



Neutral Citation Number: [2016] EWHC 859 (Ch)

Case No: HC-2015-001297

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25 April 2016

**Before :**

**MR JUSTICE ARNOLD**

**Between :**

**THE CREATIVE FOUNDATION**

**- and -**

**(1) DREAMLAND LEISURE LIMITED**

**(2) JEREMY MICHAEL GODDEN**

**(3) JORDAN HARRY GODDEN**

**- and -**

**(4) ROCHELLE GODDEN**

**Claimant**

**Defendants**

**Costs**  
**Defendant**

**Jamie Carpenter** (instructed by **Boodle Hatfield LLP**) for the **Claimant**  
**Romie Tager QC** (instructed by **Brook Martin & Co**) for the **Costs Defendant**

Hearing date: 8 April 2016

**Approved Judgment**

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

MR JUSTICE ARNOLD

## MR JUSTICE ARNOLD :

### Introduction

1. This is an application by the Claimant ("the Foundation") for an order under section 51(3) of the Senior Courts Act 1981 that Rochelle Godden (who I will refer to, without intending any disrespect, as "Rochelle" in order to distinguish her from the other members of her family involved in this case) pay the costs of the Foundation's claim against the First Defendant ("Dreamland"). That claim was for the delivery up of a section of wall bearing a mural painting known as "Art Buff" ("the Mural"). The Mural is attributed to the street artist known as Banksy. The Mural was removed by Dreamland from a building at 44-46 Rendezvous Street, Folkestone ("the Building"). Dreamland is the tenant of the Building. The Foundation brought its claim as the assignee of title to the Mural and of the cause of action of the landlord and freehold owner of the Building, Stonefield Estates Ltd ("the Landlord").
2. On 11 September 2015 I granted the Foundation summary judgment on its claim against Dreamland for the reasons given in my judgment of that date ([2015] EWHC 2556 (Ch), [2016] Ch 253, "my first judgment"). The order which I made on that date required Dreamland to pay the Foundation's costs of the proceedings, except any costs which related solely to the Foundation's claims against the Second Defendant ("Jeremy") and the Third Defendant ("Jordan") (as to which, see below), and to pay the sum of £100,000 on account of those costs within 14 days. The order also provided that, as against Jeremy and Jordan, costs should be in the case.
3. Dreamland has not paid any part of the sum of £100,000 it was ordered to pay. On 8 October 2015 the Foundation served a statutory demand on Dreamland in respect of that debt. On 15 October 2015 the Foundation obtained an order under CPR Part 71 for Jeremy to be examined at a hearing on 2 December 2015.
4. Dreamland ceased to trade shortly afterwards. Notice of a meeting of creditors was given on 5 November 2015 and Dreamland was placed into creditors' voluntary liquidation on 23 November 2015. Dreamland's statement of affairs as at that date put the total estimated deficiency to creditors at £12,017,191.62. The Foundation has lodged a proof of debt in Dreamland's liquidation for its costs pursuant to the order of 11 September 2015 in the sum of £216,926.65. In the statement of affairs this has been mistranscribed as £316,926.65. Accordingly, Dreamland's deficiency is overstated by £100,000 and should be £11,917,191.62. Nevertheless, it is clear that there will be no distribution to unsecured creditors such as the Foundation.
5. Following the appointment of the liquidator, the Defendants' solicitors Brook Martin & Co requested the Foundation to withdraw the application for the examination of Jeremy. On 26 November 2015 the Foundation's solicitors stated that the Foundation would withdraw the application if Jeremy agreed "to provide confirmation of how your firm's fees, Counsel's fees and generally the litigation was funded (i.e. by whom and from what source) given that it appears [Dreamland] was insolvent throughout the proceedings ...". On 27 November 2015 Brook Martin replied:

"In relation to the legal costs which of course included those relating to the company and Jeremy and Jordan Godden, the arrangement was that such costs would be paid on behalf of the

company, Jeremy and Jordan by Mrs Rochelle Godden as the company was not then in a position to fund unbudgeted legal costs. This is the only information that Mr Godden is able to provide either today or during any examination next week.”

In the light of that statement, the Foundation withdrew the application for the examination of Jeremy.

6. Prompted by the statement quoted above, the Foundation launched the present application on 12 January 2016. Rochelle was joined as a party to the proceedings for the purposes of costs only by an order dated 16 February 2016.

#### Applicable principles

7. There is little dispute as to the applicable principles. They were authoritatively stated by Lord Brown of Eaton-under-Heywood giving the judgment of the Privy Council in *Dymocks Franchise Systems (NSW) Pty v Todd* [2004] UKPC 39, [2004] 1 WLR 2807:

“25. (1) Although costs orders against non-parties are to be regarded as ‘exceptional’, exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such ‘exceptional’ case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against. (2) Generally speaking the discretion will not be exercised against ‘pure funders’, described in para 40 of *Hamilton v Al Fayed (No 2)* [2003] QB 1175, 1194 as ‘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 in no way seek to control its course’. In their case the court’s usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights. (3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party’s costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is ‘the real party’ to the litigation, a concept repeatedly invoked throughout the jurisprudence ... Nor, indeed, is it necessary that the non-party be ‘the only real party’ to the litigation ..., provided that he is ‘a real party in ... very important and critical respects’ .....

29. ... generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for

his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in such cases, particularly, say, where the non-party is himself a director or liquidator who can realistically be regarded as acting rather in the interests of the company (and more especially its shareholders and creditors) than in his own interests.

...

33. ... The authorities establish that, whilst any impropriety or the pursuit of speculative litigation may of itself support the making of an order against a non-party, its absence does not preclude the making of such an order."
8. It is only necessary to add two points. First, the non-party's interest in the litigation does not have to be a direct financial benefit from the fruits of the litigation (see *Vaughan v Jones* [2006] EWHC 2123 (Ch) at [26] (David Richards J)). The interest may be reputational (see *Re North West Holdings plc* [2001] EWCA Civ 68, [2001] BCLC 468 at [21], [35] and [36] (Aldous LJ)) or simply personal satisfaction from defeating the opponent or settling a score (see *Latimer Management Consultants Ltd v Ellingham Investments Ltd* [2006] EWHC 3662 (Ch), [2007] 1 WLR 2569 at [52] (Bernard Livesey QC)).
9. Secondly, as counsel for Rochelle pointed out, different views were expressed as to the correct approach to the question of causation in this context by Morritt LJ in *Globe Equities Ltd v Globe Legal Services Ltd* [1999] BLR 232 at [28] and by Chadwick LJ in *Byrne v Sefton Health Authority* [2001] EWCA Civ 1904, [2002] 1 WLR 775 (in which *Globe v Globe* was not cited) at [35]. It is not necessary for the purposes of the present application for me to attempt to resolve that difference of view, since it would not make any difference to the outcome. Accordingly, I shall apply the test stated by Chadwick LJ:
- "... it cannot be right to make an order under section 51(3) of the 1981 Act unless the court is satisfied that the conduct of the party against whom the order is to be made has been causative of the costs which have been incurred by the person [applying for] the order. There must be a sufficient causal link between the person who is to pay the costs and the incurring of those costs. What is necessary is to determine whether the conduct complained of is really an effective cause of the costs incurred."

### Factual background

#### *The Godden family*

10. Rochelle worked at Brook Martin & Co as a legal secretary from about 1980 to 1982. In about 1981 she met James Godden ("James"), who was a client of the firm. In about 1982 she moved to Folkestone to live with James and became involved in his numerous businesses. At some point they were married. Jeremy and Jordan are their sons. James

died on 27 March 2012. Prior to his death, James was the owner, and a director, of Dreamland. Since 30 November 2013, Jeremy has been the sole director of Dreamland.

11. Jeremy and Jordan were granted Letters of Administration of James' estate on 20 August 2013. Although James' will left the shares in Dreamland to Jeremy and James Godden, by a deed of variation dated 19 March 2014 between Rochelle, Jeremy and Jordan, the will was varied so as to leave James' entire estate, including the shares in Dreamland, to Rochelle. By a stock transfer form dated 2 February 2015, the shares in Dreamland were transferred from James' executors to Rochelle. (It follows that the statement in my first judgment at [6] that the shares in Dreamland were owned by James' executors was inaccurate, an inaccuracy that Dreamland failed to correct.)
12. Jeremy and Jordan own another company called J and J Gaming Ltd ("J&J").

*Dreamland*

13. Dreamland was incorporated on 16 October 1995 to acquire and operate the Dreamland Amusement Park. Shortly afterwards, it also acquired the Rotunda Amusement Park. From 2002 onwards, the company changed its focus to amusement arcades, and the amusement parks were disposed of between 2005 and 2007.
14. In 2005 Dreamland lent the purchaser of the site of the Dreamland Amusement Park £3 million of the purchase price under a loan note. It appears that subsequently Dreamland also lent the purchaser further money. The site was then acquired by Thanet District Council by means of a compulsory purchase order for a lower price than it had previously been valued at, with the result that Dreamland's loan, and the accrued interest on it, became irrecoverable. It appears that this occurred sometime in 2013.
15. Following the death of James, Dreamland's bank, Barclays Bank plc, restructured the company's loans and overdraft into one large loan of £2.2 million and a smaller short-term facility of £120,000 which was to be paid within 12 months. It appears that this caused Dreamland cash flow difficulties.
16. In February 2011 Dreamland received a VAT refund in the sum of £219,772 as a consequence of the success of Rank Group plc ("Rank") in a claim before the VAT and Duties Tribunal ([2008] UKVAT V20777) and on appeal to this Court ([2009] EWHC 1244 (Ch), [2009] STC 2304). On 13 July 2011 Dreamland lodged a claim for a further refund in the sum of £775,033 on a similar basis.
17. Subsequently, however, the Court of Appeal allowed an appeal by Her Majesty's Revenue and Customs on 30 October 2013 ([2013] EWCA Civ 1289, [2014] STC 470). On 8 July 2015 the Supreme Court dismissed Rank's appeal ([2015] UKSC 48, [2015] 1 WLR 3472). As a consequence, Dreamland became liable to repay the VAT refund it had received and ceased to have any prospect of succeeding in its claim for a further refund.
18. Dreamland was balance sheet insolvent from at least 2011. Dreamland's financial statements for the year ending 31 December 2012 recorded that, as at 31 December 2011, the company had net liabilities of £4,328,155. As at 31 December 2012, the company had net liabilities of £6,675,393. It is clear that the company was being kept afloat by James, and after his death by his executors and beneficiaries. Thus the

financial statements record that, as at 31 December 2012, the company owed £8,237,263 to James' executors and that the statements had been prepared on the going concern basis in the expectation that James' executors and beneficiaries would continue to support the company even though such support had not been formally confirmed. In their report dated 23 December 2013 the company's auditors disclaimed an opinion on the financial statements, citing as reasons the company's trading losses and uncertainties caused by, among other things, the need for support from the executors and beneficiaries, doubts over the recoverability of the loan note and the possible need to repay the VAT refund.

19. Although no financial statements appear to have been prepared for the years ending 31 December 2013 and 31 December 2014, it is clear that the company's net liabilities mounted still further in each of those years and that they continued to mount during 2015.
20. On 21 April 2015 HMRC presented a winding up petition against Dreamland for non-payment of PAYE in the sum of £100,140.85. The petition was due to be heard on 15 June 2015. On 11 June 2015 Rochelle lent £110,000 to J&J which in turn lent £86,032.33 to Dreamland in order to enable it to discharge the petition debt. HMRC would have been willing to grant Dreamland a three month adjournment, but the company preferred to have the petition dismissed because, "in view of potential transactions currently on-going", the company did not wish to have to apply for a validation order under section 127 of the Insolvency Act 1986. Rochelle's loan to J&J was secured by a debenture and J&J's loan to Dreamland was secured by a debenture, both of which were executed on 6 July 2015.
21. In the information statement prepared for the creditors' meeting, Jeremy stated that he considered that the principal reasons for the company's failure were:
  - "1. The CPO issued by Thanet District Council against the Dreamland site.
  2. The loss of the Banksy litigation.
  3. The pressure applied by Barclays Bank in relation to the company's facilities.
  4. The reversal of the Rank Group tribunal tax case.
  5. The death of Mr James Godden."
22. The statement of affairs, which was verified with a statement of truth signed by Jeremy, shows that loans from connected parties made up £10,024,126.82 (84%) of Dreamland's total liabilities of £11,917,191.62. The largest creditor was James's director's loan account standing at £7,303,688.82 (61%). By the time the Mural appeared, Rochelle had inherited the benefit of that debt pursuant to the deed of variation. Thus she was at all material times Dreamland's largest creditor.

*The Jim Godden Memorial Trust*

23. Rochelle, Jeremy and Jordan set up the Jim Godden Memorial Trust ("JGMT") at the time of James' funeral in order to collect donations to help a local hospice, The Pilgrims Hospice, to fund cancer research at the Royal Marsden Hospital and to establish a centre for terminally ill cancer patients and their families away from the hospice, The Pilgrims Centre.
24. JGMT is a small charity. Its trustees are Rochelle, Jeremy and Jordan and Clive Emson, a family friend. In the year ending 31 March 2014, JGMT's income was £16,865 and its expenditure was £4,025. It is Rochelle's evidence that the only donations JGMT has received recently came from herself, Jeremy and Jordan.

*The underlying proceedings*

25. As explained in my first judgment at [8], [11] and [12], the Mural was spray-painted on the external flank wall of the Building on or around 28 September 2014, Dreamland caused the relevant section of the wall to be removed from the Building between 31 October and 3 November 2014 and Dreamland put the Mural up for sale in early December 2014, but it failed to attract a buyer.
26. The Foundation obtained an assignment from the Landlord on 19 March 2015.
27. On 26 March 2015, the Foundation applied, without notice, to Rose J and obtained an interim injunction restraining the Defendants from dealing with the Mural until 31 March 2015.
28. On 30 March 2015 the Foundation issued and served its Claim Form together with Particulars of Claim. The Foundation brought claims for delivery up, conversion and breach of covenant against Dreamland. It also brought claims for trespass, conversion and inducing breach of covenant against Jeremy and Jordan. On 31 March 2015 the Defendants filed an acknowledgement of service indicating an intention to defend the claims.
29. On 31 March 2015 and 13 April 2015 further orders were made by consent by Barling J and myself respectively by which the interim injunction was continued until trial or further order. On 30 April 2015 a further order was made by consent by Henderson J requiring the Defendants to place the Mural into the custody of an independent storage facility in New York.
30. On 27 April 2015 the Defendants served a joint Defence. I set out in my first judgment at [17] the two contentions raised by Dreamland by way of defence to the Foundation's claim against it. Those contentions were also relied upon by Jeremy and Jordan.
31. On 15 May 2015 the Foundation applied for summary judgment on its claim against Dreamland. The application also sought determination of the two contentions raised by Dreamland as against all three Defendants. The only evidence served by the Defendants in opposition to the application was contained in two witness statements made by Rochelle dated 15 July and 24 July 2015. The application was heard on 30 July 2015. There is no dispute that the Court's determination of the two issues is binding upon Jeremy and Jordan as well as Dreamland.

32. So far, the Foundation has not taken any further steps to pursue its claims against Jeremy and Jordan, but it reserves the right to do so. Since the Foundation has obtained delivery up of the Mural, the only purposes which would be served by pursuing its claims against Jeremy and Jordan would be to attempt to recover damages and costs. It does not appear likely that the Foundation has any substantial claim for damages, however.

Factors relevant to the exercise of the Court's discretion

33. It is common ground that the principal factors which are relevant to the exercise of the Court's discretion relate to the funding of, benefit from and control of the defence of the proceedings. The Foundation contends that Rochelle funded the Defendants' defence of the proceedings, stood to benefit from a successful defence and substantially controlled the defence. Rochelle accepts that she has in fact paid the greater part of the Defendants' costs of defending the proceedings, but disputes that there was any prior agreement by her to do so. Furthermore, she disputes that she stood to benefit from a successful defence of the proceedings or that she controlled the defence.

*Funding*

34. The starting point here is the passage in Brook Martin's letter dated 27 November 2015 quoted in paragraph 5 above. This states that there was an "arrangement" that the Defendants' costs "would be paid" by Rochelle since Dreamland was unable to do so, and by implication Jeremy and Jordan were unable to do so either.
35. Jeremy's evidence is that the letter dated 27 November 2015 was written "with input from me as the Director of Dreamland". He does not say that the letter was inaccurate, but he does say that the letter "did not suggest that my mother had ever accepted responsibility for Brook Martin's costs either on behalf of Dreamland, myself or Jordan".
36. Michael Martin of Brook Martin gives evidence that he first met James in about 1975 and had a continuing professional and personal relationship with him, and from 1980 with Rochelle also, until James' death. When proceedings were commenced by the Foundation against the Defendants, Jeremy instructed Brook Martin on behalf of the Defendants at a meeting in Mr Martin's office. Subsequently there was another meeting which Jordan attended. By oversight, Mr Martin omitted to send the Defendants a retainer letter until August 2015. On the question of funding, Mr Martin states:
- "There was never any discussion by me with Mrs Godden regarding the payment of my firm's fees and disbursements relating to these proceedings. As a result of my initial discussion with Jeremy, and then Jordan, there was no doubt in my mind that Dreamland, Jeremy and Jordan were jointly and severally liable for my firm's fees and disbursements and that, as Brook Martin's clients, they clearly understood this."
37. Mr Martin goes on to discuss the two bills he rendered to the Defendants (as to which, see below). He says that, on each occasion, he "gave no thought as to how my clients would be arranging for payment". On each occasion, the bill was paid by a cheque from

Rochelle and he “assumed that Mrs Godden was paying these bills in the context of financial arrangements within her family”.

38. Mr Martin does not say that his firm’s letter dated 27 November 2015 was inaccurate. Moreover, as counsel for the Foundation submitted, there is no inconsistency between Mr Martin’s evidence and the letter.
39. Rochelle does not mention Brook Martin’s letter dated 27 November 2015 in her evidence. She states, however, that:

“At the time Brook Martin were retained, there were no discussions between me and either Jeremy or Jordan regarding the way Brook Martin would be paid for their professional work.”

This evidence solely relates to the position at the time that Brook Martin was retained.

40. Rochelle goes on to say that, although she paid Brook Martin’s bills:

“I had given no indication to Jeremy and Jordan, let alone to Brook Martin, that I would in any way accept financial responsibility for Dreamland’s legal costs or indeed for those of Jeremy and Jordan.”

This evidence echoes the evidence of Jeremy quoted in paragraph 35 above.

41. I accept the evidence of Jeremy and Rochelle that Rochelle did not accept responsibility for the Defendants’ legal costs, i.e. legal liability to pay such costs; but that evidence is not inconsistent with there having been an arrangement, namely an arrangement between Rochelle and the Defendants, that Rochelle would in fact fund the Defendants’ defence of the proceedings, as stated in Brook Martin’s letter dated 27 November 2015.
42. In any event, that is in fact what happened. Rochelle made a series of three payments. First, on 27 April 2015 she paid the Defendants’ counsel’s initial fees directly to counsel by means of two cheques in the total sum of £6,240. Rochelle accepts in her evidence that she paid this sum at Jeremy’s request knowing that “there was no possibility of Dreamland being able to pay”. It is implicit in her evidence that Jeremy and Jordan were also unable to pay.
43. On 1 May 2015 Brook Martin rendered its first bill to the Defendants in the total sum of £15,090 after giving credit for the payment of £6,240. This bill was paid by Rochelle by cheque on 6 July 2015.
44. On 3 August 2015 Brook Martin rendered its second bill to the Defendants in the total sum of £37,368. This bill was paid by Rochelle by cheque on 2 October 2015.
45. In summary, therefore, Rochelle paid Brook Martin and counsel a total of £58,698, which was the entirety of the fees and disbursements charged by Brook Martin for representing the Defendants until the conclusion of the summary judgment hearing. Both she and Jeremy say she paid this money by way of loan to Jeremy and Jordan.

46. Against that sum, Rochelle and Jeremy give evidence that J&J paid Rochelle the sum of £7,000 on behalf of Jeremy and Jordan shortly after 6 July 2015, leaving £51,698 outstanding. There is no suggestion that any of the remaining sum has been repaid since then.
47. It is clear that Dreamland would not have been able to fund the defence of the proceedings. It is evident that neither Jeremy nor Jordan would have been able to fund them other than to a modest extent either. Accordingly, I conclude that, if Rochelle had refused to fund the defence of proceedings, Dreamland would not have defended the proceedings and the Foundation would have obtained judgment in default against Dreamland.
48. In addition to the sums paid by Rochelle to Brook Martin and counsel to pay for the defence of the proceedings, counsel for the Foundation relied upon the loan which Rochelle made to J&J in order to enable J&J to lend money to Dreamland to pay off the HMRC petition debt on 11 June 2015. In my view this adds little to the Foundation's case based on the funding of the defence of the proceedings, save that it confirms that (i) Dreamland would not have been in a position to fund the defence itself and (ii) Dreamland was dependent on Rochelle's continued support.
49. Counsel for the Foundation submitted that it was significant that Rochelle and the Defendants had elected to pay off the petition debt immediately rather than seek an adjournment of the petition, and suggested that they were concerned that an adjournment would imperil Dreamland's claim to the Mural. Since this suggestion was first raised in his submissions, however, Rochelle has not had a chance to address it in evidence. In those circumstances I do not consider that it would be fair to make any finding in that respect. Counsel for the Foundation also submitted that it was significant that Rochelle's loan to J&J, and J&J's loan to Dreamland, had been secured by debentures, whereas Rochelle's loans to Jeremy and Jordan to pay the Defendants' costs and disbursements had not been. The same objection applies to this submission.
50. For his part, counsel for Rochelle relied upon Dreamland's claim for repayment of VAT. In my view this is even less significant. After the decision of the Court of Appeal, all that Dreamland had was a hope that the Supreme Court would reverse that decision, in which case Dreamland would have been able to keep the £219,772 it had already received and may have gained as much as a further £775,033. But that would not have made a significant difference to Dreamland's financial position. Moreover, that hope expired on 8 July 2015, which was before the major costs of the hearing on 30 July 2015 were incurred (the Defendants' costs of which Rochelle paid on 2 October 2015).

### *Benefit*

51. As a company that was massively insolvent at all material times, Dreamland was not in a position itself to benefit from a successful defence of the Foundation's claim. Nevertheless, Dreamland's creditors could have benefitted.
52. As noted in my first judgment at [9], the Mural was valued in press reports at between £300,000 and £470,000, although there is no evidence as to the accuracy of those valuations. If one assumes that the true value was midway between those two figures, namely £385,000, that sum would represent 3.2% of Dreamland's deficiency to creditors of £11,917,191.62. If Dreamland had sold the Mural and realised that sum

(ignoring for simplicity any expenses of the sale) so that it was available for distribution to Dreamland's creditors, the principal beneficiaries would have been Rochelle (61%) and other parties connected to Dreamland (a further 23%) in which Rochelle may or may not have an interest. Unconnected creditors would have received very little benefit.

53. The Defendants' pleaded case in the underlying proceedings was that Jeremy in his capacity as Dreamland's director, and with the support of its shareholders (i.e. Rochelle), intended to cause Dreamland to "gift the net proceeds of the proposed sale of the [Mural] as a business gift aid donation to [JGMT]". Consistently with this, Rochelle stated in her first witness statement in opposition to the summary judgment application that the family and Dreamland (acting by Jeremy) had decided that the net proceeds from any sale of the Mural would be donated to JGMT to carry on its funding of The Pilgrims Centre. In her evidence for the present application, Rochelle adds that Mr Barton (as to whom, see my first judgment at [11]-[12]) felt that this proposal "might well help" the sale of the Mural.
54. Rochelle and Jeremy explain, however, that at that stage they had not taken advice as to whether it would be possible for Dreamland to donate the proceeds of sale to JGMT and that advice would have been taken from Dreamland's advisor, and JGMT's accountant, Barry Lewis of Menzies LLP.
55. Counsel for Rochelle submitted that it is obvious that Mr Lewis would have advised that it was not possible for Dreamland, as an insolvent company, to donate all the proceeds of sale to JGMT. I agree with this. As counsel accepted, however, what Dreamland could have done was to use £86,032.33 of the proceeds to pay off its secured creditor J&J. J&J could in turn have used that sum to repay Rochelle. Rochelle could then have donated that sum to JGMT. Rochelle's evidence is that, if so advised, that is what she would have done.
56. On that basis, if the sale had realised £385,000, JGMT would have received a donation of £86,032.33 while just under £299,000 would have been available to deduce Dreamland's debts to the unsecured creditors. As noted above, the principal beneficiary of that sum would have been Rochelle and unconnected creditors would have received very little.
57. Counsel for the Foundation submitted that the proposal to donate all or part of the proceeds of sale of the Mural to JGMT was beneficial to Rochelle in two ways. First, it would have benefitted the charity. That would have been of emotional benefit to Rochelle because of her interest in the charity and its objects, but it would also have been of financial benefit to her in that it would have reduced the need for her to make future donations to the charity. Secondly, it would have been of reputational benefit to Rochelle. Counsel submitted that this was to be inferred from the facts that the removal of the Mural had attracted some adverse publicity and comment in Folkestone and that Rochelle had acted as a spokeswoman for the Defendants in relation to the court proceedings. I accept those submissions.
58. Accordingly, I conclude that the defence of the proceedings was undertaken principally for the benefit of Rochelle. She did not fund the defence of the proceedings purely out of maternal affection for Jeremy and Jordan.

*Control*

59. In her first witness statement in opposition to the summary judgment application, which Rochelle stated had been read and approved by Jeremy and Jordan, Rochelle set out very clearly her involvement in this matter. Having explained how she, Jeremy and Jordan had become aware of the appearance of the Mural, she went on:

- “9. I had discussions with Jeremy about what had happened and it was agreed that I would deal with the matter as best I could only behalf of Dreamland. I sought legal advice from Dreamland’s solicitors, Brook Martin & Co, as to the position under the Lease and Dreamland’s obligation. ... Dreamland was advised in relation to its repairing obligations under the Lease. I discussed that advice with Jeremy.
10. I looked online to see what was the best way of dealing with the removal of graffiti such as the Banksy. It was how I came into contact with Mr Barton ...
11. Mr Barton told me that we needed to deal with the Banksy ... Mr Barton also said that he would meet as soon as possible, as he had been dealing with such Banksys over several years and would be able to advise as to what to do in all the circumstances.
12. Mr Barton’s advice was ...
13. Mr Barton also told us ...
14. I discussed with Jeremy the advice that Mr Barton had given ... In the light of that advice ... Jeremy on behalf of Dreamland made the decision to have [the Mural] removed from the Building ... ”

Rochelle went on to deal with the proposed sale of the Mural and the donation of the proceeds to JGMT, as discussed above.

60. This evidence relates, of course, to the period prior to the commencement of proceedings by the Foundation. Nevertheless, it makes it clear why Rochelle was the person who was giving evidence in opposition to the summary judgment application. In short, she was the person who had been most closely involved with dealing with the Mural.
61. Rochelle’s evidence on the present application contradicts her previous evidence in one respect. Thus she states in her third statement:

“[Jeremy] asked me if I would, on behalf of Dreamland, contact Mr Robin Barton ... to discuss our options. ... Jeremy told me that Mr Barton is considered to be a Banksy expert. Jeremy said that as he would welcome my help on this.”

In my view it does not matter for present purposes whether Rochelle identified Mr Barton herself or whether Jeremy identified Mr Barton and asked Rochelle to contact him.

62. Rochelle and Jeremy dispute that Rochelle controlled the defence of the proceedings. Counsel for the Foundation submitted, however, that the evidence showed that she was actively and closely involved. Rochelle admits that her advice and help is sought by Jeremy and Jordan on a regular basis. Likewise Jeremy admits that he relies on her for advice and guidance. More specifically, Rochelle admits that:

“19. ... I had to speak and deal with Mr Martin from time to time, either in my capacity as a witness in the light of my involvement with the Banksy at the relevant time and also in relation to any other relevant information which I might have had from time to time, and as a go-between with Mr Martin on behalf of Jeremy and Jordan.

20. ... There were a number of occasions when Jeremy and Jordan discussed with me a point which had arisen because of my involvement and because they looked to me for advice. On each of these occasions it was them – not me – who took the final decision in question.

...

22. ... I became aware that a summary judgment application had been issued against Dreamland, and that discussions had taken place in relation to the instructions to be given to Mr Martin to defend this application. I was involved in these discussions. I had evidence that I was in a position to give but it is quite wrong to suggest that I controlled the decision to defend the application in any way. ...”

63. A specific instance of Rochelle’s involvement which counsel for the Foundation relied upon concerns some settlement discussions which took place shortly before the hearing of the summary judgment application. Rochelle describes these as follows:

“26. There were several attempts at settlement and I believe one came via Mr Martin. I then spoke to Jeremy and Jordan who decided to try and use Mr Emson as a go-between to try and negotiate a deal with Sir Roger [de Haan of the Foundation]. We felt that with everything that was going on all of it was unnecessary and we couldn’t understand why Sir Roger had not just contacted me to try and resolve this. ... I therefore spoke to Mr Emson on behalf of Jeremy, Jordan and Dreamland and he said that he would call Sir Roger.

27. ... Mr Emson made some proposals to Sir Roger which were all turned down and Sir Roger made a counter offer which Jeremy and Jordan decided not to accept. ...

28. Throughout this period I was not in any sense in control of the negotiations for a settlement. In relation to every offer and counter offer, this was discussed with Jeremy and Jordan. It was their decision to either make an offer or how to respond to any counter offer made. ... ”
64. Redacted copies of certain emails relating to these discussions have been exhibited by the Foundation’s solicitor. In particular, on 26 July 2015 Rochelle sent an email to Mr Emson, copied to Jeremy and Jordan, saying:

“Further to our conversation, I am setting out below the offer we would like made. You can have some leeway on this as obviously we would like to settle without incurring any further costs.”

On 28 July 2015 Mr Emson sent Linda Hogben of the Foundation an email, copied to Rochelle, saying:

“I have spoken with Rochelle and you will not be surprised to hear that the counter offer is unacceptable.”

65. In addition, counsel for the Foundation relied upon Rochelle’s role as spokeswoman for the Defendants. For example, an article published in the *Folkestone Herald* on 17 September 2015 states:

“Businesswoman Rochelle Godden has reacted angrily to the news that the Creative Foundation has won the battle over ownership of the Banksy artwork which appeared on the wall of Palace Amusements in Rendezvous Street last year.

...

Speaking to the Herald, Mrs Godden said:

‘The whole thing is disgusting. We made Roger de Haan several offers and now our charity ... has lost out - three times. Firstly on what we might have got for selling the work in the first place; secondly for the fact that he has paid out legal fees of around £250,000 which we may have to pay and thirdly because we incurred our own legal fees.

‘He could have simply bought the piece from us for the same price as his legal fees.’”

66. In my judgment the evidence establishes that, even if the ultimate decisions were taken by Jeremy and Jordan, Rochelle was actively and closely involved in the defence of the proceedings and that she was consulted upon such decisions.

*The position of Jeremy and Jordan*

67. A fourth factor, which was strongly relied upon by counsel for Rochelle, is the position of Jeremy and Jordan. He pointed out that, if Dreamland had been successful in

defending the claim against Dreamland, that would have led to the dismissal of the claims against Jeremy and Jordan. He also pointed out that, as it is, the Foundation has extant claims against them and submitted that, if it was successful in those claims, it would be very likely to obtain an order for costs against them. Finally, he relied upon the fact that the Foundation had agreed to the order that, as against Jeremy and Jordan, the costs of the summary judgment application should be costs in the case even though they had relied upon the same two contentions as Dreamland. In those circumstances, he submitted that it would not be just to make an order for costs against Rochelle.

68. I accept that the Foundation's claims against Jeremy and Jordan are a relevant factor to take into consideration, but I do not accept that this factor is sufficient to justify the conclusion that it would not be just to make an order for costs against Rochelle. This is for two reasons. First, the principal defendant to the proceedings was Dreamland, since it was Dreamland that had possession of the Mural, Dreamland that asserted title to the Mural and Dreamland against which the order for delivery up was sought and obtained. Secondly, all this factor establishes is that, if no order is made against Rochelle, then the Foundation may have an alternative avenue open to it to attempt to recover its costs. There is no evidence before the court as to either Jeremy or Jordan's means, however. Given their apparent inability to fund the defence of the proceedings to date, it may be doubted whether they are in a position to satisfy an order for costs.

#### Conclusion

69. For the reasons given above, I conclude that Rochelle substantially funded the defence of the proceedings; that, if she had not done so, Dreamland would not have defended the proceedings and the Foundation would have obtained judgment in default against Dreamland; that the defence of the proceedings was undertaken principally for the benefit of Rochelle; and that Rochelle was actively and closely involved in the defence of the proceedings and was consulted upon the decisions made in that regard. Thus I consider that it is clear that Rochelle was a real party to the proceedings: her repeated use of the word "we" in the communications quoted in paragraphs 64 and 65 above reflected the reality of the position. In all the circumstances, I conclude that this is an exceptional case and that it is just to make an order for costs against Rochelle.
70. I do not accept that Rochelle should be required to pay all of the Foundation's costs of the proceedings, however. Although Rochelle was actively and closely involved in the removal of the Mural from the Building, and hence in the events which gave rise to the Foundation's claim, the Foundation did not acquire title to the Mural until 19 March 2015. Moreover, Dreamland was a defendant to the proceedings, and not a claimant. The Foundation would have incurred the costs down to the service of the Claim Form and Particulars of Claim even if Dreamland had not defended the proceedings. Accordingly, I shall order Rochelle to pay the Foundation's costs incurred from the date on which Dreamland filed its acknowledgement of service.