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Case No: HQ16X03178

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2016

Before :

MR JUSTICE SPENCER

Between :

North West Leicestershire District Council	**Claimant**
- and -	
AB Produce PLC	**Defendant**

Timothy Leader (instructed by the Claimant's Legal Services Manager) for the **Claimant**
Miles Harris (instructed by DWP LLP) for the **Defendant**

Hearing date: 17th October 2016

Approved Judgment

Mr Justice Spencer :

1. This judgment relates solely to the issue of costs arising from proceedings for an interim injunction which were ultimately compromised.

Introduction

2. On 9th September 2016 the claimant local authority, in exercise of its statutory powers, issued an application for an urgent interim injunction to abate a nuisance which it alleged the defendant company was committing in the course of its business of processing vegetables at factory premises in Measham, Leicestershire. An abatement notice had been served in August 2015 which was the subject of an appeal in the magistrates' court, but those proceedings were adjourned in June 2016 for a period of 6 months in the hope that the issues between the parties could be resolved.

3. The urgency in the injunction proceedings was said to lie in the fact that between June and September the claimant had received over 400 complaints from members of the public about the smell emanating from the defendant's premises. The defendant's solicitors were required to carry out a good deal of work in responding to the application, which came on for hearing before Soole J on Friday 16th September. There was insufficient time for the matter to be argued that day. The application was adjourned for a month to 17th October, with various directions given.

4. Two weeks or so before the adjourned hearing, the claimant discovered that the defendant had taken very substantial practical steps to abate any nuisance, in particular by emptying the lagoons where malodorous effluent was stored. The defendant had also indicated that it proposed to fit covers to the lagoons before they would be used again, as part of the works being undertaken to install an anaerobic digester.

5. On discovering this turn of events, the claimant decided it was unnecessary to pursue the injunction application further, because its objective of abating the nuisance had been achieved. There remained, however, the thorny issue of costs.

The issue

6. The defendant seeks his costs of the whole interim injunction application on the basis that it should never have been brought in the first place, and has been abandoned. The sum claimed is £60,414. The claimant was initially prepared to bear its own costs. But in view of the stance taken by the defendant, the claimant now seeks its costs of the injunction application, in the sum of £12,860, on the basis that the application was necessary and properly brought, and has enabled the claimant to achieve its objective of abating the nuisance.

7. I have had the benefit of very full written submissions from Mr Leader on behalf of the claimant and Mr Harris on behalf of the defendant, supplemented by clear and forceful oral submissions at a hearing on 17th October 2016 which occupied half a day. The arguments and issues required an in-depth consideration of four lever arch files of documents which had been submitted, not all of which were available in time for the court's pre-reading. Through shortage of time, and in order to reflect upon the submissions and the extensive documentation, I indicated that I would reserve judgment.

The factual background

8. I do not propose to set out in full detail the factual history. It is very extensive and goes back many years. A short summary will suffice. The defendant is a well established and reputable company which has been operating at the premises in question since 2003. Its business is the processing and distribution of potatoes and other root vegetables. It has a turnover of around £24million per annum. The factory process requires vegetables to be washed and peeled. This produces an effluent which is piped to a series of eight lagoons. Hydrogen sulphide is given off and it is this which causes the problem, with its characteristic smell of rotten eggs, rotting vegetables and faeces. The remaining organic matter forms a sludge at the bottom of the lagoons. Under permit from the Environment Agency the effluent from the lagoons is spread on surrounding farmland.

9. From 2007 onwards the defendant has attempted by several different means to reduce if not eliminate the source of any offending odour. To this end the defendant entered into an odour management plan (an "OMP") with the Environment Agency.

10. There has been a long history of complaints by members of the public living in and around Measham about the odour from the defendant's premises, going back to 2004.

11. The claimant has a statutory duty to investigate complaints of a statutory nuisance in its area, and a duty to take such steps as are reasonably practicable to investigate the complaint. A statutory nuisance includes any smell arising from industrial, trade or business premises that constitutes a nuisance. If the claimant is satisfied that a statutory nuisance exists in its area, or is likely to occur or recur, it has a duty to serve an abatement notice.

12. The claimant served an abatement notice in this case on 14th August 2015. There had been complaints from members of the public, and the defendant's operation plainly had the potential to cause a nuisance by smell. Out of an abundance of caution, however, the claimant framed the abatement notice on the basis that it was satisfied of the "likely occurrence" of a statutory nuisance, rather than satisfied of the "existence" of a statutory nuisance. The distinction is important because the defendant contends that it was only with the commencement of the present proceedings, including the application for an emergency injunction, that the claimant for the first time formally asserted the *existence* of a statutory nuisance rather than merely its likelihood.

13. The defendant exercised its right of appeal against abatement notice. The appeal is to the magistrates' court. A five day hearing was set down for June 2016 before a District Judge. There was to be a fundamental challenge to the claimant's case that the offending smell emanated from the defendant's premises rather than other industrial premises and outlets in the area. A great deal of lay evidence was to be called, and expert evidence on both sides. In the event, however, the appeal was adjourned for a period of six months because there seemed to be some prospect of a practical resolution of the issues between the parties. In particular, the defendant was actively engaged constructing of an anaerobic digester which had the potential to mitigate substantially, if not eliminate, the offending odour. Counsel for the claimant, at the magistrates' court hearing, stated for the record that if the defendant's premises subsequently caused a statutory nuisance the claimant would apply to re-list the appeal.

Events following the magistrates' court hearing

14. Between 20th June 2016 and 7th September 2016 the claimant received no fewer than 429 complaints about odour emitted from the defendant's premises. The complaints came from inhabitants of 145 properties in Measham and neighbouring villages. This was an unprecedented level of complaint. In addition, there was now evidence from the claimant's own officers of the detection of foul odour on four separate occasions.

15. It was against this background that the claimant wrote to the defendant's solicitors on 11th July 2016 expressing concern at this state of affairs, and requiring the defendant to abate the nuisance failing which the claimant would request the magistrates' court to re-list the appeal as a matter of urgency and/or apply for an injunction. The letter also expressed concern that little progress appeared to have been made with the defendant's application to the Environment Agency in respect of the anaerobic digester.

16. The response from the defendant's solicitors was to deny that the complaints could be fairly attributed to the defendant's premises and to deny that there was any statutory nuisance. They offered to meet with the claimant but made it clear that the defendant was prepared to defend its position robustly.

17. By letter dated 15th July the claimant asserted that it was satisfied that there was now a statutory nuisance, and requested that the defendant confirm that it intended to take steps to abate the nuisance and indicate the time scale within which those steps would be taken. Unless this information was provided within 7 days, the claimant would apply to the High Court for an injunction. In a further letter the same day the claimant indicated that should this information be provided within 7 days, a further 7 days would be allowed for the implementation of the measures to abate the nuisance. The defendant's solicitors replied in robust terms renewing their offer to meet with the claimant to establish an open dialogue.

18. On 27th July there was a meeting between officers of the claimant and the defendant's managing director (Paul Bridgen) and finance director (Neil Sharratt). The main points were summarised in a letter from the claimant the following day. It was indicated that the permit application for the anaerobic digester was to be submitted within the next week or so, and completion of the anaerobic digester plant was on target within the six month adjournment period. As a temporary measure, a layer of straw had been placed over three of the larger lagoons. Owing to the weather conditions, land spreading had only begun the previous week and a number of applications had been submitted to the Environment Agency for "deployment". Once the crops were harvested in about three weeks' time, spreading could be completed at a faster rate.

19. In subsequent correspondence the defendant continued to express its willingness to maintain a dialogue with the claimant, but expressed concern that the offending odour might be coming from other sources and pressed for details of the complaints on which the claimant was relying.

20. The complaints continued, and by letter dated 12th August the claimant repeated that there was now a statutory nuisance which the defendant was required to abate urgently. The request was that the lagoons be covered or sheeted in such a way as to abate the nuisance, the suggestion being that this was perfectly feasible for the first three lagoons. The letter warned that if these steps were not taken within 7 days the claimant would take legal action. This was repeated in a letter from the claimant's legal department the same day.

21. On 17th August the defendant's solicitors replied at length protesting that the time limit imposed was unreasonable in view of the logistical difficulties of installing covers. Mention was made of the joint experts' report from the appeal proceedings in which health and safety issues had been highlighted in relation to the fitting of covers. It was also asserted that the anaerobic digester was nearing completion and would soon be operational.

22. It is apparent that the parties had reached stalemate. There was further correspondence including a letter from the defendant dated 25th August stating, for the avoidance of doubt, that the defendant would not be applying covers to the lagoons until the concerns the defendant had raised had been fully addressed.

23. There was, however, a further meeting on site on 25th August, because the council officers wanted to inspect the lagoons. In advance of that meeting the claimant wrote again saying that it had repeatedly sought to understand what the defendant proposed to do to abate the nuisance, and the claimant was open to suggestions. It was noted that the application to the Environment Agency for the anaerobic digester had still not been lodged, and the application would take at least 13 weeks to process. The letter requested "positive proposals" from the company on how it intended to abate the nuisance.

24. There is some factual dispute as to precisely what was said at the meeting on 25th August. It is common ground, however, that on that occasion the lagoons were full, malodorous and uncovered. It is not suggested by the defendant that the council officers were told that the defendant's intention was to empty all eight lagoons and remove the effluent by tanker lorries for disposal elsewhere, rather than on the adjoining fields. It was evident on that occasion that the remedial measures of straw and clay balls covering the lagoons had not been successful.

25. The defendant's solicitors wrote a lengthy letter dated 30th August taking issue with the assertions made by the claimant in previous correspondence that there was any nuisance. The letter confirmed that a permit application for the anaerobic digester had not yet been lodged with the Environment Agency, but the application was being finalised. The letter stated that the defendant was prepared to work closely with the claimant "to prevent recurrence of your out of the blue ultimatum correspondence". The letter concluded with the warning that if the claimant proceeded with its threatened further legal action it would be opposed and the defendant would seek the costs, given the claimants unreasonable conduct. The letter did not give any indication that it was the defendant's intention to empty all eight lagoons in the near future which would go a long way to removing any problems of odour from the site.

26. The claimant's head of legal and support services replied at length in a letter dated 7th September. She said that all the claimant wanted and has ever wanted, was that the defendant should take the necessary steps, whatever they may be, to abate the statutory nuisance caused by the operating process, pointing out that claimant was duty bound to continue to perform its statutory functions under the Act.

The interim injunction application

27. On Friday 9th September 2016 the claimant issued the application for an interim injunction, with a return date of Friday 16th September. On the same date the claimant wrote to the magistrates' court requesting that the adjourned appeal be re-listed for hearing as soon as possible. On the advice of the claimant's London agents, the proceedings were issued in the form of a Part 8 claim. The relief sought was an order that the defendant "abate the nuisance caused to the inhabitants of Measham and others by odour from the storage of

effluent in lagoons at Repton Road in Measham..., and that the recurrence of the said nuisance be prohibited". The application notice indicated that the time estimate was 2 hours.

28. The injunction application was supported by witness statements from the claimant's legal services team manager, David Gill, and two of the claimant's environmental protection officers, Minna Scott and Clare Proudfoot. There was also a witness statement from the claimant's expert, Dr Nigel Gibson, exhibiting material including the joint experts' report from the magistrates' court proceedings. Dr Gibson asserted, at paragraph 15(b) of his witness statement, that it was reasonably practicable for the defendant to avoid odour being carried into the surrounding area, thereby abating the nuisance. One option would be to remove all liquid effluent from the defendant's premises. It was not acceptable simply to spread it on nearby fields. The defendant had tried to manage the odour emissions in that way but recent events had demonstrated that this method could not be relied upon. Moving the source of the odour from the lagoons to the surrounding field did not address the problem satisfactorily.

29. On the next working day, Monday 12th September, the defendant's solicitors acknowledged receipt of the application but expressed the view that the court could not be expected to do anything other than give directions, bearing in mind that the time allowed for the hearing was only 1 hour. They indicated that if the application proceeded it would be defended on the merits, and costs would be sought on an indemnity basis. In a separate and much longer letter (running to 7 pages) the defendant's solicitors took issue with almost all the points made by the claimant in correspondence. Again, however, the letter made no mention of any intention on the part of the defendant to empty all the lagoons in the near future.

30. Further witness statements from Minna Scott and Clare Proudfoot were served in the days leading up to the hearing on 16th September, describing further complaints of odour. By letter dated 14th September the solicitors suggested that as there would be insufficient time for the case to be heard on 16th September the listing should be used instead as a directions hearing only. The claimant's solicitors rejected that suggestion as unacceptable as there was no commitment on the part of the defendant to do anything whatsoever to address the existing problem.

31. The day before the hearing, with commendable expedition, the defendant filed witness statements from its solicitor, Caroline Coates, and its finance director, Neil Sharratt. Neither of those witness statements indicated that there was any intention to empty the lagoons completely as a means of solving the immediate problem, even on a without prejudice basis.

32. The application came on for hearing before Soole J on Friday 16th September. The parties were represented by counsel: Mr Leader for the claimant, Mr Harris for the defendant. The judge took the view that there was insufficient time to hear the matter that day. He adjourned the application for 4 weeks to 17th October, directing that the matter should proceed as a Part 7 claim, with particulars of claim served. There was discussion about the wording of the relief sought by way of injunction. The point was raised that, in the absence of any concession that a statutory nuisance existed, there was a certain circularity in requiring the nuisance to be abated. The judge directed that the claimant should serve any amended draft of the order for an interim injunction by 4pm on 23rd September. There were also directions for the service of any further evidence. Save that the claimant was to bear its own costs of preparing the Part 8 grounds of claim, the order was for costs in the application. It seems that

the judge expressed the view that the hearing had been of value at least in ventilating the issues.

33. Following the hearing there was, for a while, no further substantial correspondence between the parties on the issue of abatement. On 23rd September the claimant served an amended draft order which specified the steps required to abate the nuisance:

> "(1) Cover all the lagoons which are or may be used for the storage of effluent.
>
> (2) Until the said lagoons are covered in accordance with paragraph 1(1) of this order:
>
> (a) cease forthwith the discharge of effluent into the lagoons (or any of them)
>
> (b) by 14th November 2016 empty the lagoons (and each of them) of any effluent and remove the same from the site to a licensed waste disposal facility…"

34. On 28th September full particulars of claim were served, together with further witness statements from Minna Scott and Clare Proudfoot. There was also a further statement dated 28th September from Dr Gibson in which he expanded upon the steps he considered were required to abate the nuisance, namely to cover the lagoons by a method which he specified, and until that was done, to cease discharging effluent into any lagoon, and to empty all the lagoons removing the effluent from the site. Plainly it was this expert opinion which informed the amendment of the draft order.

35. Meanwhile, on 20th September the claimant's officers, Minna Scott and Clare Proudfoot, had noted a steady flow of tankers travelling to and from the site, apparently emptying the lagoons. On 29th September there was a site inspection in the company of Mr Bridgen. The officers were surprised to find that nearly all the lagoons were empty. Mr Bridgen confirmed that the deployments issued by the Environment Agency were due to be completed by Friday 30th September and any remaining effluent would be tankered off the site by that date.

36. This was a welcome development. On 3rd October the claimant's solicitor, Mr Gill, wrote to the defendant's solicitors that it was now apparent that whilst the lagoons remained empty the defendant was effectively complying with the terms of the amended draft order. Consequently the claimant had decided to vacate the hearing of the interim injunction listed on 17th October. The claimant would continue to monitor operations at the site.

37. By letter dated 4th October the defendant's solicitors sought clarification of what was proposed, pointing out that they were in the midst of preparing for the hearing on 17th October. The claimant's solicitor responded that because the lagoons were empty the claimant was satisfied that the defendant had taken the steps required to abate the statutory nuisance. It was therefore appropriate to withdraw the application for the interim injunction because it was no longer necessary. There was then an exchange of correspondence about the issue of costs, the defendant making it clear that costs would be sought at the adjourned hearing. The rival merits of the arguments were set out at length in further correspondence.

38. On 7th October there was a further inspection of the lagoons. The claimant's officers wanted to know what the plan was for disposing of production water in the factory. Mr Bridgen confirmed that the water would drain into holding tanks at the factory, and not into the lagoons. In other words the lagoons would remain empty. Mr Bridgen also explained that in due course, as part of the construction of the anaerobic digester plant, the lagoons would be covered.

39. For the purpose of the hearing on 17th October, and to evidence these further developments, Minna Scott and Clare Proudfoot made further witness statements, as did Mr Bridgen. The claimant's officers confirmed their total surprise at discovering that the lagoons had been emptied, which had not been foreshadowed in any of the discussions with the defendant previously. Mr Bridgen explained in his witness statement that the necessary permits had been granted by the Environment Agency only in early September 2016, although they had been sought in June and July. There was now permission to spread a total of 37,500 tonnes on the areas deployed, distant from the premises. Mr Bridgen suggested that the draining of the lagoons was already at an advanced stage on 9th September when the injunction was issued. He complained that the claimant had engaged in no dialogue with the defendant over its plans for emptying the lagoons. Had there been such dialogue, the claimant would have known what was proposed.

The parties' submissions on costs

40. I have set out the history of negotiations in considerable detail because it is common ground that the key factor in deciding the issue of costs must be the conduct of the parties respectively.

41. On behalf of the claimant, Mr Leader submits that in view of the deluge of complaints received between June and September 2016 it was entirely reasonable for the claimant to have required that the nuisance be abated, and that in default the claimant had no option but to commence proceedings for an injunction. The matter was urgent because of the volume of complaints. It would not have been reasonable to await the re-listing of the appeal in the magistrates' court. There was jurisdiction to grant the injunction not only pursuant to the provisions of section 81 of the Environmental Protection Act 1991, but also at common law to restrain a public nuisance. Mr Leader submitted that the claimant's actions in seeking the interim injunction had been vindicated by the defendant's practical compliance with everything required by the amended draft order. In reality the claimant had "won" on the issue which was being litigated. Had the defendant revealed much earlier that it proposed to empty the lagoons and tanker the effluent away from the site altogether, the need for the interim injunction application could have been avoided. The claimant had demonstrated the reasonableness of its approach by its prompt decision to withdraw the application once it was discovered that the necessary remedial action had been taken. But for the discovery by the claimant's officers on 29th September that the lagoons were now empty, and the discovery on 7th October of the defendant's intention in due course to cover the lagoons, the claimant would have walked into an "ambush" at the hearing on 17th October.

42. On behalf of the defendant, Mr Harris submitted that the issuing of the application for an interim injunction was rash and unnecessary. Only three months earlier the claimant had agreed to adjourn the magistrates' court proceedings. There was still a fundamental issue as to whether the defendant was responsible for any statutory nuisance at all, and there was no urgency sufficient to justify such draconian relief. The 7 day deadlines which had repeatedly been laid down in correspondence were wholly unreasonable. The defendant knew that it was

not safe or practicable to cover the lagoons, for the reasons which had been discussed (if not agreed) between the experts in their reports for the magistrates' court hearing. At the meeting on 27th July, it had been made clear to the claimant's officers that spreading of the effluent would proceed under permit from the Environment Agency once the crops were harvested. Mr Harris conceded, however, that although there could have been better communication of the defendant's intention to empty the lagoons, fault for that lay on both sides.

43. Mr Harris submitted that, as a matter of law, the application for an injunction under section 81 of the Act was misconceived because there had been no breach of any abatement notice; its operation was suspended by statute pending the appeal in the magistrates' court. He conceded, however, that the court was entitled in principle to grant an injunction, in appropriate circumstances, at common law to restrain a public nuisance. He reserved his position on whether such an application would have been an abuse of process in the circumstances of this case.

44. That is only a brief summary of the main submissions made by the parties, set out fully in their respective skeleton arguments and developed orally at the hearing.

Discussion and conclusions

45. Normally where the court is invited to adjudicate upon costs it will be apparent that one side or the other, has "won" on the issue or issues in question. Here there has been no determination by the court of any issue, because the need for the relief sought has been overtaken by events. The application itself has been compromised. Whether that is expressed as a withdrawal of the application or a dismissal of the application matters not. It is not a situation in which the defendant is entitled to costs as of right because a claim has been discontinued.

46. The general rule, of course, is that the unsuccessful party will be ordered to pay the costs of the successful party: see CPR 44.2(2). In one sense the claimant has been unsuccessful because it has not obtained the injunction it sought. But for practical purposes it has been successful in achieving the objective it set out to achieve, namely the abatement of the alleged nuisance.

47. Similarly, in one sense the defendant has been successful in that it has not been required by mandatory injunction to take steps to abate the alleged nuisance. On the other hand, after the injunction was applied for, the defendant has taken remedial steps which have the practical effect of abating the alleged nuisance.

48. In my judgment it is inappropriate to approach the issue of costs on the usual basis of looking to see who has won. In the course of argument Mr Leader and Mr Harris both acknowledged this and agreed that the real issue is the parties' conduct.

49. CPR 44.2(4) and (5) enjoin the court to have regard to all the circumstances including the conduct of the parties, meaning the conduct before as well as during the proceedings, and whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue.

50. In my view, it was reasonable for the claimant to issue the application for an interim injunction. The volume of complaints received from members of the public between June and September left the claimant with no option but to take some further effective step to abate

what it was now satisfied amounted to a statutory nuisance. The 7 day time limits which were repeatedly imposed in correspondence were admittedly very short. However, the reality is that the defendant had been given nearly two months to take the necessary practical steps to address the very real problem of odour from the lagoons, or at least indicate what steps it proposed to take.

51. It is not necessary nor is it appropriate that I should attempt to resolve any issues of fact concerning the history of the proceedings as to what was said or done on any particular occasion. However, approaching the matter broadly, there are logically only two explanations for the way in which the substance of the matter eventually resolved itself, with the emptying of all the lagoons and the tankering of the effluent well away from the site. The first is that it was only in response to the injunction application that the defendant decided to take that remedial action. That is the claimant's case. The second is that it was always the defendant's intention to follow that course but it never said so explicitly. As always, however, the possibility remains that the reality is not so black and white and that the remedial action eventually carried out was for a mixture of both reasons.

52. Concentrating on the defendant's conduct, it is highly regrettable that it was not spelt out more clearly at the start (if there was then such an intention) that the necessary permits had been sought from the Environment Agency to enable the defendant to empty completely and remove from the site all the effluent stored in the eight lagoons. Having studied the correspondence carefully I am quite satisfied that this was never made as clear as it should have been (if indeed that was the intention all along). Mr Harris realistically accepted that there could have been clearer communication. I accept, as he submitted, that the defendant had to be careful not to commit itself to any course of action which it might not be able to fulfil. But it is highly regrettable that the defendant did not simply say what it had in mind by way of complete emptying and tankering away from the site and the time scale envisaged. Instead the correspondence became bogged down in argument and counter argument. On the defendant's part there was a veneer of willingness to co-operate, but the reality was rather different.

53. I accept that had there been a timely indication of the defendant's intention to empty the lagoons completely and tanker away the effluent from the site, the claimant would not have needed to apply for an interim injunction. As soon as the claimant discovered that the necessary remedial action had been taken, it took immediate steps to halt the proceedings. That is powerful evidence that it would have regarded the assurance of such remedial action, preferably backed by an undertaking in writing, as sufficient earnest of good faith as to avoid the need for proceedings. Despite the 7 day time limits, the claimant's position in reality was that it was simply looking for "positive proposals" as to how the defendant intended to abate the nuisance (letter 25th August), and had only ever wanted the defendant to take "the necessary steps, whatever they may be" to abate the nuisance (letter 7th September). I well understand the defendant's stance in refusing to make any concession that there was in fact such a nuisance, but they had already acknowledged the need to address the problem of odour from the lagoons and I see no reason why the defendant could not have spelt out, without prejudice to that denial of liability, the practical steps which they intended to take and ultimately took.

54. As to the form of the proceedings brought by the claimant, I accept that it was imperative to bring matters to a head as soon as possible. The initial estimate given by the claimant's solicitors was, apparently, a hearing of two hours with three hours reading. That

would probably have been sufficient, but the hearing time allocated by the court was only one hour in the event.

55. I am therefore satisfied that it was reasonable for the claimant to apply for the interim injunction, and that decision was vindicated by the remedial action which was subsequently taken. For that reason I am entirely satisfied that it would not be right to award the defendant any part of its costs of these interim injunction proceedings.

56. Turning to the conduct of the claimant, there has been a change in the claimant's stance on costs. When the decision was taken, very properly, not to proceed with the injunction application the claimant's proposal was that there should be no order as to costs. I note that in Mr Gill's witness statement dated 10 October he said in terms that the claimant's position was that "the appropriate costs order is that each party bears their own costs". That had changed by the time of the hearing before me, presumably because the defendant had rejected that proposal and the claimant was being forced to attend the hearing to argue the point.

57. In my view the claimant's initial stance was the correct and proper stance, and it should have been maintained. The claimant had acted properly and responsibly in making the application for an interim injunction, and equally properly and responsibly in not pursuing it to a hearing.

58. In addition, however, I take the view that there are aspects of the claimant's conduct which can properly be criticised. The imposition of 7 day time limits was unrealistic, particularly against the background of some of the agreed experts' views on the practicality of covering the lagoons. Such time limits were always likely to inflame the correspondence and lead to entrenched positions.

59. More particularly, it is regrettable that the practical steps suggested by Dr Gibson in his statement dated 28 September 2016, at paragraph 7, had not been put forward much sooner by the claimant as the appropriate remedial action which was required. It was these practical steps recommended by Dr Gibson which, as I have already observed, informed the helpful revision and expansion of the draft order following the hearing on 16th September. Had Dr Gibson's practical solution been shared with the defendant earlier, with the opportunity for consultation between experts, I strongly suspect that matters could have proceeded more amicably and a practical solution found sooner. That said, I remain unimpressed by the way in which the defendant withheld disclosure of the steps it proposed to take in emptying the lagoons and tankering away the effluent from the site. To describe it as an ambush is going too far. But it certainly could and should have been revealed much sooner, and Dr Gibson's earlier input might well have facilitated that.

60. I have therefore reached the conclusion that, equally, it would not be right to order the defendant to pay the claimant's costs of the interim injunction application or any part of it.

61. Accordingly, the appropriate order is that each party should bear its own costs of the whole of the interim injunction application, including the hearing before me on 17th October 2016.

62. I am grateful to counsel for the clarity and thoroughness of their submissions. I express the hope that, with goodwill on both sides, the parties can work together henceforward to

reach a sensible compromise of all the outstanding issues between them, now that a practical solution of the immediate problem has been achieved for the time being at least.