Neutral Citation Number: [2020] EWHC 2856 (Ch)

Case No: PT-2019-BRS-000103

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 27 October 2020

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

BATH RUGBY LIMITED	**Claimant**
- and -	
(1) CAROLINE GREENWOOD	**Defendants**
(2) DAVID ARTHUR GREENWOOD	
(3) EDWIN JOHN HORLICK	
(4) ERIC NEWBIGIN	
(5) DR SAVIO ANIL DE SEQUERIA	
(6) PETER FRANCIS SHERWIN	
(7) 77 GREAT PULTENEY STREET LIMITED	
(8) GODFREY DOUGLAS WHITE	

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Martin Dray (instructed by **Royds Withy King LLP**) for the **Claimant**
William Moffett (instructed by **Stone King LLP**) for the **Third, Fourth, Seventh and Eighth Defendants**
The First, Second, Fifth and Sixth Defendants did not appear and were not represented

Consequential matters dealt with on paper

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 16:30.

HHJ Paul Matthews :

1. On 13 October 2020 I handed down my judgment on the trial of this claim, dismissing it. I invited written submissions on consequential matters which the parties were unable to agree. I received such submissions on two issues, the question of costs and the question of permission to appeal. This is my decision on those two matters. I deal first with the question of costs.

COSTS

2. First of all, I set out some of the main events in the litigation relevant to this question. In June 2019 the claim was issued, against six named defendants. On 9 October 2019, when only the third and fourth defendants continued to resist the claim, Master Shuman ordered (i) a witness statement to be made and further disclosure given by the claimant, as well as (ii) a decision to be taken by 25 November 2019 by the third and fourth defendants as to whether they would continue to oppose the claim, and also (iii) a transfer of the claim to Bristol. On 23 October 2019 that further witness statement and disclosure were filed, served and given. On 21 November 2019 the third and fourth defendants confirmed that they would not continue to oppose the claim. On 20 December 2019 the seventh and eighth defendants applied to be joined, which I ordered on 7 January 2020. The documents disclosed by the claimant in October 2019 showed that the properties of the third and fourth defendants had not been retained in the Bathwick Estate by the time of the 1922 Conveyance, whereas those of the seventh and eighth defendants had.

3. At trial, therefore, only the seventh and eighth defendants appeared to defend the claim brought by the claimant. They were represented by solicitors and counsel who had previously represented the third and fourth defendants. Those four defendants (whom I shall hereafter refer to simply as "the defendants" for convenience) now seek one set of costs between them against the claimant. In principle the claimant does not resist this. But the defendants seek their costs on the *indemnity* basis, and the claimant is only prepared to concede them on the *standard* basis.

Rules

4. As is well-known, costs are in the discretion of the court (CPR rule 44.2(1)). However, if the court decides to make an order, then CPR rule 44.2(2)(a) provides that

> "the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party".

In my judgment it is appropriate to make a costs order in the present case. There can be no doubt that the defendants are the successful parties, and the claimants the unsuccessful. Ordinarily, therefore, it would follow that a costs order for the claimant to pay the defendants' costs would follow. The only question is the basis of those costs.

5. Under CPR rule 44.3(1), the court may order costs to be paid under either the standard basis or the indemnity basis. The major differences between the two bases are, first, that on the standard basis costs must be proportionate to the matters in issue, and second, that the benefit of any doubt as to whether costs should be allowable is given to the paying party on the standard basis, but to the receiving party on the indemnity basis. The default position under the CPR is to award costs on the standard basis. The general practice is to award costs on the indemnity basis only in special circumstances, usually where the behaviour of the paying party takes the case out of the norm.

Special practice

6. However, the present case involved a claim under section 84(2) of the Law of Property Act 1925, and it is clear from the authorities that the exercise of the court's undoubted discretion on costs is affected by special considerations arising from the nature of such claims. These special considerations were explained by Lightman J in *University of East London Higher Education Corporation v London Borough of Barking and Dagenham and others* [2005] Ch 354, 377, as follows:

> "10. … the claimant applying for the declaration is seeking for his own benefit the protection of a court order against the existence of any adverse rights and for this purpose must join as defendants all persons or representatives of all persons who may have adverse rights. The court must for this purpose be satisfied that there are no adverse third party rights whether or not such defendants take part in the proceedings. The policy of the law in these circumstances is to encourage the defendants to contribute to the investigation by the court encouraged by the knowledge that until the full facts are known and an informed decision whether to oppose the application can be reached they will be indemnified against costs incurred, and thereafter (in case their decision to oppose proves erroneous) undeterred by any risk that by doing so they may incur an adverse order as to costs. It is just that, as the price of the exercise of the court's extraordinary jurisdiction in his favour, the claimant should provide the fullest available information to third parties to enable them to make an informed decision whether to oppose the application and to act on such information and pay for the costs of this exercise; and that after this exercise has been completed the claimant should pay the costs of the defendant if the defendants succeeds in his objection, but should have no right to recover his own costs if the objection fails."

Authorities

7. This special costs practice appears to date from 1937, when Clauson J decided *Re Ballard's Conveyance* [1937] 2 All ER 691, 697G-H (the report at [1937] Ch 473 does not mention the point). It had been followed by Wynn-Parry J in *Re Pinewood Estate* [1957] Ch 280, 289, and by Harman J in *Re Forest Hill* (1957) 8 P & CR 179, 181-82. It was summarised by Cross J in a *Practice Note: Re Jeffkins Indentures* [1965] 1 WLR 375 in these words:

> "a plaintiff seeking a declaration that restrictive covenants do not affect his property is expected to pay his own costs. He is also expected to pay the costs of any defendants who enter an appearance down to the point in proceedings at which they have had a full opportunity of considering the matter and deciding

> whether or not to oppose the application. Any defendant who then decides to continue, and appears unsuccessfully before the judge, does so at his own risk as to his own costs at that stage. Such defendant should not however be ordered to pay the plaintiff's costs."

8. In the more recent case of *Re Wembley Park Estate Co Ltd's Transfer* [1968] Ch 491, Goff J put the matter this way (at 505D-F):

> "It appears that from 1937 or thereabouts there has been an established practice in these matters that where a party applies under section 84 of the Law of Property Act, 1925, to clear his title, he must pay his own costs and he must also pay the costs of the defendants down to the point in the proceedings at which they have had a full opportunity of considering the matter and deciding whether or not to oppose the application, but the defendants get no costs thereafter."

9. The judge distinguished two other cases cited to him, and held that he should follow the established practice. But he glossed that practice by saying (at 507D-F):

> "First, it would appear that under such an order the defendants have their costs, unless there were some special circumstances, down to the final appointment before the Master under which the case is adjourned to the judge. I wondered whether, since the defendants filed a great deal of evidence, the order giving them their costs ought to have stopped perhaps at some earlier stage, but it was necessary for them to investigate the position and obtain the large number of transfers which they put in evidence, and the actual increase in the costs already involved in finding that evidence cannot be substantial. It is difficult to see where one would draw the line in seeking to make a special order and I will therefore follow the ordinary rule."

10. He also had to decide on what *basis* the defendants should receive their costs (and it appears that he was the first judge to do this). He said (at 507G):

> "The last point is whether the costs of the defendants should be on a party and party or common fund basis. It seems to me in principle that they ought to be on a common fund basis since the obtaining of the order is something in the nature of a luxury to the plaintiff for which he ought to pay."

The "party and party" basis mentioned there is now referred to as the standard basis, and the "common fund" basis as the indemnity basis. It is however fair to say that Goff J recorded in his judgment that counsel for the claimant *conceded* the basis of assessment, even though it accorded with what the judge himself thought was right in principle.

Discussion

11. All these cases were decided under earlier procedural rules. The only authority since the CPR came into force that was cited to me was the decision of Lightman J in 2004, referred to above. He held (at 377) that the changes in the procedural rules did not alter what he called "the Rule of Practice":

> "11. As it seems to me the rationale for the Rule of Practice is equally applicable today as it was prior to the CPR and both the Rule of Practice and the rationale are (subject to three minor glosses) fully consistent with the CPR. The first gloss is that the Rule of Practice is a guideline in the exercise of the discretionary jurisdiction as to costs rather than a rule. It has less rigour than a rule and is more flexible. The second is that there is a need to reflect the emphasis placed by the CPR on pre−action disclosure. The Rule of Practice reflected a time when full disclosure was only to be expected after proceedings had been commenced. The opportunity to obtain such disclosure after the CPR may and indeed generally should, be afforded before proceedings are commenced and the defendant may be able to take an informed decision whether to oppose the application before the proceedings commenced. In either event the claimant should be obliged to pay the costs of the exercise, but the exercise may be completed before the proceedings commenced. The third relates to the level of costs. Under the pre−CPR practice the entitlement of the defendant was to costs on a common fund or solicitor and client base. The equivalent basis today is indemnity costs."

12. The statement by Cross J in 1965 of the practice on costs of such claims was referring to the case where the *claimant* was successful at trial, and ordinarily would expect to have its costs paid by the defendant. The costs practice represented almost a complete reversal of that, in that the claimant paid the defendant's costs up to a certain point, and thereafter there was no order as to costs. The *University of East London* case was different, in that the *defendants* in that case succeeded on the questions of enforceability of the covenants, and it was only on a separate point of construction of a pre-emption provision, introduced at a late stage, that the claimant in fact succeeded in obtaining the declaration it sought. The judge nevertheless awarded the defendants their costs throughout, and on the *indemnity* basis.

13. The present case is different again, in that the claimant has simply failed at trial, and the defendant has succeeded. The question for the court therefore is, what impact does the costs practice stated in the authorities have in such a case?

Arguments

14. Mr Moffett for the defendants says that it is clear from the decision of Lightman J in *University of East London Higher Education Corporation v London Borough of Barking and Dagenham and others* [2005] Ch 354 that, as the rationale of the costs practice continues to apply after the introduction of the CPR, so the practice itself has survived that introduction, subject to various "glosses", including the fact that the practice is a guideline and not a rule, and also the emphasis in the current rules on pre-action disclosure. He also says that, whereas the earlier authorities did not make clear the basis of assessment of costs, that case shows that a defendant should have its costs on the indemnity basis "*at least* up to the point it has been provided with, and has had an opportunity to consider, the material evidence".

15. He refers in support to a statement in Francis, *Restrictive Covenants and Freehold Land*, 5th ed, [15-33]:

> "Sometimes a distinction is drawn between the scale of costs to which the defendant may be entitled. The indemnity basis may be chosen down to at least

> the time when the defendant had the opportunity to make a final assessment of merits; thereafter the standard basis may be chosen. (See CPR, Part 44, r 44.3.)"

In this connection he points out that the learned author says in the penultimate line "the standard basis *may* [not 'must'] be chosen".

16. However, Mr Moffett very fairly also refers to a statement in another well-known textbook, Preston and Newsom's *Restrictive Covenants affecting Freehold Land*, 10th ed, [10-21], as follows:

> "Where the application under s.84(2) fails, the the applicant is usually ordered to pay the costs of the other parties," referring in a footnote to "*Re Dolphin's Conveyance* [1970] Ch 654, where, under the old scales, costs were ordered on a common fund (*ie* indemnity) basis to the end of the last Master's hearing and as between party and party (*ie* standard basis) thereafter".

Mr Moffett adds that the costs decision in *Re Dolphin's Conveyance* (a decision of Stamp J) is not stated in the report, but that counsel representing the defendants in that case was Mr GH Newsom QC, and therefore he would have known first hand what the costs order was, and was able to state it of his own knowledge in his book. I accept this, and proceed on the basis that the costs order in that case was as stated in Preston and Newsom. However, no *reasons* for the decision are expressed.

17. Mr Moffett submits that the distinction between costs before and after a certain point (when the defendant is fully informed of material matters and is considered them with the benefit of advice) makes sense in a case where the defendant ultimately loses at trial. But, he says, it makes less sense in the case of a successful defendant who "has been found to have been reasonable in the decision to defend the claim and has been put to expense, wrongly, by reason of a claimant seeking the 'luxury' of 'cleaning' his title". Such a defendant should have his costs throughout, and there is no good reason for awarding them on the indemnity basis up to a certain point, and on the standard basis thereafter. He therefore relies on the *University of East London* case, where the judge ultimately awarded costs to the defendants on the indemnity basis, because they had succeeded at trial on the question of enforceability, although they ultimately lost on the basis of a new point which only arose at the trial itself.

18. Mr Moffett also submits that costs should be awarded to the defendants on the indemnity basis throughout, on the separate basis that disclosure of the critical documents (the auction catalogues of 1919 and 1921 and the 1924 agreement for sale to the Bathwick Estate Company), together with other documents the fruits of the claimant's investigations into the matter, was given to the defendants only following the order of Master Shuman on 9 October 2019. Mr Moffett says that it "comprised the vast majority of the Trial Bundle, to which extensive references was made during Trial". In his submission it would be artificial to try to draw a distinction between the defendants having a proper period to digest and take advice on the disclosure and preparation for the trial itself. Moreover, having the defendants play an active part in proceedings would assist the court in reaching the correct decision.

19. Mr Dray for the claimant points out that there were no decisions on the basis of assessment before *Re Wembley Park Estate Co Ltd's Transfer*, and that in that case the common fund basis was in fact conceded by counsel. He also submits that

regarding the obtaining of an order for a *successful* claimant as a 'luxury' does not address the question of the correct basis if the matter continues to trial *but the claim fails*. He also submits that Lightman J in the *University of East London* case had recognised that there was no rigid rule, but only a general discretion: each case turns on its own facts and circumstances.

20. He further submits that there is an "intelligible conceptual reason" for distinguishing between (i) the position before the defendant was in possession of the relevant information (whether by discovery in the old system, or disclosure or pre-action disclosure in the new) and could take advice, and (ii) the position at trial. This is that, until the point at which the defendant is in possession of the relevant information, the defendant cannot make a fully informed decision as to whether to resist the claim. After that, the defendant is in no different a position to decide whether to fight a case than in any other litigation, and should only obtain standard basis costs if he or she should win, unless there are the kinds of circumstances that could justify indemnity costs otherwise.

21. Moreover, says Mr Dray, it would be wrong for the defendants (absent improper conduct on the part of the claimant) to be entitled to indemnity costs at trial, because indemnity costs entitle a party to recover disproportionate costs, which is not justified merely because it is a claim under section 84(2). That point was not in the minds of the judges when the practice was developed, not least because proportionality of costs was not then a requirement.

22. On the facts, Mr Dray submits that the third and fourth defendants should have been aware from as long ago as February 2014, when their then solicitors were sent a copy of the 1924 sale agreement, that from this it could "largely be gleaned" that their properties had not been retained in the Bathwick Estate. They should not be entitled to their costs under the special practice, because they knew or should have known from long before the litigation started that their properties could not benefit from any annexation of the covenant. So far as concerns the seventh and eighth defendants, Mr Dray submits that they were joined to the proceedings, on their own application, only after full disclosure had been given by the claimant and after they had ascertained that their property had been retained in the Bathwick Estate. So, for those two defendants, it was always voluntary, and fully informed from the beginning. That is, he says, not a proper basis for indemnity costs for them.

Assessment

23. I do not accept Mr Dray's point that, after disclosure of all relevant information, "the defendant was in no different a position to decide whether to fight a case than in any other litigation". For one thing, the costs practice from 1937 (as set out earlier) said that normally the unsuccessful defendant would not be ordered to pay the claimant's costs. That is quite different from the position in ordinary litigation. It would certainly affect the decision whether to fight at trial, to know that even if the defendant lost he or she would probably not be ordered to pay the claimant's costs. For another thing, I do not accept that, in opposing the claimant's case at trial, the defendant would be doing nothing but advancing a purely selfish interest. As I have already said, the defendant's putting forward arguments at trial makes it easier for the court to reach the right decision in the *public* interest. As Megarry J once said, in *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, 16H, albeit in a quite different context,

"Argued law is tough law." This is especially important when, as here, the court's decision in effect binds the world.

24. As to the point that indemnity costs would entitle a party to recover disproportionate costs, it must be borne in mind that even on the indemnity basis costs are only recoverable if reasonably incurred and reasonable in amount: CPR rule 44.3(1). In practice, of course, the claimant under section 84(2) wishes to develop the land and the defendant is a local resident who does not wish that to happen. The chances of an individual local resident being able, let alone prepared, to spend amounts on legal costs which are disproportionate to the value of the development to the claimant strike me as vanishingly small. But, in any event, the public interest in having the matter properly dealt with before an *in rem* decision is made outweighs any possible risk of disproportionate costs.

25. Finally there is the question of what happened in 2013-14 and then in 2019-20. I accept that the third and fourth defendants had *some* information available to them in 2014. But the information supplied was not supplied pursuant to any duty of disclosure, and so could not be assumed to be complete. Moreover, and in any event, it was by no means conclusive against them on the question of annexation. In my judgment they were entitled still to take an active part in the opposition to the development at a time when there was no litigation and there were some 19 local residents who claimed the benefit of the 1922 covenant. It was only once the litigation had begun, and the further disclosure had been given in October 2019, that the weakness of the third and fourth defendants' claim to the benefit of the covenant would have been clearly established. Moreover, so far as I can see, the claimant did not in issuing the claim refer back to the 2013-14 correspondence, for example, as some kind of letter before action. Mr Dray's submission amounts to saying that the third and fourth defendants should not have litigated at all, and I do not accept that. In my judgment they were entitled not only to take part but also to wait until they had seen all the disclosure before withdrawing (as in fact they did).

26. As for the seventh and eighth defendants, it is true that they were joined only after documents had been disclosed which showed that their property had been retained in the Bathwick Estate after 1922. But that by no means meant that they were bound to succeed. As my earlier main judgment shows, there were a number of important arguments put forward by the claimant to show why even so the defence of annexation should fail. These included the question of intention to benefit other land, the identification of that other land, and the question of the application of a test of "easy ascertainability". The court was much assisted by the submissions made on the defendants' behalf. If the seventh and eighth defendants had been parties from the beginning of the litigation, instead of the third and fourth, Mr Dray could not have made the argument he has, and I would have held that they were entitled to costs throughout. In circumstances where all the defendants were part of a loose grouping of local residents who were seeking to enforce the covenant for the benefit of their neighbourhood (and also of course for that of their own properties) I do not think the fact that the defence of the claim "changed horses" in mid-litigation should make a difference. In the circumstances of this case, I regard what has happened as one continuous opposition to the development and one continuous defence of the claim. I think the defendants should have one set of costs between them.

27. So I come back to the question of the basis of assessment of those costs. The convention is that the High Court, though not strictly bound to do so, will follow its own earlier decisions unless convinced that they are wrong. If there is more than one such decision, and they are not consistent, then the last one is followed in preference to earlier ones, at least as long as the earlier ones were cited in the later: see *Colchester Estates v Carlton Industries* [1986] Ch 80. Here the latest decision is that of Lightman J, in the *University of East London* case. Strictly speaking, in awarding the defendants costs on the indemnity basis throughout, the decision was not inconsistent with earlier decisions, where the basis of costs was not discussed, with the possible exception of *Re Dolphin's Conveyance*. However, I do not know what were the judge's reasons for making the decision he did in that case, and (as I say) the *University of East London* case is later in time. But in any event, regardless of the usual convention, I respectfully agree with the decision of Lightman J in that case. I accept that costs are always in the discretion of the court, and that what Lightman J called the Rule of Practice is simply a guideline.

Decision

28. In the present case, I consider that the public policy in claims under section 84(2) of the 1925 Act of encouraging defendants to contribute to the investigation by the court (with an indemnity against costs incurred up to a certain point, and thereafter without any risk that by opposing they may incur an adverse order as to costs) is best served by awarding the defendants a single set of costs on the indemnity basis throughout.

PERMISSION TO APPEAL

29. I turn now to the question of permission to appeal. The claimant puts forward four grounds of appeal. In summary, these are (1) that the court misconstrued the 1922 conveyance in considering that it showed an intention to benefit land at all; (2) that the court misconstrued the 1922 conveyance in considering that it identified land to be benefited by the covenant; (3) that the court wrongly rejected the test of "easily ascertainable" for the land to be benefited; (4) that the court wrongly failed to find that the land to be benefited by the covenant was not easily ascertainable. Both (1) and (2) are matters of construction of a document and therefore matters of law (referring to Lewison, *The Interpretation of Contracts*, 4th ed, [4.01]). All four grounds are helpfully amplified in the written submissions of Mr Dray. I will not set these out in detail, but I have read them. He also refers to the importance of the case to the claimant and to the City of Bath.

30. Mr Moffett opposes the grant of such permission. He says (in summary) that grounds (1) and (2) are questions of construction of a document made within a certain factual matrix, and therefore of mixed law and fact. He further says that the claimant does not complain "of any error in the court's approach either to the law to be applied for in finding the facts relevant to the exercise of interpretation". Nor is there any complaint of error "in the process of evaluation following the interpretation" placed on the document by the court. He says of ground 3 that the authorities relied on are distinguishable, and that ground 4 does not arise.

31. Under the Civil Procedure Rules, rule 52.6, the court (whether the lower or the appellate) may not grant permission to appeal unless *either* there is a real prospect of a successful appeal *or* there is some other compelling reason why an appeal should be

heard. The phrase 'real prospect' does not require a *probability* of success, but merely means 'not unreal': *Tanfern v Cameron-MacDonald* [2001] 1 WLR 1311, [21], CA. If the application passes that threshold test, however, the court is not *obliged* to give permission to appeal; instead it has a *discretion* to exercise.

32. In the present case, I am satisfied that the question of the construction of the 1922 conveyance is a matter of mixed law and fact. There is the meaning to be given to the words used in their factual context, which is a question of fact, and there is the legal effect of those words, which is a question of law: see *Chatenay v Brazilian Submarine Telegraph Co Ltd* [1892] 1 QB 79, per Lindley LJ. These distinctions apparently have their origins, not in a principled conceptual analysis, but in an historic and entirely pragmatic division of roles in English jury trials: see *Carmichael v National Power plc* [1999] 1 WLR 2042, 2048-51, per Lord Hoffmann. What matters in the present case is the intention of the parties and the identification of land in a private document. It is not a question of construction of a public document such as a statute. The court must evaluate its findings of primary facts in order to reach a conclusion on the legal effect of the document. Evaluations by judges of primary facts found by them are rarely challengeable on appeal: see *Assetco Ltd v Grant Thornton UK LLP* [2020] EWCA Civ 1151, [152]. I therefore am not satisfied that there is any real prospect of success in this case for the first two grounds of appeal.

33. As to the third ground, I agree with Mr Moffett that the cases relied on by the claimant are distinguishable, but in any event cannot have been intended to make new law, and especially not for pre-1926 cases. The fourth ground depends on the third, but it is clear on the facts found that the seventh and eighth defendants' property *was* easily ascertainable as a property intended to be benefited. There is no real prospect of success on either ground.

34. But even were I wrong, and any of the grounds had a real prospect of success, I do not consider that it is appropriate for me to give permission as a matter of discretion. The 1922 conveyance is a "one-off" document. It has no precedent value. I have construed it as a whole in the light of the factual matrix of the time, as revealed by the documentary evidence which the parties have thought fit to submit, but not to challenge. In these circumstances, I think it is appropriate that, given the limited resources of the Court of Appeal, that court should decide whether it wishes to hear an appeal from my decision.

35. I should say that, as to the other limb of the rule, although the development contemplated undoubtedly has commercial value, or even public notoriety, the claim in this case is in my judgment not such as to supply a compelling reason for an appeal if, as a matter of discretion I do not think it right to give permission on the basis that there is a real prospect of success.

Conclusion

36. I therefore refuse permission to appeal. Mr Dray asks for an extension of time in which to file an appeal notice. I will not spend time on this, which appears not to be opposed. The claimant may have until 4 pm on 17 November 2020 to file its appellant's notice. This is 21 days from today, and in fact 35 days from the date of hand-down of the judgment. I should be grateful to receive a minute of order for approval.