CA on appeal from QBD (His Honour Judge Tetlow) before Hallett LJ : Mr Justice Bennett. 4th April 2006.

JUDGEMENT : Mr Justice Bennett :

1. The claimant appeals from the decision given on 17 February 2005 by His Honour Judge Tetlow, sitting as a judge of the High Court, whereby he made no order as to costs. On 15 December 2004 the trial began. During its course the defendant, in open court, offered an undertaking in lieu of an injunction. The claimant accepted that offer and thereafter abandoned its claim for damages. The judge was invited to continue and decide the issues of costs. It appears from the transcript that he was reluctant to do so. Nevertheless he was persuaded to hear counsel's submissions. He asked if there was any Court of Appeal authority. Mr Berragan, the defendant's counsel, thought there might be. Mr Powell, the claimant's counsel, thought not. The judge ordered the defendant to pay 75% of the claimant's costs. After the judge had given his decision of 15 December Mr Berragan discovered, from further research, the Court of Appeal decision in **BCT Software Solutions Ltd v C Brewer and Sons Ltd** [2003] EWCA Civ 939. He sent a copy to the judge, who ordered a fresh hearing. On 23 December 2004 the judge heard further argument from Counsel. On 17 February 2005 he decided the costs dispute in the way I have described.

2. The background is as follows. The claimant, which provides consultancy services to farms and rural businesses, employed the defendant as a senior consultant from August 1993. In May 2004 the defendant terminated his contract of employment with effect from 27 August 2004. On 21 July 2004 he entered into a contract to work for P and L Argi Consultancy Ltd. The defendant's contract with the claimant contained a restrictive covenant preventing him, for a period of six months after the end of the contract, from dealing with anyone who, at the date of termination or in a period of twelve months before termination, was a client of the claimant or had been in the habit of dealing with the claimant and with whom the defendant had had personal contact or dealt. Thus, prima facie, the restrictive covenant would be enforceable during the six months between 27 August 2004 and 27 February 2005.

3. On 16 September 2004 the claimant issued proceedings in the High Court against the defendant. The Particulars of Claims alleged that the Defendant, in breach of the restrictive covenant, had dealt with the claimant's clients with whom the defendant had had contact in the 12 months period prior to 27 August 2004. The claimant contended that the defendant was in clear breach, that damages would not be an adequate remedy, and that unless restrained by injunction the defendant would continue to act in breach of the restrictive covenant. It was alleged that as at the date thereof the claimants had suffered damages. The annual loss of income from clients who had terminated their relationship with the client was put at £43,318. The claimant claimed an injunction until 27 February 2005 to prevent the defendant from dealing with the relevant clients of the claimant, damages in excess of £50,000 and costs.

4. The defence served on 4 October did not admit that the restrictive covenant was valid or enforceable, denied any breach, and put the claimant to strict proof of each and every allegation. Paragraph 9 thereof stated that the defendant:- *"….is well aware of the restrictive covenants and will not deal directly or indirectly with any of his former Promar clients until after the expiry of the six month period…."*

   The claimant's entitlement either to an injunction and/or to damages was denied.

5. On 22 September the claimant applied to Wakerley J and was granted an interim injunction restraining the defendant in the usual way until 8 October 2004, the return date. On 8 October, the interim injunction was replaced by an undertaking until 28 February 2005, further order or trial of the matter, whichever should first occur. A speedy trial was ordered for 15 and 16 December. Directions were given as to exchange of witness statements, disclosure and other matters. The claimant gave the usual undertaking in damages.

6. The case summary dated 14 December and skeleton argument for the claimant made it clear that the claimant sought an injunction to 28 February 2005 and damages in the sum of £132,922. The skeleton argument on behalf of the defendant stated that there were three issues i.e. was the covenant enforceable, had the defendant breached it, and what was the claimant's loss. There was a very live factual issue as to whether the defendant had broken or attempted to break the restrictive covenant.

7. In the course of Mr Powell's, counsel for the claimant, opening on 15 December the defendant made an offer to give an undertaking to the court. The offer was unconditional; it was not linked in any way to the issues of damages and costs. The offer took Mr Powell by surprise. Nevertheless he indicated that the claimant would abandon its claim for damages. All that was left unresolved was the issue of costs. Having read the transcript of the proceedings it is plain to me that the judge was extremely reluctant to become embroiled in the issue of costs. At the short adjournment the judge asked the parties to negotiate on costs. When the hearing was resumed the judge was told that no agreement could be reached. He then acceded to both parties' wish that he should determine the issue of costs.

8. It is now convenient to record the essentials of the judgment of 15 December 2004. First, the judge referred to CPR Part 44.3 and in particular sub-rule (4) i.e. that the court must have regard to all the circumstances including the conduct of the parties and whether a party succeeded on part of his case even if he has not been wholly successful. Second, he found that "I cannot say who would probably have won". It was not possible to conclude, on the papers, whether or not the claimant would have succeeded in proving that the defendant had been guilty of a breach or breaches of the restrictive covenant and/or that the defendant had attempted to breach the restrictive covenant. He said:- *"What the conclusion would have been had the evidence proceeded I do not know…."*

9. Third, he then said that he should proceed on the basis of:- *"why we are here so late in the day before this compromise was reached?"*

10. Fourth, he analysed the course of the proceedings, and looked at the relevant correspondence. He found that even if the defendant offered on 20 September a final undertaking (i.e. up to 28 February 2005), about which there was a dispute, there were no further offers by the defendant until the one made during Mr Powell's opening to the judge on 15 December.

11. Fifth, the action had proceeded without either side pausing to consider how the action could be compromised. Sixth, where a claimant is asking for an injunction and damages, and there is no offer by the defendant, the claimant is justified in continuing until settlement or trial. The defendant made no attempt to get rid of the claim until the trial.

12. Seventh, the judge concluded that:- *"the responsibility for this matter continuing until so late in the day it seems to me the primary responsibility rests with the defendant…."*

The defendant should have tested the water by asking whether an undertaking would do. The opportunity was never taken.

13. Eighth, the judge concluded at paragraph 10 of his judgment as follows:- *"At the end of the day from the limited flavour I have of this case and exercising the discretion as best I can, I conclude there should be an order that the defendant do pay the claimant's costs, but to cover the extent to which [it] may be said the claimants' have failed to do things that they should have done those costs receivable should be limited to three quarters of such costs. I think that is the fairest way of dealing with the matter and also the extent to the issue of which damages may have taken time to prepare, although that is a lesser item."*

14. I shall go into more detail in due course concerning the claimant's submissions to us. But the broad point made by Mr Foskett QC, now leading Mr Powell, on behalf of the claimant, is that the order made as to costs on 15 December did broad justice. The claimant had had to come to court to obtain the undertaking, the equivalent to the injunctive relief sought, which necessarily involved proving actual or threatened breaches of the restrictive covenant. It was injunctive relief that the claimants were really after as it was unlikely that, even if the claimants proved its damages, the defendant would be able to pay them. The order did justice to the defendant because it took account of the time taken and money spent to prepare the defendant's response to the claim for damages.

15. As I have said, following Mr Berragan sending a copy of **BCT Software** to the judge, the costs order was reconsidered by the judge on 23 December. He then had before him the authority of **BCT Software.** Mr Foskett does not complain that the judge was asking to hold a fresh hearing in the light of being made aware of **BCT Software.**

16. Judgment of 17 February 2005

In paragraphs 1 to 14 the judge set out the background, and the course of the proceedings up to 23 December 2004. The first question he had to consider was whether he should revisit his order of 15 December. He decided he should, for the reasons he gave in paragraphs 20 and 21, about which no complaint is made. H e rejected Mr Berragan's submission that on 15 December the parties did not agree that the court should decide the issue of costs and that the court should decline to exercise its jurisdiction and allow the action to proceed.

17. At paragraphs 24 and 25 the judge said:-

"24. As to guidance to be found in the BCT case for the Judge who has been so foolhardy as to decide to exercise his discretion, I apprehend it is this.

(1) If the Judge is unable to decide who is the winner or loser on any particular issue or overall without in effect trying the action he should make no order as to costs, although there is no convention that he should do so.

(2) There is likely to be difficulty in deciding who is the winner and loser in more complex cases without embarking on a trial, for example, cases involving a number of issues and claims for discretionary equitable relief.

(3) In straightforward cases it will be reasonably clear from the terms of settlement who has won or lost.

(4) Often neither side has won or lost.

25. As I read the BCT case quite apart from asking whether a party has been successful in whole or in part or not, a Court is not precluded from taking matters of conduct into account where appropriate, just as it could take into account Part 36 offers; this is simply following CPR part 44 rule 3 (4)".

18. He then posed the question at paragraph 26:- *"Is there a winner and a loser?"*
The claimant's claim for an injunction had been compromised, by the offer and acceptance of an undertaking, namely the claimant had something of value. The claimant was free to pursue its claim for damages. It did not do so and:- *"it has not negotiated the claim away as a quid pro quo".*

Had the claimant obtained an injunction on the basis of an attempted breach of the restrictive covenant he would have got his costs of that issue but not of the issue of damages. A similar position, he concluded, would seem to arise where an undertaking is offered.

19. The judge rejected the defendant's submission that the obtaining of an undertaking did not give the claimant something of value. He also rejected the defendant's further submission that in September 2004 the defendant had offered a final undertaking. At paragraph 33 having earlier further analysed the facts, he said:-

"33. I am not in a position to say who is right as to the quality of the undertaking offered; indeed both may be right in saying what they understood was being talked of; in other words there was no meeting of minds. Similarly, I am not in a position to say whether the Claimant would in fact have accepted a full undertaking if offered as at 20th September 2004."

20. The judge concluded his judgment at paragraphs 34 and 35:-

"34. The BCT case would caution me against hearing evidence to decide points at issue. In my previous decision on 15th December being unable to decide who would have won the case had it proceeded, I tried to decide the issue on costs by assessing whose responsibility it was that the case had proceeded so far before settling. In the light of the BCT case that is probably the wrong approach and even if it could be justified I have to say on reviewing the available evidence I do not think I can decide on paper whose fault it was or who was more to blame that the matter proceeded to a trial when it could and should have settled at an earlier stage, even arguably before the first hearing. It may be that both parties are equally at fault. As Mr Berragan put it in argument on 23rd December both parties missed an opportunity to settle. It is clear from the correspondence that after 22nd September both sides got "stuck in" and no further thought was given to the question of whether any compromise could be reached; the parties were not speaking to each other. That is a pity given the Defendant's stance that he wasn't in breach and didn't intend to breach the covenant and the Claimant's stance that they wanted an injunction rather than damages

35. At the end of the day I am faced with difficulty in deciding whether one party is the winner and the other the loser or whether neither party is the winner or loser, for although the undertaking is of value it is something

which may have been achievable almost at the outset without all the effort expended thereafter; on the other hand it may not have been. I have come to the conclusion following the guidance in the BCT case that the proper order is no order as to costs. I accept Mr Berragan's final submission that had I had the BCT case before me last time round I would have made a different order to the one which I did originally."

21. Mr Foskett submitted that **BCT Software** was distinguishable. In that case the parties had settled all issues save for costs. In the instant case there was no true settlement. The claimant had accepted the defendant's offer of a final undertaking but had then unilaterally abandoned its claim for damages.

22. **BCT Software** was a case involving an action for infringement of copyright in computer software. The parties settled the action on detailed terms set out in the schedule to a Tomlin Order. As the parties were unable to reach a compromise on costs they agreed that the costs of the proceedings should be decided by the trial judge, who had heard the opening and some of the claimant's witnesses. The judge acceded to the parties' request and made an order, which was not to the claimant's liking since it entailed the claimant paying a substantial part of the defendant's costs [see paragraph 12 of the judgment of Mummery LJ].

23. Mummery LJ said between paragraphs 4 to 9 inclusive of his judgment:-

"4. The arguments advanced on this appeal have demonstrated the real difficulties inherent in asking a judge to exercise his discretion in respect of the costs of an action, which he has not tried. There are, no doubt, straightforward cases in which it is reasonably clear from the terms of the settlement that there is a winner and a loser in the litigation. In most cases of that description the parties themselves will realistically recognise the result and the costs will be agreed. There will be no need to involve the judge in any decision on costs. If he becomes involved, because the parties cannot agree and ask him to resolve the costs dispute, the decision is not usually a difficult one for him to make.

5. There are, however, more complex cases (and this is such a case) in which it will be difficult for the judge to decide who is the winner and who is the loser without embarking on a course, which comes close to conducting a trial of the action that the parties intended to avoid by their compromise. The truth often is that neither side has won or lost. It is also true that a considerable number of cases are settled by the parties in the belief that the terms of settlement represent a victory, or at least a vindication of their position, in the litigation, or in the belief that they have not lost; or, at the very least, in the belief that the other side has not won.

6. In my judgment, in all but straightforward compromises, which are, in general, unlikely to involve him, a judge is entitled to say to the parties "If you have not reached an agreement on costs, you have not settled your dispute. The action must go on, unless your compromise covers costs as well."

7. The disposition of a judge to help parties in negotiations for a settlement is understood and applauded. Good intentions are not, however, risk free. If acted upon too readily, commendable judicial intentions can make things far worse than they would have been if the judge had adopted the unpopular stance of requiring the parties to confront the realities of their litigation situation. The judge has a discretion to decline to do what the parties ask him to do. If, on the one hand, the action is for damages, it will be relatively easy for the judge to tell from the size of the settlement sum and from the litigation history (offers, payments in and so on) how the costs should be borne. As I have already said, it would be relatively unusual for the parties themselves not to agree on the costs of such cases. In more complex cases, however, involving a number of issues and claims for discretionary equitable relief, the costs position is much more difficult for the judge to resolve without actually trying the case.

8. This court is entitled to approach an appeal against a costs order, which has been made as part of a compromise, with an even greater degree of reluctance than is usually the case when it is asked to interfere with the discretion of the trial judge. (It has even been said that there is no appeal against an order for costs made by a judge in a case in which, as part of a compromise, it has been agreed by the parties that he should decide the issue of costs: ***Denne v. Denne*** *(1977) CAT 4743, which is mentioned in footnote 2 to paragraph 9-03 on p 158 of The Law and Practice of Compromise 5th Ed by David Foskett QC. In my view, there is no such hard and fast limit to the jurisdiction of this court.) If there is a point of principle in this case, which I very much doubt, it does not arise from the way in which the judge exercised his discretion, but from whether*

he should ever have embarked on this particular exercise at all. As both parties agreed that he should undertake the task, it is reasonable to expect them to accept his decision, unless it can be shown that the result is, in all the circumstances, manifestly unjust. I would certainly not be inclined to interfere with the judge's decision simply because it is possible to detect imperfections in his approach or in his reasoning.

9. In my judgment, this court should only interfere with the costs order in this case, if BCT makes out a case of manifest injustice. It has not succeeded in that. I would dismiss the appeal.

24. Mummery L.J. then set out the claimant's submissions. At paragraph 14 and 15 he said:- *"**Conclusion***

*14. I am not persuaded by any of BCT's points, whether taken separately or cumulatively, that this court should interfere with the judge's order. In general the appellate function in relation to judicial discretion on costs is that described in **AEI Ltd–v- PPL** [1999] 1 WLR 1507 at 1523 C to D: "**Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the Court is forced to the conclusion that he has not balanced the various factors fairly in the scale".***

15. There are the additional special circumstances mentioned earlier. In the absence of manifest injustice, an appellate court should not interfere with a discretion, which has not been exercised at the end of the trial, as is usually the case, but with the agreement of the parties when they have settled the case."

25. At paragraph 18 Mummery LJ said that had he been the trial judge he did not think he would have embarked on the exercise at all. If he had "out of a well-intentioned, though ill-advised, wish to assist the parties" he would probably have made no order as to costs. But:- *"….the appeal was not about what I would have done in the judges' place. It is about whether what the judge has done was legally erroneous and has produced a manifest injustice."*

26. In his judgment Chadwick LJ said at paragraphs 21 to 26 inclusive:-

"21. I agree that this appeal should be dismissed. I add some observations of my own only in order to emphasise that - as has already been said by Lord Justice Mummery in his judgment – a trial judge should be cautious before making an order as to costs in litigation in which all other issues have been compromised without a full trial.

22. The power to make an order as to the costs of civil proceedings is conferred by section 51(1) of the Supreme Court Act 1981. It is in the discretion of the court whether, in any particular case, that power should be exercised. That is made clear by CPR 44.3(1)(a). It finds expression in the opening words of CPR 44.3(2) – "If the court decides to make an order about costs -". The first question for the court – in every case – is whether it is satisfied that it is in a position to make an order about costs at all.

23. In addressing that question the court must have regard to the need (if an order about costs is to be made) to have a proper basis of agreed or determined facts upon which to decide, in the light of the principles set out under the other provisions in CPR 44, what order should be made. The general rule, if the court decides to make an order about costs, is that the unsuccessful party will be ordered to pay the costs of the successful party – CPR 44.3(2)(a). But the court may make a different order – CPR 44.3(2)(b). Unless the court is satisfied that it has a proper basis of agreed or determined facts upon which to decide whether the case is one in which it should give effect to "the general rule" - or should make "a different order" (and, if so, what order) – it must accept that it is not in a position to make an order about costs at all. That is not an abdication of the court's function in relation to costs. It is a proper recognition that the course which the parties have adopted in the litigation has led to the position in which the right way in which to discharge that function is to decide not to make an order about costs.

24. In a case where there has been a judgment after trial, the judge may be expected to be in a position to decide whether one party or the other has been successful overall; whether one party or the other has been successful on discrete issues; whether the fact that the party who has been successful overall but unsuccessful on some issues calls for an order which reflects his lack of success on those issues; and whether - having regard to all the circumstances (including conduct) as CPR 44.3(4) requires – the order for costs should be limited in one or more of the respects set out in CPR 44.3(6). But where there has been no trial – or no judgment – the judge may well not be in a position to reach a decision on those matters. He will not be in a position to decide

those matters if they turn on facts which have not been agreed or determined. In such a case he should accept that the right course is to decide that he should not make an order about costs. As the arguments on the present appeal demonstrate, it does the parties no service if the judge – in a laudable attempt to assist them to resolve their dispute – makes an order about costs which he is not really in a position to make.

25. It does not, of course, follow that there will be no cases in which (absent a judgment after trial) the judge will be in a position to make an order about costs. There will be cases (perhaps many cases) in which it will be clear that there was only one issue, that one party has been successful on that issue, and that conduct is not a factor which could displace the general rule. But, in such cases, the answer to the question which party should bear the costs of the litigation is likely to be so obvious that, as Lord Justice Mummery has pointed out, the judge will not be asked to decide that question. It will be agreed as one of the terms of compromise.

26. The cases in which the judge will be asked to decide questions of costs - following a compromise of the substantive issues – are likely to be those in which the answer is not obvious. And it may well be that, in many such cases, the answer is not obvious because it turns on facts which are not agreed between the parties and which have not been determined. The judge should be slow to embark on the determination of disputed facts solely in order to put himself in a position to make a decision about costs. As Lord Justice Mummery has put it, the better course may be to require the parties to confront the realities of their litigation situation; to point out to them that, if they have not reached an agreement on costs, they have not settled their dispute and the action must proceed to judgment."

27. Brooke LJ agreed with both judgments.

28. In the instant case it can be said that, in one sense of the word, the case did not "settle". There was no agreement resolving the issues (leaving aside costs). But for my part I do not consider that Mr Foskett's submission is sustainable. There were three heads of relief the claimant sought, namely (1) an injunction, (2) damages and (3) costs. Issue (1) was resolved by the defendant offering , without admission of liability, and the claimant accepting, an undertaking that the defendant would not deal with the claimant's (relevant) clients until the expiry of the covenant on 27 February 2005. Issue (2) the claimant did not pursue. Thus, issues (1) and (2) were resolved. There was nothing in the action to litigate, save costs. In such circumstances a submission that **BCT Software** is distinguishable and thus that that authority was inapplicable to the instant case, is unreal and I reject it.

29. As I said at paragraph 14 above, the essential submission of Mr Foskett is that the judge on 15 December came to the right conclusion for the reasons the judge then gave. It was an issue/conduct based decision which **BCT Software** makes plain was within the judge's discretion in deciding issues of costs. The decision of 15 December was not manifestly unjust, whereas the decision of 17 February was. The judge was swayed far too much by **BCT Software**. Where he went wrong was to address the question of whether, if the undertaking had been offered as a final, unconditional undertaking it must have been accepted by the claimant and to treat that as a determinative issue within the approach of **BCT Software**. As it is, believing (justifiably on any objective analysis) that, notwithstanding the interim undertaking given on 8 October, the claim for injunctive relief remained in issue, the claimant prepared for trial on the basis that the claim for injunctive relief had to be established. The defendant only made an offer of a final undertaking on the day of the trial. It was he who was responsible for the case having had to go to trial. It was to be expected that any offer should come from the defendant and then in sufficient time before the trial so as to keep costs to a minimum.

30. He further submitted that if the decision of 17 February stood it would send the wrong signal to litigants and their advisors. Defendants in similar cases, could wait until trial, offer an undertaking in lieu of an injunction, and, if accepted, escape paying the claimant's costs.

31. In my judgment the judge was correct to take into account the guidance given by the Court of Appeal in **BCT Software. BCT Software** is an authority of general applicability to cases which have settled or been resolved without a judgment being delivered and the judge is asked to adjudicate on the issue of costs. **Venture Finance plc v Mead and another** [2005] EWCA Civ 325 was such a case, which involved a claim against Mr Mead and Mrs McGarrick as guarantors under deeds of guarantee and indemnity. By the time the application for summary judgment came back before the court, the parties

had agreed the amounts payable by each defendant. It was also agreed that each defendant should make payment towards the claimant's costs. But it was not agreed that each defendant should be responsible for all of the claimant's costs. The claimant contended that each defendant was liable for the whole of its costs. The second defendant, Mrs McGarrick, contended that each should be liable for only half of the claimant's costs. However Mr. Mead had been adjudicated bankrupt. Thus if the claimant recovered costs on the basis submitted on behalf of Mrs McGarrick it would be almost inevitable that it would only ever recover half of its costs. The Court of Appeal unanimously allowed the claimant's appeal on the grounds that it was one of those rare cases where it ought to interfere.

32. Chadwick LJ gave the leading judgment. At paragraph 10 he said that it was not in dispute that a judge has jurisdiction to make an order for costs where all substantive issues have been disposed of by agreement. But he is not obliged to do so. Chadwick LJ referred to the dangers of the judge embarking on that course as illustrated in **BCT Software**. He referred to passages in the judgments in that case of Mummery LJ and himself, which I have set out above. At paragraph 12 of his judgment in **Ventura Finance** he said:-

> *"12. At first sight the present case was one in which the judge would have been entitled – indeed, I would say well advised – to decline to make any order as to costs. The claimant had obtained judgment (by consent) for less than one third of the amounts which it had been claiming in the application for summary judgment. There was nothing which enabled the judge to decide whether the claimant had been willing to settle at less than the amount claimed because it accepted that it could not prove the amount of Funds in Use on which the claim was based or because it accepted that the liability of each defendant was capped at the £100,000 limit. It is pertinent to keep in mind that the defendants had accepted, on the pleadings, that they were each liable up to £100,000 to the extent that the claimant could prove loss in that amount. It was impossible – as it seems to me – to say that one party had obviously won and the other party had obviously lost."*

33. At paragraph 25, Chadwick LJ referred again to **BCT Software** and in particular to the passage at the end of paragraph 8 of the judgment of Mummery LJ in which he said that it was reasonable to expect the parties to accept the judge's decision, unless it could be shown that the result is, in all the circumstances, manifestly unjust. Chadwick LJ continued:- *"That approach, as it seems to me, recognises the hurdle which ought to confront an appellant who complains of the result reached by a judge who (at the parties' invitation) has set out to do something which – as should have been appreciated on a more careful analysis of the principles underlying CPR 44.3 – he was never in a position to do properly and should not have done at all."*

34. Arden LJ agreed with the guidance given by Chadwick LJ in **BCT Software.** Auld LJ agreed with Chadwick LJ.

35. In my judgment Mr. Foskett has the formidable obstacle in his way in the circumstances of this case of persuading us that the judge's decision on 17 February 2005 was manifestly unjust. No authorities were cited to the judge on 15 December. Both parties agreed that, in the light of **BCT Software,** the judge should be given the opportunity of reconsidering the issue of costs. It would be reasonable to expect them to accept his (later) decision, unless it was manifestly unjust. Was, therefore, the later decision manifestly unjust?

36. In my opinion it was not. First, the judge did not have the benefit of the authorities, particularly **BCT Software,** cited to him on 15 December. He did have that advantage on 23 December. Second, he undertook a fresh appraisal, as he was entitled to do. Having again received the available evidence he said that he did not think he had got it right in concluding on 15 December that the primary responsibility lay with the defendant for the matter getting to trial. He concluded that maybe both parties were at fault. Furthermore, it was within his discretion to conclude, having considered the matters afresh, that he was not in a position to say whether the claimant would in fact have accepted a full undertaking if offered as at 20 September 2004 (see paragraph 33 of his judgment). In my judgment none of these findings can be said to be manifestly unjust.

37. Third, he was correct to find there was no winner and no loser. A critical issue in the case – whether or not the claimant had established that the defendant had attempted to breach, or had breached, the restrictive covenant – was not only not tried but also, as the judge intimated, there was no way of

telling whether the claimant or the defendant would have been successful. If the claimant had succeeded in that issue, then, as Mr Berragan submitted, there would have been little argument that the claimant was entitled to the injunction. If the claimant had established an actual breach or breaches, then the defendant was at risk of paying damages. If, on the other hand, the claimant had failed in establishing breach or attempted breach, then the claimant's claim for an injunction and damages would have failed. Mr Berragan put it succinctly in his submissions. There was one cause of action out of which arose two types of potential relief, injunction and damages.

38. Fourth, although the claimant may have put in opening that their predominant claim was for an injunction, nevertheless the claim for damages was not a mere makeweight. The claim for damages was substantial. In the Particulars of Claim it was computed at £43,318. By the date of trial it had grown to £132,921, as was made clear in Mr. Powell's written submissions in opening. It may be that the defendant was not able to pay such damages but he was at risk of being held liable to pay them. The claimant could have continued with its claim for damages but chose to abandon it.

39. Fifth, if the matter were to be approached on an issue basis, it is not possible to decide the issue of costs by saying that the claimant had come to court to obtain the equivalent of injunctive relief, the defendant had never offered a final undertaking until the day of the trial and that the party primarily responsible for the abortive trial was the defendant and his failure to offer a final undertaking beforehand. Such an approach almost completely ignores the claim for damages and its abandonment on the day of the trial. It also downplays, if not actually masks, the fact that a very substantial amount of each party's costs must have been expended on the vital core of the case namely proving/rebutting the allegation of breaches of the restrictive covenant, and also on the issue of damages.

40. Sixth, in the circumstances, it cannot, in my opinion, be said that an order that each party is responsible for its own costs is manifestly unjust. The order fairly reflected that there was no winner and no loser. Such a result will not send out the message suggested by Mr Foskett. The only message that this case may send out is to reiterate and reinforce the warnings given by this court in **BCT Software** and **Venture Finance** of the dangers of trial judges being persuaded to decide issues of costs when all issues, save costs, have been settled, or resolved without the necessity for a judgment.

41. I would dismiss the appeal.

Lady Justice Hallett:

42. I agree.

Mr David Foskett QC and Mr Giles Powell (instructed by Hill Dickinson) for the Claimant
Mr Neil Berragan (instructed by Bowdlers Solicitors) for the Defendant