Neutral Citation Number: [2023] EWCA Civ 589

Case No: CA-2022-001763
CA-2022-001995

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
HIS HONOUR JUDGE JARMAN KC
[2022] EWHC 2186 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/05/2023

Before :

LORD JUSTICE LEWISON
LORD JUSTICE BAKER
and
LADY JUSTICE ELISABETH LAING

- -

Between :

ANDREW MCCARTHY	**Appellant**
- and -	
(1) WILLIAM ALLAN JONES	
(2) LUDLOW STREET INVESTMENT CORP	**Respondents**

- -

Hugh Sims KC and George McPherson (instructed by **Blake Morgan LLP**)
for the **Appellant**
Richard Salter KC and Fraser Campbell (instructed by **Burges Salmon LLP**)
for the **Respondents**

Hearing dates : 17&18/05/2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 25/05/2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction

1. In a judgment handed down on 17 August 2022 following a two day trial, HHJ Jarman KC awarded Mr Jones the sum of €1,025,000 by way of damages for breach of contract. The contract in question was one which was made between Mr Jones and Mr McCarthy in 2008, by which Mr McCarthy was to obtain ownership of a yacht, and Mr Jones was to acquire the beneficial interest in a villa in Mallorca to which Mr McCarthy held the legal title, together with a mooring in mainland Spain. It was envisaged at the time that Mr Jones would sell the villa in due course. As part of the arrangements legal title was to remain with Mr McCarthy and he granted a power of attorney to Sr Serra, a Spanish lawyer, enabling the latter to sell the villa. The judge found at [71] that the reason why the power of attorney was signed was to enable Mr Jones to direct a sale of the villa at an optimal time.

2. The judge found that Mr McCarthy was in breach of that contract in a number of different ways which he summarised at [100]. First, in 2013 he revoked the power of attorney. Second, in 2014 he reinstated the power of attorney but in favour of a Mr Proctor rather than Mr Jones; and third, in 2016 he sold the villa to a third party.

3. It is common ground that the result of the 2008 agreement was that (looking at the matter through the eyes of the law of England and Wales) Mr Jones became entitled to the beneficial interest in the villa despite Mr McCarthy's retention of the legal title. Whether the existence of such an interest would be recognised as a matter of Spanish law was not explored either at trial or on this appeal. We were asked (rather unsatisfactorily) to assume that the law of England and Wales applied. What was in issue at the trial was whether Mr Jones had ceased to be entitled to that beneficial interest; or was estopped from denying that he had. The judge found against Mr McCarthy on both issues; and, with the permission of Asplin LJ, Mr McCarthy appeals.

The principal actors

4. Mr Jones is a businessman who became semi-retired in 2007. As well as his various business interests, he owned a number of properties including the villa which is the subject of this dispute. Mr McCarthy was a long-standing friend and business associate of Mr Jones until they fell out in 2013. Mr Proctor was also a long-standing friend and business associate of Mr Jones with whom, amongst other things, he jointly bought a property in Dubai. Mr Jones owed money to Mr Proctor at the time of the trial, although the precise amount of the debt was in dispute.

5. At the time of the events in question Mr Mallett was described as Mr Jones' "right hand man" and was authorised to sign contracts on his behalf. Mr Mallett and Mr Jones have since also fallen out. By the time of the trial Mr Mallett appears to have aligned himself with Mr McCarthy.

6. Both Mr Jones and Mr McCarthy gave evidence at trial. Mr Proctor did not. Nor did Mr Mallett. In general terms the judge found Mr McCarthy to be an unreliable

witness, for a number of reasons that he gave in his judgment. On the other hand, he accepted Mr Jones' evidence as being on the whole reliable. The judge's evaluation of the witnesses is not challenged on this appeal and does have a bearing on the live issues; not least because the documentary record is patchy.

The pleadings

7. Mr McCarthy's pleaded case was that between 2010 and 2012 Mr Jones, Mr McCarthy and Mr Proctor made a series of oral agreements. By 2012 there was a tripartite agreement between Mr Jones, Mr McCarthy and Mr Proctor that Mr Jones' beneficial interest in the villa would be transferred to Mr Proctor as security for the debt owing to him by Mr Jones; and that the proceeds of any sale of the villa would be applied in discharge of that debt; that "Mr Jones and/or Mr Proctor" would continue to fund monthly payments under the mortgage; and that Mr Jones would pay Mr McCarthy a loss which the latter had suffered on the sale of the yacht.

8. The second way in which the pleaded case was put was that in so far as Mr Jones had any enforceable beneficial interest in the villa, by April 2016, he had voluntarily surrendered it to Mr Proctor as security for the debt. How this surrender was said to have come about was not pleaded.

9. The third way the case was pleaded was the allegation that during a telephone call in early June 2016 between Mr Jones and Mr Proctor they orally agreed that the payment of €950,000 to be made by Mr McCarthy to Mr Proctor would be applied by Mr Proctor in or towards discharge of Mr Jones' debt to him "so that Mr McCarthy would acquire beneficial ownership" of the villa.

10. In *Boake Allen Ltd v HMRC* [2006] EWCA Civ 25, [2006] STC 606 Mummery LJ said at [131]:

> "While it is good sense not to be pernickety about pleadings, the basic requirement that material facts should be pleaded is there for a good reason—so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial. In my view, the fact that the nature of the grievance may be obvious to the respondent or that the respondent can ask for further information to be supplied by the claimant are not normally valid excuses for a claimant's failure to formulate and serve a properly pleaded case setting out the material facts in support of the cause of action. If the pleading has to be amended, it is reasonable that the party, who has not complied with well known pleading requirements, should suffer the consequences with regard to such matters as limitation."

11. This court added to that in *Prudential Assurance Co Ltd v HMRC* [2106] EWCA Civ 376, [2017] 1 WLR 4031 at [20]:

> "Our procedural system is and remains an adversarial one. It is for the parties (subject to the control of the court) to define the issues on which the court is invited to adjudicate. This function is the purpose of statements of case. The setting out of a party's case in a statement of case enables the other party to know what points are in issue, what documents to disclose, what evidence to call and how to prepare for trial. It is inimical to a fair hearing that a party should be exposed to issues and arguments of which he has had no fair warning. If a party wishes to raise a new point, he should do so by amending a statement of case. We were told that by the time that skeleton arguments for trial were served each party would know what points were in issue. We do not regard that as sufficient."

12. Neither of these principles were affected by the subsequent appeal in each case. Lord Phillips MR said much the same thing in *Loveridge v Healey* [2004] EWCA Civ 173, [2004] CP Rep 30 at [23]; as did Dyson LJ in *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041 at [21]. Likewise in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24, [2020] Bus LR 1196 the Supreme Court said at [242]:

> "In the adversarial system of litigation in this country, the task of the courts is to do justice between the parties in relation to the way in which they have framed and prosecuted their respective cases, rather than to carry out some wider inquisitorial function as a searcher after truth."

The events of 2010

13. By the time of the trial the emphasis of Mr McCarthy's case had shifted. In his closing submissions Mr McPherson, appearing for Mr McCarthy, submitted that the central issue was whether there was an agreement in December 2010 that Mr Jones should transfer his beneficial interest in the villa to Mr Proctor. He did not persist in the pleaded allegation that there was some subsequent agreement or voluntary surrender of Mr Jones' beneficial interest. Nor did the closing submissions advance the argument that any acquisition of a beneficial interest by Mr Proctor in 2010 was by way of security only.

14. Thus, at trial it was argued that the agreement was recorded in an email dated 9 December 2010 from a Mr Mallett to Sr Serra's assistant and which was copied to both Mr Jones and Mr Proctor. The email read:

> "We have agreed a property swap with Brian [Proctor] such that Brian now is the beneficial owner of number 22, the property that Toni [Serra] dealt with as part of a property swap with [Andrew] McCarthy.
>
> We have agreed that Brian will acquire the property (at a value of €1,200,000 and the latent debt €739,000 to La Caixa) in

> exchange for Brian's beneficial interest in a property in Dubai, apartment 3401, Saba II Jumeirah Lake Towers. Brian has no wish to transfer the title into his own name and will want to [leave] the property registered in Andrew's name but Brian will be responsible for the outgoings with immediate effect. Can you ask Toni what we need to do to record this transfer?'"

15. Mr Jones' case, which the judge accepted, was that this neither was, nor evidenced, a concluded agreement; but was no more than one of the proposals which were under discussion at the time. Ground 1 of the appeal is an attack on the judge's conclusion.

16. It is not suggested that the email is itself either a disposition of an equitable interest or a contract for such a disposition. Rather it is said to record such a contract. The contract, if that is what it was, must therefore have been oral as the pleading alleged.

17. Where a contract is contained in a written document, the document is interpreted without regard to the parties' subjective understanding of what they have agreed. Where, by contrast, the alleged contract is oral then the parties' subjective understanding is admissible, at least to the extent of deciding whether the parties reached a concluded agreement, and if so, what were its terms. The judge's conclusion on those questions is one of fact: *Carmichael v National Power plc* [1999] 1 WLR 2042; *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 at [82] – [83]. There is a heavy burden on an appellant seeking to challenge a trial judge's finding of fact, especially where he has heard oral evidence. The appeal was very well argued on both sides, and I had to remind myself from time to time that we were not hearing closing submissions after trial, but submissions on an appeal against the judge's findings.

18. I summarised the principles applicable to such appeals in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29 and *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48. In the first of these cases I said at [114] (omitting citations of authority):

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. … The reasons for this approach are many. They include
>
> (1) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> (2) The trial is not a dress rehearsal. It is the first and last night of the show.
>
> (3) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

> (4) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> (5) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> (6) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

19. In the second, I said at [2]:

> "… the following principles are well-settled:
>
> (i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> (ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> (iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> (iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> (v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> (vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

20. Those principles have since been applied by this court in other cases: *Kynaston-Mainwaring v GVE London Ltd* [2022] EWCA Civ 1339; *Re T (Fact-Finding: Second Appeal)* [2023] EWCA Civ 475.

21. Mr Sims KC pointed to a number of features in the language of the email itself and in the parties' subsequent conduct which were consistent with the existence of a binding agreement under which Mr Jones agreed to transfer his beneficial interest in the villa to Mr Proctor, either outright or by way of security for the loan. Although Mr Sims submitted that it did not matter for the purposes of this appeal whether Mr Proctor acquired the beneficial interest in the villa outright or acquired no more than a security interest in it, if the question is (as in my judgment it is) whether the parties reached a concluded agreement, the nature of the agreement is of considerable importance. The email itself does not say anything about the capacity in which Mr Proctor was to acquire the villa; and it is not obvious why someone with no more than a security interest would be responsible for the outgoings.

22. First, he says the email recorded an agreement between Mr Jones and Mr Proctor in unequivocal terms ("We *have* agreed...") and had immediate effect ("Brian *now is* the beneficial owner of number 22"). The question at the end of the email ("Can you ask Toni what we need to do to record this transfer?") does not in any sense undermine the fact of the agreement. On the contrary, it emphasised the parties' common intention that their agreement should have binding legal effect; and merely needed to be put into a more formal document. Second, he says, the email provided contemporaneous evidence of an agreement to assign an interest in one property (the villa) for an interest in another (the Dubai property). Third, the assertion that there was a concluded agreement is supported by another contemporaneous email sent by Mr Mallett to La Caixa (the bank which was the mortgagee).

23. So far as subsequent conduct is concerned, Mr Sims asserts that Mr Proctor actually surrendered his 50 per cent beneficial interest in the Dubai property. But the judge made no finding to that effect; and Mr Sims did not show us sufficient evidence upon which we could have made that finding of fact. He also says that Mr Proctor contributed €364,275 towards repayment of the La Caixa mortgage. The evidence for that is recorded in a spreadsheet prepared in May 2016. But the difficulty with that argument is that the contributions are presented as increasing Mr Jones' debt to Mr Proctor which is inconsistent with Mr Proctor having become the beneficial owner of the villa along with its "latent debt" and also inconsistent with the email stating that Mr Proctor would take over the outgoings with immediate effect. Indeed, in an email to Mr Jones on 1 June 2016 Mr Proctor asserted that he "had to take on the mortgage" because Mr Jones unilaterally stopped paying thereby "increasing your overall debt to me". I do not consider that the subsequent conduct on which Mr Sims relied adds materially to his points about the language of the email.

24. Mr Jones' skeleton argument (prepared by Mr Campbell), on the other hand, pointed to a number of features in the email and in the parties' subsequent conduct which were consistent with the judge's finding of fact. He relied, in particular, on Mr Jones' continuing contributions to the mortgage; and, in the case of Mr Proctor, to the latter's claim that his contributions increased Mr Jones' debt to him. He also pointed to the fact that in 2016 Mr Jones attempted to remortgage the villa in the name of his wife; and an email from Mr Jones to Mr Proctor in May 2016 in which he asserted that he

retained "the equity" in the villa. I agree that these features are inconsistent with the concluded agreement now alleged by Mr McCarthy.

25. I agree with both Mr Sims and Mr Campbell that there are features of the email itself that point either way. But the question for an appeal court is not whether we would have made the finding that the judge did, but whether his conclusion is one that no reasonable judge could have reached.

26. It is also important to have in mind the pleaded case. The pleaded case was that there was a tripartite agreement by which Mr Proctor was to acquire a security interest in the villa. The email bears almost no resemblance to an agreement of that kind. First, it is not tripartite, and no copy of the email was sent to Mr McCarthy. Second, it says nothing about any debt owed by Mr Jones to Mr Proctor. Third, it says nothing about any security interest. Fourth, what the email contemplated was an outright exchange of property ("a property swap") under which Mr Proctor was to take the beneficial interest in the villa in exchange for his share of a property in Dubai. That is inconsistent with a mere security interest. Fifth, Mr Jones was to receive Mr Proctor's beneficial interest in the Dubai property but there is no evidence that that ever happened. Sixth, nothing was said about Mr McCarthy's alleged loss on the yacht (which in any event the judge rejected on the evidence).

27. There is one further telling piece of evidence. It is common ground that as part of the initial agreement between Mr McCarthy and Mr Jones back in 2008, Mr McCarthy granted a power of attorney to Sr Serra to be exercised on Mr Jones' instructions. Mr McCarthy subsequently revoked that power of attorney. In 2013 Mr McCarthy and Mr Jones were engaged in a different dispute relating to their business dealings. In connection with the resolution of that dispute they entered into a hand-written agreement on 11 February 2014 ("the Park Plaza agreement"). Under the terms of that agreement Mr McCarthy agreed to "reinstate the irrevocable Power of Attorney" over the villa. Since the agreement was to "reinstate" the power, the obvious interpretation was that the power of attorney would be exercisable on the same basis as the original power; that is, on the instructions of Mr Jones. The judge so found at [85]. It follows from this that neither Mr McCarthy who was party to that agreement nor Mr Proctor (who was not) could have supposed that Mr Jones had given up any part of his beneficial entitlement to the villa in 2010. Mr Sims did suggest that the power of attorney was further evidence of Mr Proctor having acquired a security interest in the villa. But no particular reliance seems to have been placed at trial on the power of attorney as itself amounting to or evidencing a security interest, apart from the contention that the purpose of reinstatement as contemplated by the Park Plaza agreement was to confer the power of attorney on Mr Proctor, which the judge rejected on the facts.

28. In addition, the power of attorney in favour of Mr Proctor was granted by Mr McCarthy (as legal owner of the villa) and without Mr Jones' knowledge at the time. It could not, therefore, of itself have conferred on Mr Proctor a security interest over Mr Jones' beneficial interest in the villa.

29. The judge said at [82]:

> "Whilst it is possible that Mr Jones may have agreed to transfer the beneficial interest in the villa to Mr Proctor while the debt

> remained in dispute, for example by way of security, in my judgment that is not very likely. Taking all these matters into account, in my judgment it is more likely that Mr Mallett's email refers to a proposal which was not finalised rather than evidencing a transfer."

30. The judge's use of the phrase "not very likely" became a peg on which Mr Sims, at least in the skeleton argument, hung the submission that the judge had applied too high a standard of proof. That is precisely the sort of minute textual dissection of a judgment that is deprecated in the authorities. Moreover, the judge's conclusion was also expressed in the conventional way in the second quoted sentence. In my judgment it is fanciful to suggest, on the basis of a single word, that an experienced judge lost sight of the civil standard of proof. Mr Sims did not press this point in oral argument.

31. In the light of his acceptance of Mr Jones' oral evidence and his findings about the parties' subsequent conduct, I consider that the judge's finding was one that was open to him. Moreover, as Mr Salter KC submitted, the fact that the parties put the matter into the hands of a lawyer for advice also tends to show that there was no concluded agreement; and that some formalities would need to be satisfied. The judge was entitled to find that there was no agreement; and what was recorded in the email was no more than one proposal which was under discussion.

32. As I have said, the second way in which the pleaded case was put was not pressed in closing submissions; and I do not therefore consider that the judge can be criticised for not having specifically addressed it. Moreover, there is no document which records or evidences such a surrender; and when a very general question was put to Mr Jones in cross-examination to the effect that he had agreed that Mr Proctor could take steps to sell the villa and use the proceeds to repay the loan, Mr Jones denied that any such agreement had been made. The judge accepted Mr Jones' evidence.

33. The third way in which the pleaded case was put was the allegation that during a telephone call in early June 2016 between Mr Jones and Mr Proctor they orally agreed that the payment of €950,000 to be made by Mr McCarthy to Mr Proctor would be applied by Mr Proctor in or towards discharge of Mr Jones' debt to him "so that Mr McCarthy would acquire beneficial ownership" of the villa. Mr McCarthy was not a party to the conversation although he said in evidence that he had overheard Mr Proctor's part of it. Mr Jones denied that any agreement was reached; and under cross-examination Mr McCarthy did not press the allegation that there had been an agreement. Thus, the judge found at [96] that no agreement was achieved. That, too, was a finding that the judge was entitled to make.

34. It follows from the judge's factual findings the factual foundation upon which Mr Sims attempted to build a legal edifice are unsound. There was no agreement or assurance. The email of 9 December 2010 was no more than a proposal which was not progressed. There was, therefore, no trust declared for value; no specifically enforceable contract; no arrangement or understanding capable of giving rise to a common intention constructive trust and no sufficiently clear assurance to give rise to a proprietary estoppel. Thus, Mr Proctor did not acquire beneficial ownership of the villa, either outright or by way of security. I should also add that since the case

involves an interest in land, consideration of the requisite formalities (either under the law of England and Wales or that of Spain) might have been required.

Estoppel by convention

35. Ground 2 asserts that Mr Jones is estopped from disputing that the beneficial interest in the villa had passed to Mr McCarthy. The pleaded estoppel was that Mr Jones was estopped from asserting that he had *any* beneficial interest in the villa. The estoppel relied on is an estoppel by convention arising out of dealings between Mr Jones, Mr McCarthy and Mr Proctor in May and June 2016. The pleaded case relies first on the alleged agreement of June 2016. But since the judge found that there was no such agreement, that allegation can be discarded. Second, the plea relies on Mr Jones' failure to contest the existence of his debt to Mr Proctor; his failure to contest the existence of Mr Proctor's beneficial interest in the villa and/or Mr McCarthy's beneficial interest in it.

36. There is no dispute about the applicable law which is authoritatively summarised by Lord Burrows in *Tinkler v HMRC* [2021] UKSC 39, [2022] AC 886 at [45], approving with minor modifications Briggs J's summary of principle in *HMRC v Benchdollar Ltd* [2009] EWHC 1310 (Ch); [2010] 1 All ER 174. I have made the modification in the italicised part of the quotation that follows:

> "In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings … are as follows. (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. *There must be words or conduct which crosses the line between the parties from which the necessary sharing may be inferred.* (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

37. The judge referred to that statement of principle but rejected Mr McCarthy's case on the facts. Before considering his conclusion, it is necessary to set out the relevant email traffic.

38. The sequence of events begins in March 2016. On 14 March Mr Proctor emailed Mr Jones to tell him that Mr McCarthy wanted the mortgage on the villa paid off as he

was buying a house in Mallorca. Mr Proctor said that the only option was for Mr Jones to pay off the mortgage. On 17 March he emailed again, reporting that Mr McCarthy would buy the villa for €1 million, adding "Al this is your call". Mr Jones replied later that day saying that his plan was "to look at sorting out a mortgage a bit quick and get the thing sold".

39. On 2 May 2016 Mr McCarthy told Mr Proctor that €950,000 was the amount he was comfortable paying Mr Proctor for "release of the power of attorney." Mr Proctor promptly forwarded that email to Mr Jones saying "I need a deal done either way". On 4 May Mr Jones replied to Mr Proctor: "Its €1m for me to get out as we agreed and no less. If you want to swallow on the €50k then that's another matter." Later that day Mr Proctor replied to Mr Jones: "I need to be paid, if you pay what I am owed 850k€ +- by Friday, if I not I will sell to Maccarthy for 950k€, for you to say to me to swallow 50k€ is a joke." On 6 May Mr Jones replied to Mr Proctor: "This was never your house to sell from under me. The POA was put in your name to protect me against Mr McCarthy which in turn was always going to protect your interest. McCarthy might be comfortable at €950k but I am not. The deal which we agreed was €1m and nothing less." Mr Proctor's response that day was "...it is the only on [sic] offer to get me paid now I don't Care who it is I need money now...You pay what you owe me in full now..."

40. On 8 May Mr Jones said that he would head over to Mallorca "so that we can sort this out face to face". Mr Proctor replied "that's fine but the money from Maccarthy Will be paid next week." Mr Jones responded on the following day: "My thinking is that everything is up for discussion but it does revolve around my retaining the equity in no 22." Mr Proctor's initial response was that he was not going to be left in a situation where Mr Jones paid part now and part later; and followed that up with another email on 14 May in which he said: "One minute you say sell to Maccarthy, now you want to retain the equity. The property has passed to Mac for 950k€... Then we agreed that you would give me 22 to Secure my debt, but you decided to stop paying the mortgage so it was left to me to pay, all the time increasing my [debt] … the repayment of the [debt] plus interest is more than €950k I will see you next week or Skype."

41. On 16 May Mr Jones emailed Mr Proctor saying: "Not sure how you are calculating the numbers. If you can set these out on a spreadsheet that would help...To begin with please send me proof that McC has paid." In response Mr Proctor sent Mr Jones a spreadsheet. That spreadsheet included both what Mr Proctor claimed to be owed in respect of the Dubai property and also his contributions to the mortgage repayments on the villa as increasing Mr Jones' debt, but at the same time deducted the sum of €950,000 paid by Mr McCarthy. On 31 May Mr Jones raised a number of queries about the detail of the spreadsheet but made no comment on the deduction of €950,000. Mr Proctor responded to Mr Jones' queries on the following day. That produced a response from Mr Jones on 1 June 2016: "all this toing and froing is going to get us no where so I'm here on the island, why don't we meet up today and look to sort things out." A meeting was arranged for the morning of the following day.

42. The email traffic stops at that point, and there appears to have been no evidence before the judge about what happened at the meeting (or, indeed, whether it actually took place). Although Mr McCarthy said in evidence that he had overheard part of a telephone call between Mr Jones and Mr Proctor in which the amount of Mr Jones' debt was agreed, the judge did not accept his evidence in that regard.

43. Mr McCarthy paid Mr Proctor on or about 30 August 2016, some three months later.

44. The judge concluded at [96]:

> "In my judgment the factual scenario falls short of the required express sharing of assumptions, a conveyance of expected reliance, of reliance, or of an unjust element. It is clear that in his last email in this chain, Mr Jones stated that all the toing and froing was going nowhere, and suggested a meeting to which Mr Proctor agreed. However, if an agreement was then reached with Mr Jones, it is surprising that this is not recorded. As that was the end of the email chain, it is more likely that no agreement was achieved and that Mr McCarthy pressed on to by-pass Mr Jones as he had set out to do and to come to an agreement with Mr Proctor only, as he says in his email to the lawyers. As Mr Jones did not consent to this, it is not unjust that he should now seek damages from Mr McCarthy."

45. As I have said, Mr Proctor did not give evidence. So, there was no direct evidence about what he believed or assumed. If the judge were to come to any conclusion about what he believed or assumed, it could only be a matter of inference. One pointer against inferring that Mr Proctor believed that he had the right to sell the property is the email exchange between him and Mr Jones in March. If Mr Proctor had believed that he could sell the property without the agreement of Mr Jones, it is difficult to see why he considered that the only option was for Mr Jones to pay off the mortgage; or why the sale was Mr Jones' call. Had he had the right to sell, then he (Mr Proctor) could have sold the property and paid off the mortgage out of the proceeds. By the time matters reached May 2016 Mr Jones was asserting that Mr Proctor had no right to sell the villa from under him and that any agreement would depend on his retaining the equity. Mr Proctor cannot have believed that Mr Jones was agreeing that Mr Proctor had the right to sell against his wishes. Mr McCarthy made a witness statement, but that statement does not descend to any detail about what he believed or assumed either. In cross-examination, however, he said that Mr Jones had sold the villa to Mr Proctor; that Mr Proctor owned the villa and the equity in it, and that he did not have a charge on the house. He, at any rate, does not appear to have believed that Mr Proctor had a security interest. He could not have got the impression from anything that Mr Jones said or did that Mr Jones had sold the villa to Mr Proctor when Mr Jones had said that his plan was to remortgage the villa; that Mr Proctor had no right to sell the villa from under him and that any discussions that might take place would revolve around his retaining (not acquiring) the equity. Although it was suggested that Mr Jones' reference to "the equity" might have referred to a mortgagor's equity of redemption, that seems to me to be a meaning which only a Chancery lawyer could ascribe to it.

46. Mr Jones said both in his witness statement and in his evidence that he never authorised the sale of the villa. He also gave evidence, which the judge accepted, that later on he and his wife had a meeting with Mr Proctor and asked him for an explanation of what had happened and why "to which Mr Proctor replied that he saw his chance and took it". That is not the phrasing of someone who believed that he had the legal right to do what he did. In my judgment the judge was entitled to find that the alleged shared assumption had very shaky foundations.

47. The case on estoppel rested heavily on Mr Jones' failure to protest. A failure to react or protest can give rise to an estoppel but only where that failure implies a manifestation of assent: *The August Leonhardt* [1985] 2 Lloyd's Rep 28 at 34, cited with approval in *Tinkler* at [36]. Mr Jones' actions as revealed by the email traffic are consistent with his assertion of his interest in the property; and inconsistent with his assent to what Mr Proctor was proposing. What was put to him in cross-examination was:

> "Q. But at no point after this [i.e. the email of 14 May asserting that the property had passed to Mr McCarthy] do you assert that you have an equity interest in the property?
>
> A. So why do you think I need to do that when it's been previously stated, and I've made the point clear in recent times that I wanted to retain the equity in the property."

48. I consider that there is considerable force in that answer. If someone asserts their rights, I do not consider that they are bound to continue to assert those rights every time they are infringed; still less where on the face of it Mr Jones was presented by Mr Proctor with what appeared to be a fait accompli.

49. Next is the question of reliance. Reliance is itself a question of fact. The communications in question were communications between Mr Jones and Mr Proctor to which Mr McCarthy was not a party. As he himself said in his witness statement he was not aware of the precise details of the discussions. It is therefore difficult to see how Mr McCarthy could have relied on anything said or done by Mr Jones, except in so far as it was relayed to him by Mr Proctor. But there was no real evidence of what Mr Proctor told him. Nor was there any evidence from Mr Proctor saying that he relied on any particular assumption or statement made by Mr Jones; or even that he relied on Mr Jones' silence. The expression of exasperation in his email to Mr Jones of 14 May 2016 over Mr Jones' change of position suggests the contrary. Likewise, Mr McCarthy did not say that he relied on anything said or done by Mr Jones. Mr Sims thus could not point to any direct evidence of reliance. It is no doubt possible, on strong facts, to infer reliance even in the absence of direct evidence. But in this case the judge made two findings of fact which point against reliance. First, he said at [34]:

> "In July 2014 Mr McCarthy emailed Mr Proctor with options to "by pass the hoodlums" by which he meant Mr Jones and Mr Mallett. In December 2014, they agreed that Mr Proctor would pay Mr McCarthy €150,000 and Mr McCarthy would transfer his rights and obligations under the agreement to Mr Proctor and reinstate the power of attorney in relation to the villa in Mr Proctor's favour (the December 2014 agreement). It was recorded that Mr Proctor was the owner of the villa and the mooring. This agreement was not notarised. It is not in dispute that Mr Jones was not a party to this agreement or that Mr McCarthy did not discuss it with him."

50. Second, the judge said at [86]:

> "Mr McCarthy also accepts that he then decided to cut out Mr Jones and deal directly with Mr Proctor. He added, for the first time, that this direct dealing was suggested by Mr Mallett. In my judgment this is inconsistent with his email in July 2014 to Mr Proctor where he referred to Mr Jones and Mr Mallett as hoodlums and to his intention to by pass them. The email also refers to Mr McCarthy's impression that the "Mallett/Jones gang is just as content to shaft you as they did me." When he then emailed Mr Proctor on 29 July 2016, copying in Sr Serra, confirming their agreement, he did not copy in Mr Jones or Mr Mallett or refer to either of them."

51. So, two years before the representations or assumptions now relied on Mr McCarthy was proposing to act independently of Mr Jones and behind his back. It is true that Mr Proctor forwarded the July 2014 email to Mr Mallett who in turn forwarded it to Mr Jones. But it was not shown that Mr McCarthy knew that. So, looking at the position from Mr McCarthy's perspective, the judge was entitled to find that Mr McCarthy was proposing to act independently of Mr Jones. In my judgment the judge's conclusion that reliance had not been established on the facts was one that was open to him. If reliance is not established, the estoppel claim fails.

Quantum

52. Ground 3 proceeds on the basis that the judge was not wrong to find that Mr McCarthy was in breach of contract. The argument is that Mr Jones ought to give credit for the amount that Mr McCarthy paid to Mr Proctor because it went in diminution of the debt that Mr Jones owed to Mr Proctor. The judge's findings on this point were as follows. First, as mentioned, the judge found that no agreement was reached between Mr Jones and Mr Proctor. Although Mr Proctor asserted that the debt exceeded €950,000, Mr Jones disputed that figure and asserted that the debt at that time was less than half that amount. The judge was not in a position to determine the precise figure. Second, he said at [113]:

> "The issue then arises as to whether there should be deductions from the damages. The first potential deduction is the amount of the debt which Mr Jones admits he owes to Mr Proctor. In my judgment there should not. That is a matter between him and Mr Proctor. I have found that Mr Jones did not consent to the sale to Mr McCarthy and that the amount of the debt remains unresolved. Although Mr Jones put a figure on the debt in his evidence, he made clear that no precise calculation has been undertaken, and that it involves complex business dealings between him and Mr Proctor. I accept that evidence."

53. Thus, the judge was not in a position to find on the facts that the debt was equal to or exceeded €950,000. Although it is possible that some of the €950,000 went in diminution or extinction of Mr Jones' debt, it is not possible to say that it all did. Since Mr Proctor did not give evidence, and Mr McCarthy did not take up the burden of proving the exact amount of the debt, I do not think that the judge can be fairly criticised for not plucking a figure out of the air.

54. Moreover, the judge found that there was no binding agreement between Mr Jones and Mr Proctor about the amount of the debt; and since Mr Proctor was not a party to the action, it follows that even if the judge had been able to find a figure, Mr Proctor would not have been bound by it.

55. Mr Sims argued that none of that matters. On the basis that Mr Proctor had a security interest in the villa and exercised that interest by, in effect, selling the beneficial interest to Mr McCarthy, he was in the same position as a mortgagee exercising a power of sale. Where a mortgagee exercises a power of sale, he is entitled to use the proceeds of sale in or towards discharge of the debt secured by the mortgage, with any surplus going to the mortgagor. As far as the purchaser is concerned, the state of account between mortgagor and mortgagee is irrelevant. Since Mr Jones acknowledged that he owed *some* money to Mr Proctor, the precise amount was none of Mr McCarthy's concern.

56. The fundamental flaw in the argument is that Mr Proctor did not have a security interest in the villa. Since the appeal fails both on agreement and estoppel, the question of quantum must be approached on the basis Mr Proctor was a stranger to the villa. Thus, in paying him Mr McCarthy falls foul of the basic principle that if A owes money to B, an unauthorised payment to B by C does not discharge A's debt unless A subsequently ratifies the payment, or C is compelled to pay. The principle was summarised by Fox LJ in *Electricity Supply Nominees Ltd v Thorn EMI Retail Ltd* (1991) 63 P & CR 143,148:

> "If a person makes a voluntary payment intending to discharge another's debt, he will only discharge the debt if he acts with that person's authority or the latter subsequently ratifies the payment. Consequently if the payee makes the payment without authority and does not obtain subsequent ratification he normally has no redress against the debtor."

57. The principle so stated was applied by this court in *Crantrave Ltd v Lloyds Bank plc* [2000] QB 917. Pill LJ went on to explain part of the policy underlying that principle. He said at 924:

> "In relation to a banker, the principle applied appears to me to be soundly based. It is a startling proposition that bankers can pay sums to a third party out of a customer's account because they believe the customer to be indebted to that third party. I see no difference in principle between a judgment debt and other perceived debts. As against a customer, a contrary principle would place the bank in a position to act as debt collector for creditors of the customer. It would be for a customer who contested a creditor's claim then to seek relief. The bank could decide in what priority the claims of creditors were to be met out of the sums in the account, without the customer having recourse against the bank."

58. Mr Sims submitted that the principle thus established required modification in the light of the decisions of the Supreme Court in *Swynson v Lowick Rose llp* [2017] UKSC 32, [2018] AC 313 and *Tiuta International Ltd v De Villiers Surveyors Ltd*

[2017] UKSC 77, [2017] 1 WLR 4627, although we were not taken to those cases in any detail. But the issue in those cases was whether a benefit received by a claimant arising out of the loss for which the claim was made was to be regarded as a collateral benefit (which would not be taken into account in assessing the loss) or a direct benefit (which would). The point in *Crantrave*, however, is a different one. The point in that case is not whether any benefit received by the voluntary payment is or is not collateral. It is whether the debtor receives any benefit at all. The answer to that question is "no".

59. In addition, Mr Sims accepted that if the true amount of Mr Jones' debt at the relevant time was of the order of €400,000 (as Mr Jones asserted) rather than the amount asserted by Mr Proctor, any possible credit would be limited to the lower sum. But Mr McCarthy made no real attempt to prove the true amount of the debt; and there is no challenge to the judge's conclusion that on the basis of Mr Jones' evidence (which he accepted) he was unable to do so. Mr Sims suggested that this court might remit that issue for an inquiry. But no inquiry was sought at trial and in my judgment, it is far too late to ask for one now.

60. Ground 4 asserts that the judge wrongly assessed the quantum of damages. The judge said at [107]:

> "The normal measure of damages where a seller fails to transfer land in breach of contract is the market value at the time for completion less the contract price. The resale price obtained by a seller has been taken as evidence of the market price at the time due for completion (see McGregor on Damages, 21st edition, paragraph 27-006). In this case, the consideration to be received by Mr McCarthy was the yacht, which he has received and sold and retained the proceeds."

61. Mr Sims does not quarrel with the judge's statement of the normal measure of damages, nor with his assessment of market value at the date of the breach. He took the latter as €1.1 million which is the price that Mr McCarthy achieved on a sale to a third party. Mr Sims' argument was that the judge failed properly to consider the counter-factual; that is to say what would have happened but for Mr McCarthy's breach of contract. In considering that question what matters is what Mr Jones would have done.

62. Mr Jones' case was that he would have re-mortgaged the property with Mrs Jones becoming the legal owner of the villa, Mr Jones having decided to keep the property in the Jones family as opposed to selling it. The judge found that a fresh mortgage would have been granted and taken for that purpose. But the proposal was that Mrs Jones would buy the villa from her husband for €850,000. It follows, so the argument runs, that in the counter-factual, Mr Jones would not have received €1.1 million; he would only have received €850,000. The fact that the villa might have achieved a value of €1.1 million if sold to an unrelated third party at that date, is irrelevant. That is not what Mr Jones had decided to do. The judge rejected that submission. He said at [112]:

> "Whether the villa would then have been sold by Mr Jones or his wife or kept in the family, upon sale by Mr McCarthy in

> November 2016, the loss to them in my judgment is its value at that time."

63. In my judgment the judge was correct to reject this argument. But for the breach the villa would have been at Mr Jones' disposal to do with it as he pleased. Let it be supposed that he intended to give it to his wife. The gift would have been a gift of a villa worth €1.1 million. In order to restore him to the position in which he would have been but for the breach, he would need to find a replacement villa also worth €1.1 million. On the particular facts of this case Mr Jones intended to sell to his wife a villa worth €1.1 million for €850,000. As the judge found, Mr Jones wished to keep the villa "in the family". Clearly, that would not have been an arms' length transaction as it would have involved a gift element of €250,000. In order to put Mr Jones into the position in which he could sell his wife a villa worth €1.1 million at an undervalue, he would need to find a villa worth that amount. He did not in fact receive the €850,000 his wife would have paid, so the judge was correct to take the starting point as €1.1 million. To be fair to Mr Sims, he did not press this point in oral argument.

64. Mr McCarthy says that the judge should have deducted the sum of €150,000 which, he said, was necessary expenditure on refurbishment to achieve the market value of €1.1 million. There does not appear to have been any expert evidence to that effect; and Mr McCarthy's case was based on his evidence that he had himself spent that sum. But he produced no invoices, nor even a schedule of what he said he had spent. The judge was not satisfied on the evidence that Mr McCarthy had spent that amount; so he declined to make that deduction. On the state of the evidence before the judge, I consider that his decision was open to him.

65. The judge deducted from the market value of the villa the amount that Mr Jones would have paid in order to acquire legal title to it. Mr Sims argues that the deduction was not enough. The expert evidence was that tax would have been payable at the rate of 6.5 per cent of the value of the villa at the date of the original agreement: i.e. in 2008, rather than its value at the date of completion. The question for the judge, therefore, was what the value of the villa was at that time. In the absence of any valuation evidence, that was not a straightforward task. The argument for Mr McCarthy was that the value of the villa was €1.5 million which was the apportioned purchase price mentioned in a draft purchase contract made between Mr Jones and Mr McCarthy. The judge rejected that argument on the ground that the draft purchase contract was neither signed nor did it govern the 2008 agreement. Rather, he took the value of what Mr McCarthy received in exchange for the beneficial interest in the villa, namely the yacht. The yacht was later sold for €1 million and the judge considered that that was "likely to be nearer to the purchase price of the villa at the time." He considered that the appropriate deduction for tax was €75,000, which (applying tax at the rate of 6.5 per cent) would imply a value of €1.15 million.

66. Although Mr Sims criticised the judge for not taking the apportioned purchase price in the draft contract as the measure of market value, the judge found a number of aspects of that draft "puzzling"; parts of it made "little if any sense" and other parts of it were inconsistent with the parties' undisputed agreement. I do not consider that it is a valid criticism of the judge that he declined to take the apportioned price as being a reliable indication of the market value of the villa. Next, Mr Sims says that if the judge was entitled to take the value of the yacht as representing the market value of the villa he ought to have taken the higher figure of €1.38 million which was the value

agreed by Mr McCarthy in July 2008 in connection with an abortive sale of the yacht to a Mr Bransgrove, rather than the €1 million that Mr McCarthy in fact achieved when he came to sell the yacht later that year. In the first place one premise underlying this submission is wrong. The judge did not take the value of the villa as being €1 million. If he had done that, the deduction for tax would have been €65,000 rather than the €75,000 that he allowed. Second, the judge had to do the best that he could, in the face of no expert evidence about value and very limited other material. If, as Mr Sims submits, the yacht was not an appropriate proxy then there would have been no reliable material on which the judge could have based any deduction. I do not consider that we can say that he was wrong in making the deduction that he did.

67. Finally, Mr Sims submits that the judge should have deducted the stamp duty that would have been payable if Mr Jones had remortgaged the villa in his wife's name. Although at [111] the judge recorded the submission made on Mr McCarthy's behalf that stamp duty would have been payable, we were not shown any evidence to that effect, nor any evidence about what the amount of any stamp duty would have been. I reject this submission.

Result

68. I would dismiss this appeal.

The costs appeal

69. In the course of the proceedings Mr Jones made an application against Mr Mallett in two parts. The first was an order under CPR 25.1 (1) (c) requiring him to preserve documents. The second was an order under CPR 31.22 permitting Mr Jones to rely on documents disclosed in the current action for the purpose of pursuing an action against Mr Mallett and Sr Serra. At the time Mr Jones was contemplating issuing separate proceedings against Mr Mallett for breach of a settlement agreement. The application was initially made without notice and was supported by a witness statement made by Mr Ward, Mr Jones' solicitor. In paragraph [27] of that statement Mr Ward said:

> "I respectfully request that the Court reserve the costs of this application for future determination in either these proceedings or the Mallett Breach Of Contract Claim."

70. An order was made giving effect to the application. Although Mr McCarthy was given liberty to apply to vary or set aside the order, he never did so. At the time of the application it was also envisaged that an application for third party disclosure in this action would be made against Mr Mallett, as Mr Ward said in his witness statement. But following the making of the order for the preservation of documents, Mr Mallett made voluntary disclosure; so the potential application for third party disclosure fell away. That exercise brought to light documents relevant to the action between Mr Jones and Mr McCarthy. At the interlocutory stage the costs of the application were reserved. Following the judge's hand down of his substantive judgment, the question arose who should pay those costs. Mr Jones asked for the costs to be borne by Mr McCarthy; alternatively that they be reserved to any claim which they might subsequently bring against Mr Mallett, which were the alternatives suggested by Mr Ward in his witness statement. Mr McCarthy argued that there should be no order for

costs as between him and Mr Jones. The judge decided that because the disclosure application "brought forth documents relevant to the present proceedings, it is appropriate to make the order primarily sought" by Mr Jones. He therefore ordered Mr McCarthy to pay those costs.

71. The grant of permission to appeal by Asplin LJ is headed with the Court of Appeal reference for this appeal as well as the substantive appeal, although she did not make any comment on the grounds of appeal in relation to the costs order.

72. In Mr McCarthy's skeleton argument it was asserted that the costs of such an application are governed by CPR part 46.1 which provides:

> "(1) This paragraph applies where a person applies—
>
> …
>
> (b) for an order under—
>
> (i) section 34 of the Senior Courts Act 1981; or
>
> (ii) section 53 of the County Courts Act 1984,
>
> (which give the court power to make an order against a non-party for disclosure of documents, inspection of property etc.).
>
> (2) The general rule is that the court will award the person against whom the order is sought that person's costs—
>
> (a) of the application; and
>
> (b) of complying with any order made on the application.
>
> (3) The court may however make a different order, having regard to all the circumstances, including—
>
> (a) the extent to which it was reasonable for the person against whom the order was sought to oppose the application; and
>
> (b) whether the parties to the application have complied with any relevant pre-action protocol."

73. Thus, the general rule would have resulted in Mr Jones paying Mr Mallett's costs of the application, unless the court decided to make a different order. But CPR Part 46.1 only deals with the position as between the applicant and the respondent to the application. It does not deal with costs as between the applicant and the other party to the underlying proceedings. This point was not pressed in oral argument.

74. An analogous situation is where an applicant seeks a *Norwich Pharmacal* order. In such a case the applicant will normally be ordered to pay the costs of the respondent to the application. But as Aldous LJ said in *Totalise plc v The Motley Fool Ltd* [2001] EWCA Civ 1897, [2002] 1 WLR 1233 at [29]:

> "*Norwich Pharmacal* applications are not ordinary adversarial proceedings, where the general rule is that the unsuccessful party pays the costs of the successful party. They are akin to proceedings for pre-action disclosure where costs are governed by CPR r 48.3. That rule, we believe, reflects the just outcome and is consistent with the views of Lord Reid and Lord Cross in the *Norwich Pharmacal* case [1974] AC 133, 176, 199. In general, the costs incurred should be recovered from the wrongdoer rather than from an innocent party."

75. That statement was approved by the Supreme Court in *Cartier International AG v British Telecommunications Plc* [2018] UKSC 28, [2018] 1 WLR 3259 at [12] in relation to an order for the blocking of internet sites for websites selling counterfeit goods. Lord Sumption said that it was not clear how the costs were actually dealt with in *Norwich Pharmacal* itself. It is true that it is not clear how the costs as between the applicant and HM Customs & Excise were dealt with by the House of Lords; but in the ultimate action for patent infringement the patentee recovered the costs it had incurred in making the *Norwich Pharmacal* application from the infringers by way of damages: *Morton-Norwich Products Inc v Intercen Ltd (No 2)* [1981] FSR 337. Thus the principle that the costs should ultimately be paid by the wrongdoer was, indeed, applied.

76. In the case of a *Norwich Pharmacal* application the application is usually made before the applicant knows the identity of the wrongdoers, so recovery of the costs of the application in the subsequent action as damages is the most effective route to recovery. But where, as here, the application is made in the course of proceedings to which the wrongdoer is already a party, I consider that to deal with the costs of the application as part of the general costs of the underlying action is entirely legitimate.

77. In principle, therefore, I consider that the judge was entitled to make the order that he did. The appeal therefore concerns the judge's exercise of the wide discretion that a first instance judge enjoys under CPR Part 44.3. As Wilson J (sitting in this court) put it in *SCT Finance v Bolton* [2002] EWCA Civ 56, [2003] 3 All ER 434 at [2]:

> "This is an appeal brought with leave of the single Lord Justice from the county court in relation to costs. As such, it is overcast, from start to finish, by the heavy burden faced by any appellant in establishing that the judge's decision falls outside the discretion in relation to costs conferred upon him under rule 44.3(1) of the Civil Procedure Rules 1998. For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion very widely."

78. Mr Sims argued with some force that Mr McCarthy was not a party to the application itself; he did not cause costs to be incurred in making it; and the issue was in effect between Mr Jones and Mr Mallett. It was unfair to require him to pay any part of the application against Mr Mallett. As regards that application he was in the same position as a third party against whom a third party costs order is sought. Such a person will not usually be liable unless he has in some way caused the costs to be incurred.

79. Mr Campbell, who argued this appeal on behalf of Mr Jones, pointed out that the trigger for the application was the discovery that Mr Mallett had been passing documents to Mr McCarthy; that Mr McCarthy's disclosure of those documents was the trigger for the application; that the application was intended as a prelude to the making of an application for third party disclosure (which in the event turned out to be unnecessary) and that if a successful third party disclosure application had been made the costs of such an application would have been recoverable by the successful party in the underlying litigation. In addition, the judge reduced the recoverable costs by 10 per cent overall which in the context of this particular application could be attributed to such of the costs as were occasioned by the application under CPR Part 31.22.

80. There is, in my judgment, force in both sides of the argument. The judge could legitimately have taken either view. But the question is not whether we would have made the order that the judge did. It is whether the order was within the wide ambit of his discretion. Another judge might well have made a different order; but that is beside the point. I have not been persuaded that the order that the judge made fell outside the scope of his discretion.

Result

81. I would dismiss this appeal too.

Lord Justice Baker:

82. I agree.

Lady Justice Elisabeth Laing:

83. I also agree.