the company’s accountants wrote to say that they were no longer willing to act for the company as it was no longer economic for them to do so.
10. On 10 September 2018, the third defendant wrote to Companies House requesting an extension of time to file the 2017 accounts, which were due on 30 September 2018. By letter dated 14 September 2018 to the third defendant, the Companies Registrar extending the time for filing to 31 October 2018. The letter continued  

“In instances where firm figures are not available, the registrar will accept accounts based on estimated figures when necessary, with suitable explanatory notes on the understanding that the company submits revised or amended accounts when full and accurate figures are available.”
11. The deadline of 31 October came and went, without the 2017 accounts being filed.
12. On 28 January 2019, Companies House wrote to the third defendant that it was instructing its Prosecuting Solicitor to institute criminal proceedings in respect of the company’s failure to file the 2017 accounts.
13. On 13 February 2019, Warner Goodman (“WG”), solicitors, wrote on the claimant’s behalf a letter before claim to the third defendant, in respect of her conduct as secretary, copied to the other directors. That letter required, first, the third defendant’s resignation as director and secretary; and, secondly, that the company appoint an independent company secretary.
14. The directors were unable to agree which firm of accountants should be appointed to replace Jones Avens. On 25 February 2019 WG wrote threatening to apply for an injunction to break the impasse and secure the appointment of an accountant to prepare the 2017 accounts.
15. The claimant also did not accept that the Original Feeder Documents should be the basis of instruction of the accountants who were to prepare the 2017 accounts. His solicitors’ letter of 5 March 2019 set out his detailed comments on the feeder documents, and proposed revisions in two specific respects, which were explained in the letter. The letter also threatened an application for injunctive relief. Clintons’ response dated 8 March 2019 to this letter did not engage with the detail provided by the claimant, stating

“Your letter and its enclosures merely serve to confirm the fact that your client is not driven by a desire to protect the interests of the Company (as you assert), but rather solely by his own self interest. For what other reason, we ask rhetorically, would he be continuing to seek to manipulate the information and documents that form the foundation of the instruction to the accountants and consequently the 2017 accounts to reflect his partial and self-serving view?”

16. On 12 March 2019, WG wrote suggesting that estimated accounts could be filed for the purposes of meeting the deadline. The letter concluded

“If your clients are not agreeable to the preparation and filing of estimates for the Statutory Accounts, our client will be left with no option to commence legal proceedings to avoid prosecution by the Companies Registrar and to file Statutory Account or estimates for the Statutory Accounts.”

17. Clintons initially queried whether the company could file estimated accounts. When reminded by WG of the Registrar’s letter of 14 September (set out above), they responded

“It is not the case, here, that the figures are unknown or unavailable. Rather, the figures are not agreed, with your client positively challenging the figures and seeking to reserve his rights in respect of them.”

and continued

“... We note that your client has stated that the issues relate to errors in the 2016 accounts. The prevailing issues between our respective clients, as your client well knows, are wider reaching than this, and also include issues relating to the historic communal refurbishment.”

18. WG’s reply of 25 March 2019 stated:

“It must be accepted by all parties that the filing of the statutory accounts for 2017 is a priority and the most expeditious way to achieve this and avoid prosecution for the late filing of accounts is for the Company to file estimated accounts....

Our client accepts that the matters in dispute will need to be resolved post filing of the estimated accounts and decisions made resolving the disputed matters will form the basis of the restated/corrected accounts for 2017 which will need to be filed in due course. It must be accepted, however, that the issues in dispute concerning the 2016 accounts and the communal refurbishments in 2015 cannot be resolved in the near future in light of the pending threat of prosecution by the Solicitor for the Companies Registrar.

Our client invites your clients and [the first defendant] to agree to the filing of estimated accounts and *the issues in dispute between the parties to be the subject to a general meeting of the Company after the estimated accounts are*

*filed*. If matters cannot be resolved by way of general meeting, then each party may take whatever action they think fit (to include litigation) to bring about resolution.”  
(emphasis added)

The letter then set out that the claimant was willing for the Original Feeder Documents to be used as the basis for the estimated accounts. It concluded:

“Unless your clients and [the first defendant] confirm by written returned no later than 4pm on 27 March 2019 that they are agreeable to estimated accounts being prepared by Wilton Group as soon as possible, our client reserves the right commence legal proceedings without giving any further notice. Such proceedings may include an application injunctive relief (*sic*) as well as seeking directions from the Court *to assist with resolving the issues in dispute concerning the Company*.”  
(emphasis added)

19. By their letter of 28 March 2019, Clintons agreed that the company should appoint Wilton Group to prepare and file estimated accounts, on the basis that the parties would need still to deal with the remaining issues between them, and subsequently file revised accounts. The letter conceded one of the points made by the claimant in WG’s letter of 5 March 2019. However, the letter proposed that an updated version of the feeder documents (“the New Feeder Documents”) be the basis of the estimated accounts. These were sent to the claimant later that day.
20. The claimant did not accept that the New Feeder Documents were an appropriate basis for the estimated accounts. His solicitors’ letter of 2 April 2019 listed 4 areas of dispute arising from the New Feeder Documents. The letter reaffirmed the claimant’s position as being that set out in WG’s letter of 25 March 2019, namely inviting the defendants to agree to
  - “1. The filing of estimated statutory accounts for 2017 based on the Original Feeder Documents produced by [the third defendant] in August 2018;
  2. *The resolution of remaining issues in dispute between the parties to be subject to a General meeting of the Company after the accounts are filed.*”  
(emphasis added)

The letter concluded:

“It is our client’s position that he has facilitated a sensible and quick solution to the filing of estimated accounts so as to avoid prosecution and set out a mechanism for *the points of dispute to be resolved by way of a general meeting post filing*. If your clients and [the first defendant]) are not agreeable to our client’s proposal, then absent a better solution, *we see very little alternative than to advise our client to apply for injunctive relief.*”  
(emphasis added)

21. Clintons' response dated 4 April 2019 stated that the letter of appointment to the accountants "must enclose and address the New Feeder Documents". The letter continued:

"Turning briefly to your suggestion of a general meeting, we think it is an all parties' interests, not least given the recent experience of the mediation, for the parties to focus at this stage on getting the correct accounts filed, and for that purpose *we see no need for a general meeting*. On the contrary, we consider that it may be counter-productive.

Please now confirm that your client agrees to appoint Wilton Group to prepare estimated accounts on the basis of the New Feeder Documents and on the basis of our clients' draft letter of appointment."  
(emphasis added)

22. This was followed by another letter dated 12 April 2019 setting out that Companies House had provided a revised deadline of 19 April 2019 for filing of the 2017 accounts. The letter continued:

"We therefore await your client's agreement to appoint Wilton Group to prepare estimated accounts on the basis of the new feeder documents... and on the basis of our clients' draft letter of appointment."

23. On 15 April 2019 the proceedings were issued, and served the same day.
24. In an open letter headed dated 3 May 2019, Clintons asserted that the claim was misconceived for two main reasons. The first, which is now conceded, was that the court had no jurisdiction to make the order sought in paragraph 1 of the claim form. The second criticism was that it was not "*impracticable*" within the meaning of section 306 to call a meeting of the company. The three defendants were, the letter asserted, not opposed to the holding of a general meeting. They invited the claimant to discontinue his claim on the basis that there would be no order as to costs.
25. This letter was accompanied by a letter of the same date headed "Without prejudice save as to costs" in which the open offer was repeated, but the basis of it was expanded to include:

"2. our respective clients agree to appoint the accountants on the basis of the New Feeder Documents, but on the understanding that:-  
(a) they will seek to reach some compromise in relation to the letter of engagement, by agreeing a revised draft of the letter that meets their mutual concerns...  
(b) our respective clients identify a date or dates convenient to all parties on which to circulate, discuss and seek to agree written resolutions so that any remaining matters relating to the accounts and ongoing corporate governance can be discussed."

26. The claimant did not accept this offer but, in WG's letter of 10 May 2019, proposed a stay of the proceedings until 14 June 2019, provided that a date could be agreed

for a general meeting to be called in the near future to resolve the remaining points of dispute between the parties. The letter continued:

“... Your clients have not proposed any specific mechanism to address the urgent issue of filing the Companies overdue 2017 Statutory Accounts, nor to resolve the disputes between the parties. Specifically, your clients have not agreed to the scheduling of a general meeting, which our client maintains is necessary to resolve matters of dispute and to progress outstanding matters which he believes are not in dispute such as fire regulations compliance and buildings insurance.”

27. On 15 May 2019 the defendants agreed to the stay proposed by the claimant and agreed in principle to a general meeting.
28. On 24 May 2019, the parties agreed a consent order staying the claim until 21 June 2019.
29. The general meeting took place on 12 June 2019. The parties attended by telephone. It was resolved unanimously to appoint a professional company secretary and company solicitor; and by a majority to appoint a managing agent; and that there should be a further meeting for the purpose of that appointment. It was also resolved by a majority:
  - (1) to appoint Wilton Group to prepare and file estimated accounts;
  - (2) that the basis of the estimated accounts should be the New Feeder Documents;
  - (3) that the letter of instruction to Wilton Group should be in the terms proposed by the second defendant on 28 March 2019;
  - (4) that Wilton Group should undertake full audit of the company's historic accounts.
30. On 25 June 2019, WG wrote to Clintons seeking to agree dates for the CCMC, and saying that the claimant would consider a general stay of the proceedings, subject to a further general meeting being called to resolve various outstanding issues.
31. Clintons in their reply of 28 June 2019 rejected the suggestion that a further general meeting was necessary; and invited the claimant to discontinue the claim, with an order for costs in their favour. They expressly withdrew their offer made on 3 May 2019. On 19 July 2019, the Defence was served. On 1 August 2019, the claimant discontinued his claim against the first defendant.
32. A meeting of the directors of the company took place on 20 August 2019 at which resolutions were passed appointing a new company secretary, managing agent and company solicitor.
33. On 23 September 2019, the claimant filed an application for permission to discontinue the claim. This was misconceived because he was entitled to discontinue the claim without permission by filing and serving a notice of discontinuance. He did this on 30 September 2019.

**Discontinuance: relevant legal principles**

34. There was no dispute as to the applicable legal principles. CPR 38.6 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.”

35. Also relevant is CPR 44.2 which sets out the considerations the court is to take into account when making an order about costs. CPR 44.2(4) provides that the court will have regard to all of the circumstances including the conduct of all the parties. The context for the court’s consideration of all of the circumstances under CPR 44.2 is the determination of whether there is a good reason to depart from the presumption laid down by CPR 38.6: see *Nelson’s Yard Management Co v Eziefula* [2013] EWCA Civ 235 at paragraph 15 (Moore-Bick LJ).
36. CPR 44.2(5) provides that the conduct of the parties includes:
  - (1) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction on Pre-Action Conduct or any relevant pre-action protocol;
  - (2) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; and
  - (3) the manner in which a party has pursued or defended its case or a particular allegation or issue.
37. The principles applicable to the exercise of the court’s discretion under CPR 38.6 were summarised by the Court of Appeal in *Brookes v HSBC Bank plc* [2011] EWCA Civ 354 (para 6):
  - “(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.”
38. The court observed in *Brookes* (at [10]) that:

“[i]t is clear, therefore, from the terms of the rule itself and from the authorities that a claimant who seeks to persuade the court to depart from the normal position must provide cogent reasons for doing so and is unlikely to satisfy that requirement save in unusual circumstances.”



39. The 6 point summary from *Brookes* was adopted and approved by the Court of Appeal in *Nelson's Yard*. There, it was reiterated that it is not the function of the court considering costs to determine whether the claim would have succeeded, although the court is permitted to consider whether the unreasonableness of the defendant's conduct provides a good reason to depart from the default rule. The court may take account of matters relating to conduct where it does not have to resolve disputed questions as to the merits of the substantive claim.
40. In *Nelson's Yard*, the defendant had failed to respond to pre-action correspondence relating to excavation work he was carrying out close to the claimants' property. The claimants subsequently commenced proceedings for (among other things) injunctive relief to restrain development and to permit inspection of the foundations of the claimants' property. The defendant then allowed the claimants' surveyor to inspect and proceedings were subsequently discontinued. On costs, the court took account of "*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*" (paragraph 40). The claimants were awarded their costs up to service of the defence, and thereafter there was no order for costs.

#### **Discussion and conclusion**

41. In my judgment the defendants have behaved sufficiently unreasonably to justify departing from the general rule that the discontinuing claimant pays the costs of the claim. The specific aspects in which they have done so are as follows.
42. First, in my judgment, the defendants acted unreasonably in July 2018:
  - (1) in refusing to attend a general meeting, unless the claimant removed his resolution to appoint his wife as a director from the agenda; and
  - (2) in proposing that the claimant and his wife be entitled to hold only one share, instead of the two shares currently held by them; the effect of this proposal, if implemented, would have been to disenfranchise the claimant and his wife in the governance of the company, notwithstanding the fact that they owned 2 flats and paid 42% of the service charge.The defendants' counsel submitted that this conduct was "historic", and not directly related to the matters with which the claim is concerned. I do not accept that. The claim form refers in general terms to the resolution of "the issues pertaining to the company's accounts and ongoing corporate governance". These issues were live between the parties in July 2018, and remained live until resolved at the general meeting on 12 June 2019.
43. Secondly, the defendants again unreasonably refused to attend a general meeting by their solicitors' letter dated 4 April 2019, in which they declined to agree to a meeting "at this stage". Their counsel submitted that this was not a refusal, because the pre-condition for the meeting, namely the filing of estimated accounts, had not occurred at that point. However, the letter did not agree to a meeting or put forward any specific proposal as to when a meeting could take place. Furthermore, the defendants' own evidence was that they did not wish to attend a meeting: they were "*genuinely anxious at the thought of attending another meeting with [the claimant] present*" and believed that such a meeting "*could destroy the progress as well as*

*causing personal distress*". This is consistent with their long-standing reluctance to attend a meeting: over a 3 year period, the defendants have never made an unconditional offer for a general meeting of the company. Their attitude to attending meetings was in my judgment, unreasonable, in that the governance of the company required meetings to be held, irrespective of the defendants' personal feelings about them.

44. Thirdly, I consider that that the defendants acted unreasonably by:
  - (1) failing to engage at all with the claimant's proposals in respect of the Original Feeder Documents set out in WG's letter dated 5 March 2019, and responding in their solicitors' letter of 8 March 2019 with generalised derogatory comments;
  - (2) in their solicitors' letter dated 20 March 2019, taking an unreasonably narrow approach (later abandoned) to the basis on which estimated accounts could be submitted;
  - (3) delaying until 4 April 2019 in accepting that estimated accounts could be filed, when this should have been apparent from the Companies Registrar's letter of 14 September 2018;
  - (4) putting forward on 4 April 2019 the New Feeder Documents: this was 7 months after the Original Feeder Documents had been put forward and 6 months after the original deadline for the 2017 accounts had passed, so that filing the estimated accounts had become a matter of urgency;
  - (5) in their solicitors' letter of 4 April 2019 opposing the claimant's proposal for a meeting, without putting forward any mechanism for the resolution of the outstanding issues between the parties.
45. The defendants' counsel submitted that the claim was misconceived, because the defendants were always willing to attend a general meeting; and that there was, therefore, no causal link between the proceedings having been issued and the meeting taking place. For the reasons given above, I reject that submission.
46. The defendants' counsel also submitted that the claimant's own conduct meant that the general rule applicable to a discontinuing claimant was not displaced. He submitted first, that the claim was brought with improper haste, because the claimant had not written a letter before claim setting out the basis of his claim.
47. I do not accept that submission. The issue of whether there should be a general meeting had been live between the parties since July 2018. It was raised again in WG's letter of 25 March 2019, which referred to seeking assistance from the court with resolving the issues in dispute concerning the company. WG's letter of 2 April 2019 again made it clear that he was seeking a general meeting, and warned of an application for "injunctive relief". The fact that the claimant's solicitor did not write a letter specifically referring to s.306 of the Companies Act 2006 does not in my judgment render his proceedings "precipitate" as alleged by the defendants.
48. The defendants also criticised the claimant for not taking any procedural steps to obtain an urgent hearing for the relief sought in para (1) of his claim form; but since this is now conceded to be misconceived, this is subsumed within the total failure of that part of the claim.

49. Similarly, the defendants criticised the claimant for bringing his claim by Part 8 claim form when it involved substantial questions of fact. However, in my judgment this criticism applies only to para (1) of the claim form. The relief sought in para (2) does not involve any significant questions of fact and is entirely suitable to be brought by Part 8 claim.
50. Finally, the defendants relied upon their open offer and without prejudice save as to costs (“wpsatc”) offer, both dated 3 May 2019. However, neither of these offers provided a binding means by which the parties could resolve the various issues between them, and did not therefore provide an adequate substitute for the meeting sought by the claimant.
51. However, my criticisms of the defendants do not, in my judgment, justify an order that the defendants pay the claimant’s costs for the following reasons. First, as noted, the claim under para (1) of the claim form was bound to fail. Secondly, I take into account that what was achieved at the general meeting was in substance what had been proposed by the defendants in correspondence, albeit that the effect of its being decided at the general meeting was that it was a binding decision by the company.
52. Taking all the above circumstances into account therefore, I consider that the appropriate order is no order as to costs.