



Neutral Citation Number: [2026] EWHC 795 (KB)

Case No: KB-2023-003469

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 April 2026

Before :

THE HONOURABLE MR JUSTICE NICKLIN

Between :

Full Colour Black Limited
(trading as Brandalised)

Claimant/
First
Respondent

- and -

(1) The artist known as "Banksy"
(2) Pest Control Office Limited

Defendants/
Applicants

- and -

Andrew Gallagher

Second
Respondent

Aidan Eardley KC (instructed by **Laytons LLP**) for the **Claimant/Respondents**
Andrew Caldecott KC and Gervase de Wilde (instructed by **Howard Kennedy LLP**)
for the **Defendants/Applicants**

Hearing date: 28 November 2025

Approved Judgment

This judgment was handed down remotely at 10.00am on 1 April 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Nicklin :

1. The Claimant (“FCB”) brought a claim for libel against the Defendants. On 27 March 2025, FCB filed a notice of discontinuance. The usual order, following a discontinuance, is that FCB is liable for the costs incurred by the Defendants up to the service of the notice of discontinuance (see [89] below). However, the Court can make a different order for costs, and that is what the Defendants seek.

A: The present applications

2. By Application Notice dated 22 July 2025, the Defendants applied for orders: (1) that FCB should pay the Defendants’ costs on the indemnity basis; (2) that Andrew Gallagher, the sole director and shareholder of FCB, should be ordered to pay the Defendants’ costs; and (3) for a payment on account of the order for costs. FCB does not resist a payment on account of any order for costs; the only matter to be resolved is the quantum. The Defendants seek the orders in (1) and (2) on the grounds, in summary, that the claim brought by FCB, and the way it was pursued, was an abuse of process. In summary, the Defendants’ principal contention is that FCB used the proceedings to threaten to expose the real identity of the First Defendant (“Banksy”) as part of a strategy to obtain a commercial agreement between FCB and the Defendants enabling FCB to continue commercial exploitation of Banksy’s artworks.

B: Background and Parties

3. FCB is a company, established in 2007, trading under the name “Brandalised”. It describes itself as a company specialising in the commercialisation of contemporary street art, including works by Banksy. Andrew Gallagher is the sole director/shareholder of FCB. He began photographing Banksy’s art in 2001. Later, through FCB, he began exploiting Banksy’s art commercially. FCB’s business model is to grant licences to exploit photographs of artworks for commercial use, principally on clothing and greeting cards (I deal below with the viability of this business model at least insofar as it involved exploitation of Banksy’s artworks – see [13] below).
4. Banksy needs no real introduction. He is an internationally renowned pseudonymous street/graffiti artist. His works are typically sprayed on surfaces in public locations using stencils. Banksy’s artworks frequently deliver anti-establishment political messages, often expressed through sharp, satirical commentary.
5. Banksy is well-known for having kept his identity secret and has taken great care to preserve his anonymity throughout his career. There are several compelling reasons for this choice. Chief among them is its significance to his artistic expression: anonymity ensures that attention remains focused on the work itself, rather than on the celebrity or personal attributes of the artist. Moreover, the impact of the social commentary embedded in much of Banksy’s art is, at least in part, strengthened by the mystery surrounding his identity.
6. Banksy has his own website (banksy.co.uk) and his Instagram account has over 14 million followers. When sold commercially, Banksy’s artworks are valued highly. In March 2021, Banksy’s “*Game Changer*”, which was donated to the University Hospital Southampton, sold for £16.8m. However, consistent with many of the anti-

consumerism messages in his art, Banksy is publicly opposed to the commercial exploitation of his works and refuses to licence such exploitation.

7. The Second Defendant is a registered company. The Second Defendant publicly describes itself as the “*Parent/Legal guardian for the artist Banksy*”. On its website, it states:

“We’re the office that handles the paperwork for the graffiti artist Banksy. We keep detailed records of all the artwork, answer inquiries and intercept hate mail. We are the sole point of contact for the artist”.

8. The Second Defendant has been appointed by Banksy to protect his work and to act as his exclusive and only approved authentication body. The Second Defendant holds exclusive worldwide licence of the copyright in Banksy’s artworks. It seeks to protect, enforce and defend the copyright and moral rights of Banksy. Consistent with Banksy’s opposition to commercial exploitation of his works (see above), a notice on the Second Defendant’s website makes clear:

“... neither Banksy or Pest Control licence the artist’s images to third parties. Please do not use Banksy’s images for any commercial purposes, including launching a range of merchandise or tricking people into thinking something is made or endorsed by the artist when it isn’t”.

9. FCB’s unauthorised exploitation of Banksy’s artwork has led to a history of clashes between FCB and the Defendants stretching back over a decade. Banksy has objected to FCB’s use of his works both directly and indirectly through complaints made to the third parties who were selling FCB’s Banksy merchandise. In response, FCB has sought to persuade Banksy to agree a commercial arrangement to enable it commercially to exploit his art.

- (1) In late 2011, FCB complained to the Second Defendant after it had made representations to the Tate Gallery alleging that the Gallery was selling unauthorised Banksy merchandise. In an email, dated 14 November 2011, Mr Gallagher protested that “*this type of activity is actionable against you and your business as unjustified threats and unlawful interference with our business*”. He asserted that FCB did not use “*unlawful images*” in its merchandise. In what might be thought to reflect a rather rudimentary understanding of copyright law, Mr Gallagher sought to justify FCB’s commercial exploitation of Banksy’s works on the basis that “*there is a separate copyright that applies to photographs*”. As to the threat of action by Banksy, Mr Gallagher added:

“... the sort of action you are talking about will also certainly hurt Banksy as well. We are both aware that Banksy has firmly established a popular ‘scarlet pimpernel’ reputation which puts him on a different level to every other graffiti artist in the world. This is valuable and probably a position he wishes to preserve. In the course of a legal action there will be close scrutiny of all the claims made and Banksy himself will have to give evidence to prove the creation of the works on which he claims copyright”.

Mr Gallagher finished his email with a proposal:

“As have stated both verbally and in written communications to your office, we are ready and want to pay Banksy. If this is something that you are open to discussing, do let us know so that we can set out a deal proposal. Anything discussed and agreed would remain absolutely confidential”.

- (2) In December 2011, a licensee of FCB contacted FCB to advise it that the Second Defendant had contacted museums, including MoMA in New York, and other retailers demanding that they cease selling FCB’s Banksy products.
 - (3) In January 2014, the Second Defendant made similar complaints to a licensee of FCB in Japan. In response, Mr Gallagher sent a letter to the Second Defendant responding to the allegations of infringement of Banksy’s rights. Mr Gallagher asserted that FCB’s activities were lawful, maintaining that the images it used were either original works created by designers or photographs licensed from independent photographers, and denying any use of “*unlawful images*”. He repeated the threat that he had made in the email of 14 November 2013 email (see [9(1)] above) that any legal proceedings would subject Banksy and his claims to public examination, require him to give evidence to establish authorship and ownership of copyright, and thereby carry a risk of public identification. Finally, Mr Gallagher renewed his earlier offer to resolve matters without litigation, stating that FCB had been, and remained, willing to pay Banksy, and proposing confidential discussions to avoid escalation, while purporting to reserve FCB’s position should the dispute continue.
 - (4) In October 2014, apparently in response to a complaint lodged by the Second Defendant, officers from Trading Standards visited FCB’s exhibition stand at the ‘Brand Licensing Europe’ event at Earl’s Court Exhibition Centre.
 - (5) In mid-January 2016, Banksy (through the Second Defendant) raised a complaint with one of FCB’s Japanese licensees, Medicom, concerning the manufacture and sale of certain Banksy-branded products. The complaint asserted that the products in question were unauthorised and infringed Banksy’s rights, and it sought to prevent Medicom and its retailers from continuing to deal in them. On 14 January 2016, FCB responded in writing on its own behalf. In that response, Mr Gallagher rejected the substance of the complaint and maintained that FCB was entitled to license the relevant products. He insisted that neither Medicom nor its retailers were acting unlawfully by continuing to sell Banksy products. The response was copied to Medicom. At the same time, Mr Gallagher prepared a standard form letter intended for circulation to any retailers who might be contacted directly by the Second Defendant. That letter reiterated FCB’s position, denied that the products were unauthorised, and sought to reassure recipients that there was no legal basis for the demands being made.
10. The parties have also been engaged in a longstanding dispute arising from the Defendants’ attempts, through the Second Defendant, to protect Banksy’s works by seeking to register trade marks (including word marks and image marks derived from well-known artworks), and from FCB’s opposition to those efforts. From around 2018, FCB challenged and sought to invalidate or revoke a number of trade mark registrations applied for by the Second Defendant, on the basis that they covered goods and services

which Banksy did not himself produce and which, in FCB's view, were intended to impede FCB's ongoing licensing activities. The Defendants adopted the trade mark strategy as a means of protecting Banksy's works and reputation in circumstances where reliance on copyright litigation was problematic because of the risk to Banksy's anonymity.

11. Mr Eardley KC described the historic relationship between the parties as an "*uneasy equilibrium*", a phrase also used by Mr Gallagher. More accurately, it had hardened into a fractious stalemate. FCB continued to produce and sell merchandise that it knew the Defendants contended were infringing copies. The Defendants' apparent unwillingness to litigate reflected a clear unwillingness on Banksy's part to embark upon proceedings that carried a risk of revealing his identity. Mr Gallagher was well aware of the reluctance of the Defendants to litigate; it was a point he was making forcefully in his correspondence. A belief that Banksy would be unwilling to sue for copyright infringement, given the attendant risk of identification, would readily explain FCB's stance in declining to comply with repeated demands by the Defendants that it cease commercial exploitation of Banksy's works.
12. Public statements made by Aaron Wood, a Chartered Trade Mark Attorney and Trade Mark Litigator who acted for FCB (and later joined the firm of solicitors originally instructed by FCB) also reinforce the conclusion that FCB was conscious of the potential leverage of Banksy's concern to protect his anonymity.
 - (1) In response to a post about the trade mark dispute between FCB and the Defendants, Mr Wood posted on Twitter, on 16 June 2020:

"For BAnKSY (sic) it is also about avoiding having to prove ownership of copyright (which would end his anonymity)"
 - (2) To similar effect, in comments made to the BBC on the trade mark dispute Mr Wood said:

"The problem for Banksy using copyright is he would have to come out of the shadows. He would have to say, 'Here I am, I created the work'. And in doing so he would lose that shroud of anonymity. So, he doesn't do that".
 - (3) In an article published in the *Daily Telegraph* on 22 June 2021, Mr Wood was quoted saying:

"The unusual issue for artists is not being identified, so Banksy is in uncharted waters".
 - (4) In a further interview with Australia's Channel Nine Television, on 3 July 2021, Mr Wood said:

"He's never sued anyone for copyright infringement and there's a really good reason why: if he went to court and said 'I want to sue you for copyright infringement', he would have to say 'I'm the person who created it'.

...

Banksy has found himself in a legal Catch 22... To get trademarks on his work he has to unmask himself and if he unmasks himself his work would not have the same value”.

- (5) After proceedings were commenced by FCB, Mr Wood was quoted in an article in *The Sun* making similar comments (see [33] below).
13. FCB’s business model was, in this respect, legally precarious. FCB’s licensing arrangements were premised on the grant of rights in photographs of Banksy’s artworks. While a photograph may itself attract copyright protection, that copyright is distinct from, and does not displace, the copyright subsisting in the underlying artistic work. Where a photograph of an artwork is reproduced so as to copy a substantial part of the underlying work, the making and commercial exploitation of such copies, without the consent of the copyright owner of the artistic work, is liable to infringe that underlying copyright. Accordingly, absent a licence from Banksy (or from the Second Defendant as his exclusive licensee), the reproduction of photographs of Banksy’s works on merchandise carried an inherent risk of infringement proceedings by the owner of the copyright in the artworks themselves. FCB’s ability to license photographic copyright could not, as a matter of law, confer a right to reproduce the underlying artistic works, and it was this fundamental limitation which underpinned the Defendants’ longstanding objections to FCB’s activities.
 14. The events that led to FCB bringing a libel claim against the Defendants can be shortly stated.
 15. In October 2022, a collaboration between FCB and the fashion retailer GUESS resulted in the launch of a clothing collection marketed under the description “*GUESS X BRANDALISED WITH GRAFFITI BY BANKSY*”. The collection was promoted online and in GUESS retail stores across the United Kingdom, including the flagship store on Regent Street, London. The promotional materials and garments featured images derived from artworks attributed to Banksy, including the work commonly known as “*Flower Thrower*” (or “*Flower Bomber*”).
 16. The commercial arrangements between FCB and GUESS were governed by a written licensing agreement dated 8 March 2022. Banksy was not a party to the agreement, and it was concluded without his knowledge. Under the agreement, FCB granted GUESS a licence to use and reproduce images supplied by FCB, comprising photographs and digital image files derived from artworks attributed to Banksy, for the purposes of manufacturing, marketing, promoting and selling apparel and related merchandise. The licence extended to the incorporation of those images into clothing and other consumer products, and to their use in associated advertising, promotional and point-of-sale materials. The agreement contemplated wide commercial exploitation of the images through GUESS’s retail operations, subject to the contractual terms as to territory, duration, royalties and approvals.
 17. Of particular significance is clause 7.1 of the agreement, by which FCB expressly represented and warranted to GUESS that it was entitled to grant those rights. FCB warranted that it had the right to exploit and license the photographs of the artworks in question and to enter into and perform the agreement, and that, to the best of its knowledge, the licensed materials did not infringe the rights of any third party. I have no evidence from GUESS, but it might be thought surprising if (with the benefit

of advice) it had not identified the risk that exploitation of Banksy's artwork in the proposed range of merchandise might expose it to a claim for copyright infringement. GUESS was, however, entitled to rely upon the warranty from FCB that it was lawfully entitled to license the use of photographs of Banksy's works for the commercial purposes contemplated by the agreement.

18. By mid-November 2022, the Regent Street GUESS store displayed items from the collection in its shop window. The window display incorporated a large image derived from *Flower Thrower* and prominently displayed the wording "*GUESS X BRANDALISED WITH GRAFFITI BY BANKSY*" applied to the window itself. As was the intention, the display was visible to passers-by on one of London's busiest shopping streets.
19. On 14 November 2022, the Second Defendant became aware of the Regent Street window display after receiving a photograph of it. No permission had been sought from, or granted by, the Defendants for the commercial use of Banksy's artworks or name in connection with the GUESS collection. It would naturally have appeared to consumers that Banksy had entered a commercial relationship with GUESS to exploit his works in a range of clothing sold by GUESS. Any such an appearance would have been false. Banksy had done no such thing.
20. On 18 November 2022, Banksy took a photograph of a window display at the Guess store on Regent Street, London. The same day, he posted it on his Instagram account adding a notice in the following terms ("the Instagram Post"):

"Attention all shoplifters

Please go to GUESS on Regent Street. They've helped themselves to my artwork without asking, how can it be wrong for you to do the same to their clothes?"
21. The post was published to the very substantial number of Banksy's followers on Instagram and rapidly attracted widespread public and media attention.
22. Following publication of the Instagram Post, crowds gathered outside the Regent Street GUESS store, causing disruption and leading to the temporary closure of the store. The window display was altered shortly thereafter, with the wording referring to "GRAFFITI BY BANKSY" being removed from the window. The clothing collection continued to be sold through other channels.
23. On 22 November 2022, the Second Defendant sent a formal letter of complaint to GUESS objecting that the window display and associated promotional material had misled the public into believing that Banksy (and Pest Control) had endorsed or authorised the collaboration. The letter stated, in terms, that "*nothing could be further from the truth*" and complained that the public had been misled into thinking that Banksy had endorsed GUESS's activities.
24. I was told at the hearing that GUESS did not respond to that letter, nor did it acknowledge it. Mr Caldecott KC showed me an email, dated 23 November 2022, in which Dario Cardamone, the Vice-President of Global Marketing for GUESS, issued the following statement for publication:

“GUESS are fully committed with our licensing collaboration with Brandalised™ and are continuing to sell out Collaboration across all our channels. Recent social media actions have not damaged our campaign, if anything, it has pushed it’s (sic) success further.

At GUESS, we do not take into consideration actions of individuals who make false claims and dishonest claims on social media.

We confirm that we have not received any official legal communications regarding this collection from any third parties”.

25. I infer from the final sentence of that statement that Mr Cardamone was unaware of the Second Defendant’s letter of complaint at the time his statement was issued. Nevertheless, GUESS continued to sell merchandise bearing Banksy’s artworks until at least October 2023.

C: Procedural history

26. On 21 December 2022, FCB sent a formal letter of claim to the Defendants alleging that the Instagram Post was defamatory. It is important to note that in this initial communication FCB did not raise any issue about Banksy’s true identity. The letter treated him as one of the relevant defendants, liable for publication of the Instagram Post, and focused entirely on alleged defamatory meaning and serious harm. At this stage, there was no suggestion that FCB might seek to compel Banksy’s identification.
27. No substantive response was provided by, or on behalf of, the Defendants at that stage. (It was not until 10 October 2023 that the Defendants’ solicitors sent a substantive response (see [36] below)).
28. Between January and February 2023, FCB’s solicitors sent a series of chasing letters seeking a response to the letter of claim. The Defendants’ solicitors provided holding responses. During this period, the focus of FCB’s inquiries was directed at establishing who was responsible for publication, rather than who Banksy was.
29. On 22 February 2023, the Defendants’ solicitors confirmed that the Second Defendant accepted responsibility for publication of the Instagram Post. Importantly, considering later developments, the Defendants’ solicitors suggested that defences of truth and honest opinion would protect publication of the Instagram Post.
30. No further steps were taken by FCB until 6 September 2023, when it issued a Claim Form bringing a libel claim against both Defendants in respect of the Instagram Post. The Claim Form, together with the Particulars of Claim, was served on 13 September 2023. In its Particulars of Claim, which were settled by Leading and junior Counsel (not Mr Eardley KC), FCB alleged that the Instagram Post identified it and conveyed the meaning that it had “*stolen Banksy’s artwork by licensing images to GUESS without permission or other legal authority*”. FCB contended that, in that meaning, the Instagram Post was defamatory and that its publication had caused, and was likely to cause, serious harm to FCB’s reputation and serious financial loss within the meaning of s.1 Defamation Act 2013.
31. In the final sentence of Paragraph 2 of the Particulars of Claim, the ostensible purpose of which was to introduce the parties, FCB included the following:

“The Claimant reserves the right to seek an order that [Banksy] identifies himself for the purposes of these proceedings”.

32. Acknowledgments of Service, indicating an intention to defend the proceedings, were filed by solicitors acting on behalf of both Defendants on 29 September 2023.
33. On 4 October 2023, an article was published in *The Sun* newspaper reporting on the dispute. The article included a quote attributed to Mr Wood, described in the article as the solicitor acting for FCB, commenting that “*the worst thing that could happen to Banksy is if he gets unmasked by appearing in court*” and suggesting that disclosure of Banksy’s identity would fundamentally alter the public perception of his work (“*The Sun Article*”). These remarks were in keeping with earlier public statements made by Mr Wood (see [12] above).
34. Following receipt of the Acknowledgement of Service, FCB’s solicitors objected to Banksy’s failure to state his full name in the Acknowledgment of Service. In correspondence, dated 5 October 2023, relying upon CPR 10.5(1)(d), FCB’s solicitors demanded that Banksy must set out his name “*in full*” in the Acknowledgment of Service, notwithstanding that he had been named in the Claim Form as “*the artist known as Banksy*”.
35. On 10 October 2023, the Defendants’ solicitors sent a substantive letter in response to FCB’s letter before action and the commencement of proceedings. The letter repeated that both Defendants accepted responsibility for publication of the Instagram Post but denied that it was defamatory. They contended that the ordinary reasonable reader would understand the GUESS window display and associated promotional material – particularly the wording “*with graffiti by Banksy*” and the branding “*Brandalised*” – as conveying that Banksy had collaborated with, or authorised, the commercial exploitation of his artwork by GUESS. The letter asserted that this impression was false, that no permission had been given by Banksy or the Second Defendant for such use, and that the public had been misled as a result.
36. The Defendants further maintained that the Instagram Post was a legitimate and proportionate response to that misleading impression, published to correct the record and to protect Banksy’s reputation. They advanced substantive defences of truth and qualified privilege on the grounds that the Instagram Post was a reply to attack. The letter also addressed issues of identification and anonymity, explaining the Defendants’ position that the First Defendant should continue to be identified in the proceedings as “*Banksy*”, and foreshadowed the making of an application for anonymity and related relief.
37. On 22 November 2023, the Defendants duly issued an Application Notice seeking, among other things, an order that the real identity of the First Defendant should be withheld in the proceedings and that he be identified in the proceedings only by the name “*Banksy*” (“*the Identity Application*”) and an extension of time for service of a Defence until the Identity Application had been resolved.
38. The Identity Application was referred to me, as the then Judge in Charge of the Media & Communications List, and, on 8 December 2023, I made an Order, without a hearing, giving directions for the listing of the Identity Application. In the Order, I also noted (1) FCB’s purported “*reservation of the right*” (sic) to seek the unmasking of Banksy

in the proceedings included in the Particulars of Claim (see [30] above); and (2) the comments attributed to FCB's solicitor in *The Sun* Article (see [33] above). I therefore directed that, by 5 January 2024, FCB must issue any Application Notice seeking an order that Banksy identify himself for the purposes of the proceedings ("the Naming Application"). In default, the Order provided that the sentence of the Particulars of Claim purporting to reserve the right to do so would be struck out. The Order required that the evidence in support of any Naming Application must (1) confirm whether Mr Wood had been accurately quoted in *The Sun* Article; and (2) explain what FCB sought to achieve in the claim against Banksy that it could not legitimately achieve in its claim against the Second Defendant.

39. The Order included the following explanation for the orders I had made, some of the Court's own initiative:

(B) ... The final sentence of Paragraph 2 of the Particulars of Claim might be thought to be gratuitous (perhaps even provocative). What purpose it serves in a Particulars of Claim is not clear to me. However, it must have been included for a purpose. Now that the Identity Application has been issued, it would be sensible for the Claimant to bring forward the Application that it has "*reserved the right*" to bring for an Order that the First Defendant should identify himself. As the issues in any Naming Application are likely to overlap with the issues in the Identity Application it is desirable that these are resolved at the same hearing. The Orders I have made ensure that any Naming Application (if issued) can be issued and heard at the Hearing. If no Naming Application is made, the final sentence of Paragraph 2 of the Particulars of Claim will be otiose and will be struck out (with the Claimant paying the costs of the Amended Particulars of Claim).

(C) Someone described as a lawyer for the Claimant is quoted in an article in *The Sun* ... [(“the Wood Statement”). This has been relied upon in the evidence in support of the Identity Application. The Wood Statement appears me to have potential significance. So that clarity is obtained, I have included [the order requiring confirmation whether Mr Wood had been accurately quoted].

(D) Finally, and thinking more broadly about the way in which the Court might manage this litigation, I have directed the Claimant to provide the information [explaining what FCB seeks to achieve in the claim against the First Defendant that it could not legitimately achieve in its claim against the Second Defendant]. One way in which the Court could resolve potential tensions between the parties on the issue of the identity of the First Defendant, and whether it should be revealed, might be to stay the claim against the First Defendant. If the Claimant can obtain all the relief that he could legitimately obtain in these proceedings from the Second Defendant, what of additional and legitimate benefit is obtained by suing the First Defendant as well? This represents very preliminary thinking on my part, without the benefit of the parties' submissions, but the provision of this information will assist in determining whether this is a realistic way in which the Court could proceed”.

40. In the event, FCB did not pursue the Naming Application and, on 28 February 2024, substantially by consent, the Court (1) ordered that the claim against Banksy be stayed

until the resolution of the claim against the Second Defendant; and (2) confirmed the striking out of the sentence in the Particulars of Claim seeking to reserve a right to require identification of Banksy and required FCB to remedy its default in serving Amended Particulars of Claim. The hearing of the Identity Application was listed for 25 March 2024.

41. Meanwhile, the Second Defendant served its Defence on 26 January 2024, and FCB served its Reply on 8 March 2024, settled by the same Counsel who had pleaded the Particulars of Claim. The statements of case crystallised the issues of meaning, truth, qualified privilege and serious harm. The Defence admitted and averred that Banksy created the relevant artworks.
42. The absence of a defence of honest opinion in the Defence appears, on its face, striking, and it was a change of tack from the position advanced in the letter of 22 February 2023 (see [29] above). Honest opinion was the obvious and, judged objectively, far and away the strongest defence to the claim. Instead, the Defence advanced other substantive defences which, if successful, would dispose of the claim while reducing the risk that Banksy himself would be required to give evidence. One explanation for this plainly tactical decision is that reliance on honest opinion would have carried a material forensic risk: it would have required Banksy to give evidence that he genuinely held the opinion expressed in the Instagram Post. Mr Caldecott KC declined to be drawn on this issue at the hearing. My conclusion, however, is that this explains the otherwise difficult-to-understand omission of an honest opinion defence. Having largely seen off FCB's efforts to unmask Banksy through the proceedings, the Second Defendant was not going to undermine that position by advancing a defence that would reintroduce that risk.
43. On 20 February 2024, having apparently learned of the Defence being filed, *The Sun* reported: "*Now Banksy has filed defence documents at the High Court – which is an unexpected move as he was expected to concede the lawsuit to avoid revealing his true identity*".
44. The abandonment of the Naming Application, coupled with the terms of the Defence, which materially reduced the prospect of Banksy being compelled to give evidence, might have been thought to have brought an end to any attempt by FCB to apply pressure on the Defendants by exploiting Banksy's concern about being unmasked. However, in its Reply, FCB adopted a pleading approach which had the effect of reintroducing that issue. FCB disputed that the relevant artworks had been created by Banksy and advanced a non-admission as to his involvement in, and responsibility for, publication of the Instagram Post. This resulted in FCB advancing contradictory positions across its statements of case. In the Particulars of Claim, FCB had pleaded that Banksy had published the Instagram Post (a point that the Defendants had already admitted in correspondence) and asserted that the artworks licensed to GUESS were works "*by Banksy*", thereby advancing a case that he was the creator and owner of the copyright. By contrast, in the Reply, FCB resiled from its previous case on publication and declined to admit that Banksy was the creator of the artworks and required the Second Defendant to prove that matter. The Defendants characterised this change in approach as a tactical shift, contending that it was intended to ensure that the proceedings continued to carry a risk that Banksy might be required to give evidence and face public identification.

45. On 12 March 2024, the Identity Application was resolved, without a hearing, by a consent order (albeit that, as it was a derogation from open justice, I was required to be – and was - satisfied that it was strictly necessary to make the order). Amongst other things, the Order (1) granted anonymity to the First Claimant pursuant to CPR39.2(4) and directed that the First Defendant be referred to only as “*Banksy*” for the purposes of the proceedings; and (2) confirmed that the stay of FCB’s claim against Banksy was, as agreed between the parties, continued “*on the basis that the Claimant and the First Defendant shall await and abide by the final determination of the claim against the Second Defendant*”.
46. For reasons that are not adequately explained, FCB took no steps in the litigation for over a year. On 4 February 2025, the Second Defendant issued an application for summary judgment on, and/or striking out of, the claim. On 6 February 2025, FCB instructed new solicitors and counsel (who appeared at the hearing). On 19 March 2025, Collins Rice J gave directions for the determination of the summary judgment application.
47. Between 6 February 2025 and the service of the Notice of Discontinuance on 27 March 2025, FCB’s new solicitors made a concerted effort to settle the litigation in correspondence marked without prejudice save as to costs.
 - (1) In its letters, Laytons proposed settlement terms which were not confined to disposal of the immediate libel claim, but instead sought to link resolution of that claim to wider matters between the parties, including separate challenges to trade marks. In particular, Laytons raised the possibility of the parties “*co-existing*” and proposed discussions aimed at agreeing the terms of a broader arrangement governing future dealings.
 - (2) As part of that approach, Laytons’ correspondence contemplated the negotiation of a commercial or “*co-existence*” agreement, under which FCB would be permitted to exploit Banksy’s works. The proposed settlement discussions were therefore framed to encompass not only the resolution of the libel proceedings, but also the potential for an agreed commercial relationship between FCB and the Defendants going forward.
 - (3) Howard Kennedy, for the Defendants, rejected that approach. In its responses, the solicitors disputed FCB’s characterisation of the correspondence as containing a genuine offer to settle the libel claim alone, and took the position that Laytons’ proposals were improperly structured by seeking to tie settlement of the litigation to agreement on unrelated commercial matters. Howard Kennedy refused to enter discussions aimed at reaching a broader commercial arrangement: “*our clients do not wish, or intend, to work alongside your client going forwards or at all*”.
48. The negotiations produced no resolution and, on 27 March 2025, before the summary judgment application was determined, FCB served a Notice of Discontinuance, discontinuing the claim against both Defendants.
49. Subsequently, on 22 July 2025, the Second Defendant issued the present application.

D: Evidence

(1) Defendants

50. In support of their application, the Defendants rely upon evidence provided in five witness statements provided by their solicitor, Mark Stephens CBE. Collectively, his statements confirm the matters that I have set out in Section B above and address the following matters.

(a) Banksy's anonymity and attitude to commercial exploitation

51. Mr Stephens explains that Banksy is a well-known anonymous artist who has consistently sought to preserve his anonymity, including in legal contexts. He gives evidence that:

- (1) disclosure of Banksy's real identity in legal proceedings would have significant personal and professional consequences; and
- (2) the Second Defendant acts as Banksy's exclusive licensee and authentication body, and is responsible for protecting his interests, including anonymity.

(b) Subsistence and ownership of copyright in Banksy's works

52. The Defendants' position on copyright is explained by Mr Stephens in his first witness statement. In summary, the Defendants contend that copyright in the relevant artworks subsists in the First Defendant as author, and that no licence or consent was ever granted to FCB (or to third parties acting through or with FCB) to use or commercially exploit those works. The Defendants' case is that this position had been made clear to FCB repeatedly prior to the commencement of the proceedings.

53. Mr Stephens explains that the Defendants consistently objected to what they regarded as unauthorised commercial exploitation of the First Defendant's artwork, and that those objections were grounded in their asserted ownership of copyright.

54. Insofar as FCB relies on its business model or on arrangements with third parties, those matters do not undermine the Defendants' copyright claim. The Defendants' position is that FCB's arrangements could not confer rights which FCB did not have, and that any commercial exploitation required the consent of the copyright owner, which was never given. Accordingly, the Defendants maintain that their assertion of copyright, and their objections to FCB's conduct, were genuine, longstanding and properly founded, and that they were entitled to state publicly that permission for the relevant use of the artwork had not been granted.

(c) Banksy's consistent opposition to commercial exploitation

55. Mr Stephens gives evidence of a long-standing and publicly articulated position by Banksy opposing the secondary commercial exploitation of his works, a position that would have been well-known to FCB. In particular:

- (1) He refers to public statements made by Banksy from at least the early 2000s onwards objecting to the commercialisation of his art.

- (2) He explains that neither Banksy nor the Second Defendant has ever authorised third parties to exploit his works commercially in the manner undertaken by FCB.
- (3) He exhibits examples of correspondence and public material relied upon to demonstrate that this position was well known.

(d) The Defendants' defences

56. Mr Stephens gives evidence that, before service of the Defence, the Defendants had:
- (1) Explained their position on qualified privilege and copyright in pre-action correspondence.
 - (2) Made clear that they regarded FCB's activities as infringing Banksy's rights and as misleading the public.
 - (3) Set out, in detail, the factual basis on which they intended to defend the claim.
57. This evidence is relied upon to counter any suggestion that the Defendants' defences were an afterthought or opportunistic, and to support the submission that FCB continued the proceedings with full knowledge of the strength of the Defendants' position.

(e) Alleged "unmasking" strategy and use of pressure

58. Mr Stephens addresses a series of matters relied upon by the Defendants as evidence of an alleged strategy to apply pressure by exploiting Banksy's sensitivity about anonymity, including:
- (1) FCB's insistence, in correspondence, that Banksy provide his full name in the Acknowledgment of Service.
 - (2) The reservation, in the Particulars of Claim, of the right to seek an order requiring Banksy to identify himself.
 - (3) Media statements and background briefings provided by or on behalf of FCB following the issue of proceedings, including *The Sun* Article.
 - (4) The way in which the Reply was pleaded, particularly the non-admissions referred to above (see [44] above).
59. This evidence is relied upon as part of the Defendants' case that the litigation was being used, at least in part, as a means of exerting illegitimate pressure rather than pursuing a straightforward claim for vindication.

(f) Settlement overtures and "co-existence" proposals

60. Mr Stephens gives evidence that, after the summary judgment application was issued and after Laytons came on the record for FCB, FCB made settlement overtures on a without-prejudice save as to costs basis.

61. He states that:
- (1) FCB sought a negotiated outcome that would allow it to continue its business model and its commercial exploitation of Banksy-attributed works.
 - (2) These proposals were advanced notwithstanding Banksy's consistent refusal to permit such exploitation.
62. Mr Stephens argues that these overtures demonstrate that FCB was seeking, through litigation pressure, to obtain a commercial accommodation that had been refused outside court. This evidence is relied upon in support of the Defendants' submissions on motive and abuse.

(g) The role of Mr Gallagher and FCB's financial position

63. Mr Stephens addresses the position of Mr Gallagher as:
- (1) FCB's sole director and shareholder;
 - (2) the individual who controlled and directed the litigation; and
 - (3) the person who stood to benefit from any successful outcome or favourable settlement.
64. He also gives evidence suggesting that:
- (1) FCB has limited resources and may be unable to satisfy an adverse costs order.
 - (2) Intellectual property assets had been assigned to another company controlled by Mr Gallagher prior to the proceedings.
 - (3) Mr Gallagher declined to provide financial information demonstrating FCB's ability to pay costs.
65. This evidence underpins the application for a non-party costs order.

(h) Delay in bringing the costs applications

66. Mr Stephens' fourth witness statement was served pursuant to a court order requiring the Defendants to explain the delay between discontinuance and the issue of the present applications.
67. He explains that:
- (1) The Defendants did not immediately appreciate the full significance of FCB's conduct until the proceedings had concluded.
 - (2) The delay was not tactical but arose from the time taken to assess the implications of FCB's discontinuance and conduct.
 - (3) The Defendants did not regard the delay as causing prejudice to FCB.

(i) Costs incurred and payment on account

68. Finally, Mr Stephens provides evidence of:

- (1) the categories and scale of costs incurred by the Defendants, including costs attributable to the Identity Application, the summary judgment application, and the proceedings as a whole;
- (2) the involvement of leading and junior counsel; and
- (3) the basis on which a payment on account is sought.

69. This evidence is relied upon in support of both the indemnity costs application and the application for an interim payment.

(2) FCB

70. In answer, FCB has filed witness statements from (1) Andrew Gallagher, the sole director and sole shareholder of FCB; (2) Robert Paydon, a partner in FCB's solicitors (instructed since February 2025 – see [45] above); and (3) Aaron Wood, a Chartered Trade Mark Attorney, with whom FCB has worked since 2012.

(a) Andrew Gallagher

71. Mr Gallagher's evidence addresses both the purpose for which the libel proceedings were brought and his own role in directing them.

72. He explains that the claim was commenced to vindicate FCB's reputation and to seek compensation for what he contends was serious reputational and financial harm caused by the Instagram Post. He denies that the proceedings were pursued for any improper or collateral purpose, including any strategy to threaten or procure the identification of Banksy. In his evidence, Mr Gallagher states in terms that neither he nor FCB sought to "unmask" Banksy through the litigation.

73. Mr Gallagher accepts that he exercised control over the conduct of the proceedings, but emphasises that this was inevitable given his position as FCB's sole director and shareholder. He maintains that decisions were taken on legal advice from specialist solicitors and counsel, and denies that he acted in bad faith or with any intention to misuse the litigation process.

74. As to the pleading history, Mr Gallagher seeks to explain the way the Reply was framed. He denies that the non-admissions concerning Banksy's authorship of the artworks or his responsibility for publication of the Instagram Post were adopted for tactical reasons, and contends that they reflected legitimate issues raised by the Defence, including challenges to attribution and authorship.

75. Mr Gallagher also addresses the history of dealings between FCB and the Defendants. He accepts that FCB has, on occasions, offered to pay royalties for the use of Banksy's works, but disputes the characterisation of those communications as threats or pressure. He maintains that they were genuine attempts to regularise FCB's business and to resolve disputes commercially.

76. In relation to costs and means, Mr Gallagher accepts that FCB's business has suffered a significant downturn since November 2022. He attributes that decline to the impact of the Instagram Post on FCB's commercial relationships. He accepts that FCB would struggle to meet a substantial adverse costs order, but denies that this justifies the imposition of personal liability on him. He emphasises the importance of limited liability and contends that any benefit he stood to gain from the litigation was no more than the indirect consequence of his shareholding.

(b) Robert Paydon

77. Mr Paydon's evidence is primarily directed to the conduct of the litigation following Laytons' instruction, the settlement efforts made on behalf of FCB, and the Defendants' delay in bringing the present applications.
78. He explains that Laytons were instructed in February 2025, shortly after service of the Second Defendant's summary judgment application. He states that, once instructed, Laytons undertook a review of the proceedings and engaged in without-prejudice save as to costs correspondence with the Defendants' solicitors to seek to resolve both the libel proceedings and the wider disputes between the parties.
79. Mr Paydon characterises those efforts as genuine attempts to settle the litigation and to avoid the incurring of further costs. He disputes the Defendants' contention that the settlement overtures were improper or abusive, and denies that they were premised on any illegitimate leverage arising from Banksy's anonymity.
80. Mr Paydon also addresses the Defendants' costs claims. He criticises the level of costs incurred, contending that they are excessive and disproportionate, particularly in light of the procedural history and the fact that the claim was discontinued before determination of the summary judgment application. He raises concerns about duplication of work, the number of fee-earners involved, and the involvement of leading counsel.
81. In addition, Mr Paydon relies on the delay between FCB's discontinuance of the proceedings in March 2025 and the issue of the present applications in July 2025. He contends that this delay is unexplained and prejudicial, and should weigh against the exercise of the Court's discretion to award indemnity costs or to make a non-party costs order.

(c) Aaron Wood

82. Mr Wood's evidence was directed principally to the issue of Banksy's anonymity, the media coverage following the issue of proceedings, and his own role in communications with the press.
83. He explained that he was a Chartered Trade Mark Attorney who had advised FCB for many years and that, at the relevant time, he had been working closely with FCB's then solicitors. Mr Wood addressed *The Sun* Article in which he had been quoted (see [33] above).
84. Although Mr Wood stated that the quotation had been taken out of context, he did not dispute the accuracy of the words attributed to him in *The Sun* Article. He explained

that he had been responding to press enquiries following the issue of the claim, and that his intention had been to correct what he described as inaccurate reports suggesting that FCB had named Banksy in the proceedings. He denied that he had been advancing, or encouraging, any strategy to apply pressure on Banksy through the risk of identification.

85. Mr Wood further explained that he had provided copies of the Claim Form and Particulars of Claim to members of the press to prevent misreporting of the proceedings. He maintained that his communications had been intended to be factual and explanatory, and not to apply pressure on the Defendants.
86. More generally, Mr Wood disputed the suggestion that FCB's approach to anonymity had been improper. He contended that issues concerning identification had arisen as a matter of procedural necessity rather than tactical design, and that FCB had ultimately accepted the anonymity arrangements ordered by the Court.
87. Overall, FCB's evidence seeks to characterise the proceedings as a genuine attempt to vindicate FCB's reputation, to deny any misuse of the litigation as a means of pressure, and to resist the conclusion that the way the claim was pursued took it outside the norm. Mr Gallagher and Mr Wood both deny that there was any strategy to exploit Banksy's concern for anonymity, while Mr Paydon emphasises the steps taken by FCB's new legal team to resolve the dispute and mitigate further costs.
88. Considering the significant disputes on the evidence, I indicated to Mr Eardley KC, at the hearing, that FCB could, if it wished, call the witnesses on whose evidence it relied, so that they might address any challenges advanced by the Defendants. Mr Eardley KC indicated that FCB was content for the Court to resolve any disputes of fact based on the written witness statements alone, and that cross-examination was not required.

D: Legal principles

(1) Indemnity costs

89. When a claim is discontinued, CPR 38.6(1) provides that the claimant is liable for the costs of the defendant up to the date on which notice of discontinuance is served. However, that default position is expressly subject to the Court's power to make a different order. By their application for indemnity costs, the Defendants seek a different order.
90. As to indemnity costs, the starting point is CPR 44.3, which confers a broad discretion on the court both as to whether to award costs and as to the basis on which they are to be assessed. The practical consequence of an order for indemnity costs is that any doubt as to whether costs were reasonably incurred or reasonable in amount is resolved in favour of the receiving party.
91. The distinction between standard and indemnity costs, and the circumstances in which indemnity costs may be appropriate, are well established. The discretion is fact-sensitive and evaluative, rather than rule-based.

92. The Court of Appeal summarised the key principles in *Thakkar -v- Mican* [2024] 1 WLR 4196 [19] (with further citation of authority omitted):
- (1) The discretion to award indemnity costs is a wide one and must be exercised considering all the circumstances of the case, including but not limited to the conduct of the paying party.
 - (2) To obtain an order for indemnity costs, the receiving party must surmount a high hurdle; to be able to demonstrate “*some conduct or some circumstance which takes the case out of the norm*”. That is the critical requirement.
 - (3) To the extent that the application is based on the paying party’s conduct, it is necessary to show such conduct was “*unreasonable to a high degree*” to recover indemnity costs, but it is not necessary to go so far as to demonstrate “*a moral lack of probity or conduct deserving of moral condemnation*”.
 - (4) The phrase “out of the norm” is intended to reflect something outside the ordinary and reasonable conduct of proceedings.
93. Pursuit of a hopeless case will not ordinarily justify an award of indemnity costs: *Arcadia Group Brands Ltd -v- Visa Inc* [2015] EWCA Civ 883 [83]. In contrast, conduct that the Court finds amounts to an abuse of process by a party may well be found to conduct that is “*out of the norm*”: *McPhilemy -v- Times Newspapers Ltd* [2002] 1 WLR 934 [29].
94. But even conduct that falls short of being held to be abusive, may yet be found to justify an order for indemnity costs. *Hosking -v- Apax Partners LLP* [2019] 1 WLR 3347 was a case where indemnity costs were ordered following a discontinuance. It establishes the following principles:
- (1) Discontinuance does not of itself justify an assessment of the merits, nor does it ordinarily require the court to determine whether the claim was unwarranted or hopeless, since at the point of discontinuance the court will often not have adjudicated on the evidence and the reasons for discontinuance may be unclear or unknowable [44]–[46].
 - (2) Discontinuance does not necessarily connote an acceptance that a claim lacked merit, whether from the outset or at the point of discontinuance; it may reflect a range of considerations, including cost, funding, or strategic priorities, and a fair assessment of the merits may be difficult or impossible where the case has not been adjudicated: [45]–[46].
 - (3) The court is nevertheless entitled to examine the circumstances of the case at the point of discontinuance, including the documentary record and the manner in which the proceedings were pursued, in order to assess whether the claim lacked, or came to lack, any real vitality, or whether it appears to have been continued not with a view to adjudication but as a means of extracting a settlement (for example, by reason of its nuisance value, expense or inherent uncertainty): [47]–[48].

- (4) In the absence of a credible explanation, a sudden and unexplained discontinuance may support an inference that weaknesses which led to discontinuance were not merely late emerging but had always been recognised: [48].
 - (5) There is no special reluctance, at the stage of discontinuance, to awarding indemnity costs where the conduct of the proceedings or the circumstances of the case are revealed as being “*out of the norm*”; the CPR provisions governing discontinuance and standard costs are directed to the norm and do not fetter the court’s discretion in exceptional cases: [49].
 - (6) A hallmark of cases falling “*out of the norm*” is that the proceedings have been highrisk litigation pursued, and often deliberately publicised, to exert pressure in the hope of extracting a settlement, with frail evidential support and little regard to their prospects of success at trial or any genuine objective of securing vindication by adjudication: [50].
 - (7) Although such conduct may not amount to an abuse of process in strict terms, it may be close to it, in that the Court has been intentionally used as an instrument of leverage – an “*anvil for settlement*” – rather than as an adjudicator. Where such conduct is demonstrated, the Court may conclude that the party subjected to the litigation has been exposed to legal process in a way, and for a reason, which is neither proportionate nor reasonable: [51].
 - (8) Where the court concludes that the proceedings were, or became, of that character, discontinuance should not deter, and may positively incline, the Court towards an award of indemnity costs, particularly where serious allegations have been advanced, pursued and widely publicised, and are then abruptly abandoned without explanation, depriving the opposing party of any opportunity for vindication by adjudication: [52].
95. FCB has not disputed these principles, but Mr Eardley KC has rightly emphasised that the threshold remains a high one, reflected in the principles from *Thakkar* (see [92(2)]-[92(3)] above).
96. The authorities do not require proof of dishonesty or bad faith before indemnity costs may be ordered, but they do require conduct which, viewed objectively and in the round, is sufficiently unreasonable to take the case outside the norm. Proceedings pursued for an improper or collateral purpose, including the exertion of illegitimate pressure, may justify such an order. Ultimately, whether the threshold is crossed is a matter of evaluative judgment for the Court on the facts.

(2) Non-party costs orders

97. The jurisdiction to make a non-party costs order derives from s.51 Senior Courts Act 1981. CPR 46.2 provides:
- “(1) Where the court is considering whether to exercise its power under section 51 of the Senior Courts Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings, that person must –

- (a) be added as a party to the proceedings for the purposes of costs only;
and
- (b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further.”

98. The leading authority is *Dymocks Franchise Systems (NSW) Pty Ltd -v- Todd* [2004] 1 WLR 2807. It establishes the following principles ([25]):

- (1) Non-party costs orders are described as “*exceptional*” only in the sense that they fall outside the ordinary run of cases in which parties pursue or defend litigation for their own benefit and at their own expense; the description does not import any special presumption against the exercise of the jurisdiction.
- (2) The ultimate question in every case is whether, in all the circumstances, it is just to make the order sought. The jurisdiction is inherently fact-specific, and the court will often be required to weigh several competing considerations, some pointing towards an order and others against it.
- (3) Generally, the discretion will not be exercised against “*pure funders*”, namely those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and do not seek to control its course. In such cases, priority is ordinarily given to the public interest in facilitating access to justice over the interest of the successful party in recovering its costs.
- (4) Where a non-party not only funds but also substantially controls the proceedings, or stands to benefit from them, justice will ordinarily require that, if the proceedings fail, the non-party should bear the successful party’s costs. In such cases, the non-party is not merely facilitating access to justice, but is himself using the proceedings to gain access to justice for his own purposes.
- (5) In that context, the non-party may properly be characterised as the “*real party*” to the litigation, a concept repeatedly recognised in the authorities. The non-party need not be the sole real party, if he is a real party in very important and critical respects.
- (6) The concept of the “*real party*” is reflected in domestic procedural rules, including CPR 25.27(b)(v), which permits security for costs where a claimant is acting as a nominal claimant.
- (7) In determining whether it is just to make an order in such cases, relevant considerations may include:
 - a) the reason why the non-party caused the proceedings to be brought or defended;
 - b) whether the non-party stood to gain the fruits of the litigation or to preserve assets in which he had an interest;
 - c) the financial position of the party through whom the proceedings were conducted and its ability to meet an adverse costs order;

- d) the degree of potential benefit to the non-party; and
 - e) whether, although ultimately unsuccessful, the bringing or defending of the proceedings was a reasonable course to adopt.
- (8) Directors of a company may stand in a different position from other non-parties with a financial interest, since they may owe duties to act through the company in the interests of creditors or shareholders, including where the company is insolvent. The mere fact that a director promotes or supports litigation will not automatically justify a non-party costs order; the court must consider the position in the round.
99. As to that final point, where the proposed non-party is a director or shareholder of a corporate litigant, the authorities emphasise the fundamental importance of limited liability. Control of the litigation, even sole control, is not of itself sufficient. Nor is the fact that the director may have funded the litigation or stood to benefit indirectly from its success. In *Goknur Gida Maddeleri Enerji Imalet Ithalat Ihracat Tiracet ve Sanayi AS -v- Aytacli* [2021] 4 WLR 101, Coulson LJ reviewed the authorities and summarised the principles to be applied when considering an application for a non-party costs order against a director of a company that was party to the litigation ([40]) (omitting further citation of authority):
- (1) An order against a non-party is exceptional, and it will only be made if it is just to do so in all the circumstances of the case.
 - (2) The touchstone is whether, despite not being a party to the litigation, the director can fairly be described as “*the real party to the litigation*”.
 - (3) In the case of an insolvent company involved in litigation which has resulted in a costs liability that the company cannot pay, a director of that company may be made the subject of such an order. Although such instances will necessarily be rare, non-party costs orders may be made to avoid the injustice of an individual director hiding behind a corporate identity, to engage in risk-free litigation for his own purposes. Such an order does not impinge on the principle of limited liability.
 - (4) To assess whether the director was the real party to the litigation, the Court may look to see if the director controlled or funded the company’s pursuit or defence of the litigation. But what will probably matter most in such a situation is whether it can be said that the individual director was seeking to benefit personally from the litigation. If the proceedings were pursued for the benefit of the company, then usually the company is the real party. But if the company’s stance was dictated by the real or perceived benefit to the individual director (whether financial, reputational or otherwise), then it might be said that the director, not the company, was the “*real party*”, and could justly be made the subject of a non-party costs order.
 - (5) In this way, matters such as the control and/or funding of the litigation, and particularly the alleged personal benefit to the director of so doing, are helpful *indicia* as to whether a non-party costs order would be just. But they

remain merely elements of the guidance given by the authorities, not a checklist that needs to be completed in every case.

- (6) If the litigation was pursued or maintained for the benefit of the company, then common-sense dictates that a party seeking a non-party costs order against the director will need to show some other reason why it is just to make such an order. That will commonly be some form of impropriety or bad faith on the part of the director in connection with the litigation.
 - (7) Such impropriety or bad faith will need to be of a serious nature and, Coulson LJ suggested, would ordinarily have to be causatively linked to the applicant unnecessarily incurring costs in the litigation.
100. Without being in any way prescriptive, Coulson LJ held ([41]) that, to persuade a Court to make a non-party costs order against a controlling director, the applicant will usually need to establish, either:
- (1) that the director was seeking to benefit personally from the company's pursuit of or stance in the litigation; or
 - (2) that he or she was guilty of serious impropriety or bad faith.
101. As to the latter, the authorities make clear that for a non-party costs order to be justified, the Court must be satisfied that the non-party's conduct involved impropriety or abuse of process of a qualitatively different order from ordinary litigation misjudgment, tactical error, or commercial optimism – even if the litigation was ill-advised, weak, or ultimately hopeless.
102. The Defendants submitted that both routes were engaged on the facts of this case, relying on Mr Gallagher's control of the litigation and on the same features of conduct said to justify indemnity costs against FCB.
103. Mr Gallagher relied on the same authorities, but emphasised the passages cautioning against too ready a conclusion that a director is the real party to the litigation, and against eliding the threshold for indemnity costs with the more stringent threshold required to justify personal liability.
104. The dispute between the parties as to the legal principles concerns:
- (1) whether conduct found sufficient to justify indemnity costs against a company can, without more, satisfy the threshold of serious impropriety required for a non-party costs order; and
 - (2) the proper characterisation of "*personal benefit*" in the context of a sole director and shareholder.
105. I am satisfied that the two jurisdictions are distinct and that the thresholds are not co-extensive. While the same facts may be relevant to both applications, a finding sufficient to justify indemnity costs does not automatically or necessarily justify a non-party costs order. A separate and more exacting analysis is required before displacing the principle of limited liability.

E: Submissions

(1) Defendants

106. On the issue of indemnity costs, the Defendants submitted that this was an exceptional case which plainly fell outside the norm and justified an order for indemnity costs. They accepted that neither discontinuance nor the arguable weakness of the underlying libel claim, taken alone, would suffice. However, they contended that the way the proceedings were conducted, and the purpose for which they were pursued, rendered the case exceptional.
107. The Defendants contended that the litigation was deployed as a means of exerting improper pressure by exploiting Banksy's well-known and long-standing desire to preserve his anonymity. In support of that contention, they relied on the history of threats made by FCB which, they submitted, sought to take advantage of that concern (see [9] above), and on the repeated acknowledgement that Banksy faced a risk of being unmasked if he became embroiled in legal proceedings (see [12] above). They also pointed to FCB's early procedural steps, pleadings and correspondence, which raised – either expressly or by reservation of rights – the prospect of identifying Banksy, and to the repeated linkage drawn between that issue and FCB's commercial demands. Taken together, the Defendants submitted that these matters could not be characterised as simply the ordinary consequences of litigation, but instead amounted to an abuse of proceedings for a collateral purpose.
108. They further relied on the timing of FCB's discontinuance, which occurred only when FCB was confronted with a substantive challenge to the viability of its case and the imminent incurring of further costs. That sequence, they submitted, supported the inference that the proceedings were abandoned once they ceased to be an effective means of applying pressure. The Defendants limited their application to costs incurred from 10 October 2023, which they characterised as the point from which the impropriety became clear.
109. As to the application for a non-party costs order against Mr Gallagher, the Defendants submitted that he was the driving force behind the litigation, exercised complete control over it, and stood to benefit personally from its outcome. In those circumstances, they argued, he should properly be regarded as the real party to the proceedings.
110. Alternatively, the Defendants submitted that Mr Gallagher's conduct met the threshold of serious impropriety required to justify a non-party costs order. They relied on the same features of the litigation conduct said to justify indemnity costs, contending that Mr Gallagher had caused the company to pursue proceedings as a form of risk-free pressure, knowing that any adverse costs consequences would fall on the corporate claimant rather than on him personally.
111. The Defendants accepted that the jurisdiction was exceptional, but submitted that this was an exceptional case, and that it would be just to make Mr Gallagher personally liable for the costs incurred.

(2) FCB

112. FCB resisted any award of indemnity costs. It submitted that the claim was properly brought to vindicate its reputation and was always arguable. It emphasised that discontinuance does not, without more, justify indemnity costs and that parties must be free to discontinue when litigation is no longer proportionate or commercially sensible.
113. FCB denied that the proceedings were pursued for any improper or ulterior purpose. It submitted that there was no strategy, explicit or implicit, to threaten or procure the unmasking of Banksy, and that references to identification arose only as legitimate procedural issues, including compliance with the CPR. FCB relied on the fact that it did not pursue a naming application and ultimately accepted a stay of the claim against Banksy as being inconsistent with any alleged impropriety.
114. FCB further argued that the Defendants' case amounted, in substance, to an attempt to re-characterise robust, but legitimate, litigation as abusive, and that to do so would risk discouraging claimants from pursuing arguable claims.
115. In answer to the application for a non-party costs order, Mr Gallagher submitted that the principles governing non-party costs orders against directors and shareholders are stringent and deliberately so, reflecting the fundamental importance of limited liability. He accepted that he controlled the litigation, but submitted that control, even when combined with sole ownership, is not sufficient to justify a non-party costs order.
116. Mr Gallagher denied that he was the real party to the litigation in the relevant sense. He submitted that the claim was brought to vindicate the company's asserted commercial and reputational interests, and that any benefit to him was no more than the indirect consequence of his shareholding. He further denied any serious impropriety or bad faith on his part, and submitted that the Defendants' case impermissibly sought to elide the threshold for indemnity costs with the much higher threshold required to impose personal liability.
117. Finally, Mr Gallagher relied on the delay in bringing the non-party costs application as a further discretionary reason why it would not be just to make the order sought.

E: Decision

(1) Indemnity costs

118. I am satisfied that this case falls outside the norm. FCB must pay the Defendants' costs on the indemnity basis from 10 October 2023.
119. My conclusion does not rest on discontinuance alone, nor does it depend upon a finding that FCB was not entitled to discontinue when it did. It is founded on the manner and purpose for which the proceedings were pursued, viewed objectively and in the round.
120. On the material before the Court, the defamation claim was, viewed objectively, without any real prospect of success. In particular, once the relevant context is taken into account, an honest opinion defence would, in all likelihood, have disposed of the claim (and would likely have done so on a summary judgment application). That sits with my earlier observation that honest opinion was "*far and*

away the strongest defence” (see [42] above) and that its omission from the Defence is otherwise difficult to understand. I do not determine the underlying merits as if finally adjudicating them; I refer to the apparent strength of the honest opinion defence only insofar as it supports the inference, contemplated by *Hosking*, that the claim lacked real prospects of success and that the proceedings were deployed for leverage rather than adjudication.

121. The critical feature which explains why such a claim was nonetheless pursued, and what takes the case outside the norm, is that the proceedings were deployed to exert pressure relying upon Banksy’s well-known concern to preserve his anonymity as central to his artistic expression. Mr Wood said as much in *The Sun* Article. The *risk* of being unmasked, as FCB calculated, was sufficient to exert pressure, even if the Court ultimately contained it. I have set out above the history of communications in which Mr Gallagher drew attention to the risk to Banksy’s anonymity inherent in litigation and sought to use that risk as leverage in disputes concerning the commercial exploitation of Banksy’s works.
122. That dynamic is also reflected in the conduct of this litigation. The inclusion in the Particulars of Claim of a purported reservation of a right to seek an order requiring Banksy to identify himself, the subsequent correspondence pressing for Banksy’s “*full name*”, and the pleading decisions which had the effect of maintaining the possibility that Banksy might ultimately be required to give evidence, were not incidental to the procedural course adopted. Taken cumulatively, they served to maintain – and to some extent to amplify – the very risk which the Court later took steps to contain by case management and anonymity orders.
123. A further consideration reinforces that conclusion. At an early stage of the proceedings, the Second Defendant admitted responsibility for publication of the Instagram Post (see [29] above). In circumstances where the Second Defendant had done so, and having regard to the remedies sought by FCB, there was little objective justification for naming Banksy as a personal defendant. Any legitimate concern about restraining further publication could have been addressed by undertakings to abide the outcome of the claim against the Second Defendant, which was, in substance, the position ultimately adopted when the claim against Banksy was stayed by consent (see [40] and [45] above). The decision nevertheless to include Banksy as a defendant from the outset, and to maintain his presence in the proceedings until compelled by case management to do otherwise, is consistent with the conclusion that FCB deliberately exposed Banksy to the risk inherent in the proceedings that his anonymity might be jeopardised, and that this was intended to exert pressure rather than to secure remedies which could not adequately be obtained against the Second Defendant alone.
124. Mr Gallagher denies that the proceedings were pursued as an instrument of pressure and maintains that they were brought for vindication of legal rights in defamation. I reject that evidence. I reach that conclusion because it is inconsistent with the objective documentary record and with the inherent logic of the position which FCB adopted. A claim which, viewed objectively, had no real prospect of succeeding by adjudication is difficult to reconcile with a purely vindicatory purpose; whereas it is readily explicable if the proceedings were regarded as creating leverage by reason of the continuing sensitivity around Banksy’s anonymity.

125. A further feature supports that conclusion. As I have already noted, honest opinion was the obvious and strongest defence to the claim, yet it was not pleaded. In my judgment, the most likely explanation is that reliance on that defence was recognised to carry an increased risk that Banksy would be required to give evidence, with the attendant risk of identification. Viewed in that context, the continuation of the proceedings can be understood as proceeding on the basis that Banksy would be reluctant to take procedural or evidential steps which might increase that risk, even if those steps were otherwise available. The absence of an honest opinion defence is consistent with that analysis.
126. The correspondence in March 2025, marked without prejudice save as to costs, provides further support. FCB's settlement overtures were not confined to compromise of the defamation proceedings. They were framed to link settlement to wider matters and to the prospect of a broader "*co-existence*" or commercial arrangement under which FCB would be permitted to continue exploiting Banksy's works – an approach which the Defendants rejected. Whilst not sufficient on its own, it provides support to the conclusion that the proceedings were being used, at least in part, to seek a broader commercial accommodation rather than to obtain vindication by adjudication.
127. Finally, the timing of the discontinuance – in the face of a substantive challenge and the prospect of further significant costs – is consistent with the inference that the proceedings were abandoned once they ceased to serve the function for which they were being deployed. No other explanation has been offered by FCB as to the sudden decision to discontinue.
128. Taking these matters together, I am satisfied that the proceedings were pursued in a manner and for purposes which were unreasonable to a high degree and which take the case outside the norm.
129. The Defendants' limitation of their application to costs incurred from 10 October 2023 is appropriate and proportionate. Although FCB's plan to exploit the Defendants' concerns over Banksy's anonymity was implemented when the Claim Form was issued and Particulars of Claim drafted, 10 October 2023 is the date on which the Defendants provided their substantive response to the claim and formally raised the issue of protection of Banksy's anonymity in the proceedings. I therefore order that FCB pay the Defendants' costs from that date on the indemnity basis.

(2) Non-party costs order

130. The application for a non-party costs order against Mr Gallagher raises a distinct and more exacting question. The issue is not whether the litigation was conducted in a manner which justifies an indemnity costs order against FCB, but whether it is just to impose personal liability for costs on a person who was not a party to the proceedings, thereby displacing the principle of limited liability.
131. Mr Gallagher plainly exercised control over the litigation as FCB's sole director and shareholder. I also accept that he was, in a practical sense, the directing mind of the company and that the conduct which I have found to take this case outside the norm for the purposes of indemnity costs reflects decisions taken under his direction. However, the law draws a deliberate distinction between (1) responsibility for litigation conduct which warrants an indemnity costs order against a corporate party, and (2) the

exceptional step of imposing personal liability for costs under s.51 Senior Courts Act 1981.

132. That distinction is reflected in the authorities. An indemnity costs order is concerned with marking, in costs, litigation conduct which is unreasonable to a high degree or otherwise outside ordinary and reasonable forensic behaviour. It does not require a finding of dishonesty or moral turpitude. By contrast, where the proposed non-party is a director/shareholder of a corporate litigant, control of the litigation – even sole control – and even the pursuit of litigation which is ill-advised or tactically motivated will not ordinarily suffice. Something more is required: either that the director be properly characterised as the “*real party*” to the litigation in the relevant sense, or that the director’s personal conduct involves serious impropriety or bad faith of a qualitatively different order from ordinary litigation misjudgment or tactical opportunism.
133. Accordingly, it does not follow from my conclusion that FCB’s conduct justifies an indemnity costs order that a non-party costs order against Mr Gallagher must also be made. The two jurisdictions have different functions and different thresholds. Conduct may properly be criticised as a misuse of the litigation process (or as sufficiently close to that) for the purposes of indemnity costs, without it being just, or lawful, to displace limited liability by making the directing mind personally liable. This is not an artificial distinction. It reflects the policy that the ordinary consequence of unreasonable litigation by a company is a costs order against the company (possibly on the indemnity basis), and that personal liability is reserved for cases where justice requires it because the non-party has, in substance, used the company as a vehicle for risk-free litigation for his own purposes, or has acted with serious impropriety.
134. In the present case, whilst Mr Gallagher plainly controlled the litigation, I am not satisfied that he was the “*real party*” to it in the requisite sense. The claim was brought in the company’s name and sought relief for the company, namely vindication of asserted corporate reputational and commercial interests and recovery of alleged corporate loss. Any personal advantage to Mr Gallagher from a successful outcome would have been indirect and incidental to his shareholding. That is not unusual in the case of a small company whose shares are held by, and whose affairs are controlled by, a single director, and does not, without more, justify treating the director as the true litigant and transferring to him the company’s costs liability.
135. I also take into account that FCB was advised by solicitors and Counsel. The litigation strategy adopted was, I am satisfied, formulated and implemented with the benefit of legal advice, albeit directed towards objectives which I have found to be improper for the purposes of the indemnity costs analysis. That feature does not excuse the company’s conduct, but it is relevant to whether it is just to impose personal liability on the director in the absence of clearer evidence that he acted in bad faith of the kind contemplated by the authorities. In any event, I am not satisfied that any aspect of Mr Gallagher’s personal conduct provides a sufficient causative basis for transferring to him personal responsibility for costs arising from the company’s prosecution of the claim.
136. The Defendants also relied on the allegedly precarious financial position of FCB as supporting the inference that Mr Gallagher was using the company’s corporate personality to shield himself personally from the costs consequences of litigation. I am unable to draw that inference on the evidence before me. While there is material

suggesting that FCB's financial position deteriorated significantly after publication of the Instagram Post, I do not have sufficient evidence as to the company's financial health at the time when the litigation strategy was adopted and pursued, or as to whether FCB was then insolvent, undercapitalised, or being rendered unable to meet an adverse costs order by design. In the absence of such evidence, it would not be safe to conclude that Mr Gallagher was deliberately engaging in risk-free litigation through an impecunious corporate vehicle, rather than pursuing the claim through the company in the ordinary course, albeit in a manner which I have found to be improper for the purposes of the indemnity costs analysis.

137. Nor am I persuaded that the evidence establishes serious impropriety or bad faith by Mr Gallagher personally of the qualitatively different order required to justify a non-party costs order. I have found that the proceedings were deployed to exert pressure. However, the evidence does not establish, to the requisite standard, that Mr Gallagher engaged in dishonesty towards the Court, deliberate manipulation of the corporate form to render the company unable to meet an adverse costs order, or other conduct of a markedly different order from aggressive or opportunistic litigation strategy. In short, the conduct warrants the sanction of an indemnity costs order against the corporate claimant, but it does not cross the higher threshold required to make it just to impose personal costs liability on Mr Gallagher.
138. I also take into account the delay in bringing the non-party costs application which, while not determinative, reinforces the conclusion that it would not be just to make such an order.
139. The application for a non-party costs order against Mr Gallagher is therefore refused.

F: Conclusion

140. FCB is ordered to pay the Defendants' costs from 10 October 2023 on the indemnity basis. The application for a non-party costs order against Mr Andrew Gallagher is refused. FCB must make a payment on account of costs in a sum to be determined. As to that last point, if not agreed, I will resolve the amount of the payment on account and the time for payment based on further written submissions.