



Neutral Citation Number: [2026] EWCA Civ 729

Case No: CA-2024-002435

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**BUSINESS LIST (Chd)**  
**Louise Hutton KC (sitting as a Deputy High Court Judge)**  
**BL-2019-001029**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 12/06/2026

**Before:**

**LORD JUSTICE LEWISON**  
**LORD JUSTICE ARNOLD**  
and  
**LADY JUSTICE FALK**

**Between:**

(1) ALAN WARD  
(2) LUXAP LIMITED  
(3) EBONAIR INVESTMENT S.A  
- and -  
(1) ANTHONY DONNELLAN  
(2) RICKY KEANE  
(3) BOBI HOWARD

**Appellants**

**Respondents**

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**Timothy Polli KC and Tim Hammond** (instructed by **Awan Legal Associates Limited**)  
for the **Appellants**

The Official Receiver on behalf of **Anthony Donnellan** was neither present nor represented.

**Ricky Keane** was present in person.

**Simon Arnold** (instructed by **Bobi Howard**) for the **3rd Respondent**

Hearing date: 21/05/2026  
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**Approved Judgment**

This judgment was handed down remotely at 11.00am on Friday 12 June 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## Lord Justice Lewison:

### Introduction

1. This is an appeal about costs. As Wilson J (sitting in this court) said in *SCT Finance v Bolton* [2002] EWCA Civ 56, [2003] 3 All ER 434 at [2]:

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

2. To similar effect, in *F & C Alternative Investments (Holdings) Ltd v Barthelemy (No 3)* [2012] EWCA Civ 843, [2013] 1 WLR 548 Davis LJ said at [42]:

“Decisions on costs after a trial are pre-eminently matters of discretion and evaluation. Further, it is particularly important to bear in mind that a trial judge—especially after a trial such as this one—will have a knowledge of and feel for a case which an appellate court cannot begin to replicate. The ultimate test, of course, for the purposes of an appeal of this kind is whether the decision challenged is wrong. But it is well established that an appellate court may only interfere if the decision on costs is wrong in principle; or if it involves taking into account a matter which should not have been taken into account or failing to take into account a matter which should have been taken into account; or if it is plainly unsustainable.”

3. As it happens, however, in both cases the appeal succeeded.
4. The costs order under appeal was made by Ms Louise Hutton KC (sitting as a judge of the Business and Property Courts) following a trial of three actions heard together. The trial lasted for 15 days. The three actions were:
  - i) A claim (“the Partnership Claim”) by Mr Donnellan that he and Mr Ward had formed a partnership (alternatively were joint venturers) to develop property. The principal target of the claim was a variety of interests in a building known as Creative House in Battersea. The freehold of the property was held by a company called Ebonair Investment SA which Mr Donnellan alleged was, in effect, a front for Mr Ward. Two of the other interests concerned were flats in the building of which leases had been granted to Mr Keane and Ms Howard. As part of the Partnership Claim Ebonair brought a Part 20 Claim against Mr Keane and Ms Howard seeking a declaration that they held the leases on trust for Ebonair.

- ii) A claim (“the Arbitration Claim”) brought by Mr Keane against Mr Ward (or against a company called Chelsea Bridge Apartments Ltd “CBA”) claiming to be entitled to sums awarded by an arbitrator pursuant to an arbitration agreement between him and Mr Ward. The Arbitration Claim does not feature in this appeal, so I say no more about it save to record that it failed against Mr Ward but succeeded against CBA.
  - iii) A claim (“the Possession Claim”) brought by Mr Keane for possession of two of the flats in the building.
5. The result of the relevant claims, in very broad terms was:
  - i) The Partnership Claim failed. The judge held that there was no partnership as Mr Donnellan had alleged. Nor was there any joint venture.
  - ii) As a consequence of the failure of the Partnership Claim, Ebonair’s Part 20 Claim succeeded. The judge found that the leases of the flats held by Mr Keane and Ms Howard were held on trust for Ebonair.
  - iii) The Possession Claim also failed as a consequence of the failure of the Partnership Claim and the Part 20 Claim.
6. The judge gave a short extempore judgment on costs on 14 October 2024. She decided to make no order for costs on the Partnership Claim or the Part 20 Claim. It is that part of her order against which this appeal is brought.

### **The appeal**

7. The appeal was listed for hearing on 5 February 2026 before me, Nugee LJ and Sir Launcelot Henderson. At the beginning of the hearing Mr Polli KC informed us that Mr Donnellan had been adjudicated bankrupt on 7 October 2025. His instructing solicitors knew about the bankruptcy at the time because they had been acting for the petitioning creditors (Mrs Ward and Ms Dorobat). Although they had had some contact with a potential trustee in bankruptcy, no trustee had in fact been appointed, so the bankrupt estate was vested in the Official Receiver. The Official Receiver had only been supplied with the appeal papers during the afternoon before the scheduled hearing of the appeal; and had said that she knew nothing about it.
8. Having regard to the decision of this court in *Heath v Tang* [1993] 1 WLR 1421 we took the view that the effect of the bankruptcy was that Mr Donnellan himself had no interest in the appeal and that any decision whether or not to oppose it should be made by the Official Receiver (or, if appointed, the trustee in bankruptcy). Mr Donnellan told us that he had applied for an annulment of the bankruptcy order. But unless and until that order is indeed annulled, he has no interest in the appeal.
9. Given that the Official Receiver had only been supplied with the appeal papers the day before the appeal and said that she had had no prior knowledge of it, we considered that we had no real choice but to adjourn the appeal. The Official Receiver has since confirmed that she wishes to play no part in the appeal. She said that she neither supported nor criticised the judge’s judgment but remained entirely neutral. She did not ask for a stay of this appeal and since, absent success in the appeal there is

no judgment debt which could be proved in the bankruptcy, we considered that the appeal should proceed.

10. In preparation for the first hearing of this appeal Mr Donnellan had filed written submissions. Despite the fact that the Official Receiver has taken no part in the appeal, I have nevertheless considered those submissions.
11. In the light of Mr Donnellan's bankruptcy, whether success in the appeal as against Mr Donnellan would bring the Ward parties any tangible benefit is open to doubt. But the appeal also involves Mr Keane and Ms Howard.
12. This, therefore, is the second time that the appeal has come before this court. It was our hope that the appeal could be relisted before the original constitution that was to hear it. Unfortunately, that has not proved possible. Of the three members of the court who heard the appeal, I am the only one who was a member of the original constitution.

### **The main judgment**

13. The trial concluded on 7 June 2024; and the judge handed down her reserved judgment on 6 September 2024. It is detailed and comprehensive, running to some 103 pages and 473 paragraphs. Her judgment is at [2024] EWHC 2304 (Ch). She began by setting out the nature of the three claims that she had to try.

#### *The Partnership Claim and the Part 20 Claim*

14. She described the Partnership Claim and the Part 20 Claim as follows:

“[2] Mr Donnellan's primary claim is for a declaration as to the existence of a partnership between him and Mr Ward and for relief flowing from the existence of that partnership.

[3] Mr Donnellan is a mortgage broker, and Mr Ward is a property developer. The dealings between Mr Donnellan and Mr Ward and related parties on each side date back to 2007 and concern a number of properties in which Mr Donnellan and Mr Ward were involved.

[4] In very brief summary, Mr Donnellan says that in 2012 Mr Ward expressly agreed to go into partnership with Mr Donnellan for the ongoing development of Creative House (a property Mr Ward had acquired through a wholly-owned company in 2003) and future projects, with their respective interests (including in Creative House itself) to be 25% (Mr Donnellan) and 75% (Mr Ward).

[5] Mr Ward says that there was no such partnership and that the interests in Creative House are ultimately held by his wife, Mrs Ward (the Fourth Defendant in the Partnership Proceedings), his former girlfriend, Ms Dorobat (the Fifth Defendant in the Partnership Proceedings), and a Panamanian

company, Ebonair Investment SA (“Ebonair,” the Third Defendant in the Partnership Proceedings).

[6] It is common ground that a number of the flats in Creative House are held by Mr Keane, a friend of Mr Donnellan, and by Ms Howard, a former girlfriend of Mr Donnellan, as nominees. However, while Mr Keane, Ms Howard and Mr Donnellan say that Mr Keane and Ms Howard hold their interest in those flats for the alleged partnership, Mr Ward and Ebonair say that Ebonair is the ultimate beneficial owner of the flats. By Part 20 Claim in the Partnership Proceedings, Ebonair seeks declarations that Mr Keane and Ms Howard hold their flats on trust for it and related accounts and inquiries, including against Ms Howard's father, Mr Keen.”

### *The Possession Claim*

15. Next, the Possession Claim:

“[10] By claims originally issued in the Wandsworth County Court, Mr Keane seeks possession of Flats 13 and 14 against (i) Luxap Limited (“Luxap”, a company which runs a business granting short lets of the flats in Creative House), (ii) CBA, and (iii) persons unknown. Ebonair was subsequently joined to the proceedings on its application and the claims were transferred, initially to Central London County Court, and then transferred to this Court to be heard together with the Partnership Proceedings and the Arbitration Claim.

[11] The dispute between the parties in the Possession Proceedings is the same as one of the disputes in the Partnership Proceedings, namely whether Mr Keane holds the relevant flats as nominee for Ebonair as the Ward Parties say or, as Mr Keane contends, for the alleged partnership.”

### **Dishonesty**

16. The judge was highly critical of the probity of both Mr Donnellan and Mr Ward.

#### *Mr Donnellan*

17. The judge found at [49] that Mr Donnellan was “happy not to follow rules” and “was willing to procure and participate in dishonest business arrangements.” At [50] she said that Mr Donnellan was “willing to behave dishonestly to achieve what he considers his legitimate ends”; and that he was “willing to say what he considered necessary to obtain what he regards as the right result of this trial.”

18. Mr Donnellan’s pleaded case in the Partnership Claim was that the partnership was orally agreed in numerous conversations between him and Mr Ward. In support of his claim that he and Mr Ward agreed to form a partnership, Mr Donnellan pleaded and gave evidence about meetings that he said had taken place between him, Mr and Mrs

Ward and Ms Dorobat. One such meeting was said to have taken place in Dorking. A second meeting which he pleaded and gave evidence about was a meeting between him, Mr Ward and Ms Dorobat held in the roof space of Creative House for the purpose of completing Ms Dorobat's mortgage application form.

19. Having considered the evidence about those two meetings carefully, the judge concluded at [153]:

“In the light of all the evidence, I have concluded that Mr Donnellan's evidence about the alleged meetings with Mr and Mrs Ward and later with Ms Dorobat and Mr Ward, and his evidence about the statements said to have been made at those meetings by and in front of Mrs Ward and by Ms Dorobat, is not true and was made up to support Mr Donnellan's claim to an interest in Creative House. I find that neither of those meetings happened and that the alleged statements were not made.”

20. In other words, Mr Donnellan's evidence about both those meetings was dishonest. Mr Donnellan also pleaded a meeting in Spain in October 2012. It was common ground that Mr Donnellan and Mr Ward were together in Spain on that date. The judge discussed that meeting at [211]. She seems to have been sceptical about the accuracy of Mr Donnellan's account of that meeting but made no clear findings of fact. There was another pleaded meeting on which Mr Donnellan relied (and which Mr Ward denied had taken place) but the judge did not make clear findings about whether that alleged meeting took place or, if it did, whether it was as Mr Donnellan's pleaded case described it.

21. At [252] the judge discussed Mr Donnellan's reliance on a series of trust deeds executed by Mr Keane, some of which declared that he held certain flats on trust for Mr Donnellan. A similar and contemporaneous deed of trust executed by Mr Keane declared that he held some of the same flats on trust for a company. These were referred to as “either/or” trust deeds. Mr Donnellan's evidence was that Mr Ward had requested this to be done. It was put to him in cross-examination that his evidence was untrue. The judge concluded at [255]:

“I find that the use of “either/or” trust deeds is an example of Mr Donnellan's willingness to execute dishonest documents to try to avoid tax or legal requirements which he regards as unjustified or unduly technical.”

22. She went on to say at [256] that she did not accept Mr Donnellan's evidence about the trust deeds which she considered was not credible. She accepted the Ward parties' submission that the trust deeds were dishonest: [49].

23. One of the further matters that Mr Donnellan relied on in support of his partnership claim was his assertion that a mortgagee was threatening to foreclose on a mortgage over Creative House. The judge rejected that assertion, saying at [389]:

“...I find it is an example of Mr Donnellan being prepared to make assertions that are not true in order to bolster his case.”

24. She noted also at [404] that Mr Donnellan’s “changing case as to when and how the agreement for a partnership was reached” was a strong factor against the conclusion that a partnership had been formed.

*Mr Keane*

25. Mr Keane accepted that he had no direct knowledge of what was discussed between Mr Donnellan and Mr Ward about any partnership. He relied throughout on what he had been told by Mr Donnellan. Mr Keane’s role was to execute the trust deeds. Although it was put to him that this was dishonest, the judge recorded at [53] that Mr Keane failed to engage with the point being put to him. Her overall assessment of his evidence at [54] was that his own interest and his determination to support his friend Mr Donnellan meant that his evidence could not be relied on except where it was supported by reliable documents or the inherent probabilities. It is important to stress, however, that the judge made no finding that Mr Keane himself was dishonest in relation to the trust deeds.

*Ms Howard*

26. The judge recorded her assessment of Ms Howard’s evidence at [59]. She said:

“As I explain further below, I find that Ms Howard became involved in these transactions because she believed they would be profitable for Mr Donnellan and trusted that he would make sure she also benefited when he did so. Having thrown in her lot with him in relation to these transactions, she has kept to that position, instructing the same legal teams during the proceedings. I formed the view that Ms Howard regards her own interests in these proceedings as inseparable from Mr Donnellan’s. She is not an independent witness and I formed the view that her evidence also was not reliable unless supported by reliable documentary evidence or the inherent probabilities.”

27. Again, there was no finding that Ms Howard herself was dishonest. But the judge found at [282] that she, too, executed bogus trust deeds which purported to show that she held flats in Creative House on trust for Mr Donnellan.

*Mr Ward*

28. As I have said, the judge was also critical of Mr Ward. At [62] she said that Mr Ward was (like Mr Donnellan) “prepared to make untrue statements where he considered it to be necessary to achieve what he wanted.” Among those was a dishonest statutory declaration which he had made on 19 July 2011. As she noted at [5], one of the planks of his defence was that he had no interest in Creative House and no interest in Ebonair (“the Ebonair issue”), and that therefore Creative House could not have been partnership property. His case was that Ebonair was owned by a group of overseas investors. Among the documents he relied on was a loan agreement purportedly made in July 2000 recording a loan by Ebonair to Mr Ward, and a trust deed purportedly made in April 2009. Mr Ward had been declared bankrupt on 17 August 2009; and it

was put to him (and denied by him) that these two documents were shams, designed to hide assets from his trustees in bankruptcy. The judge concluded at [120]:

“Looking at the overall picture, I have concluded that the Loan Agreement was created in 2009 or later (and the Deed of Variation was created after 28 December 2010) in order to stand as evidence of a loan of £1.65m from Ebonair to Mr Ward in 2000 which was never in fact made, for the purpose of protecting (or hiding) assets from Mr Ward’s Joint Trustees.”

29. She further concluded at [122] that the trust deed was not a genuine document.
30. As I have said, Mr Donnellan’s case was that Mr Ward was the beneficial owner of Ebonair and therefore ultimately entitled to beneficial ownership of the freehold of Creative House. The judge did not accept that case in its entirety. Her ultimate conclusion at [346] was:

“In light of all the evidence at the trial, I have therefore concluded that Mr Ward has at least a beneficial interest in Ebonair. I do not conclude he is Ebonair’s sole beneficial owner: the evidence given (and the manner in which it was given) by Ms Hamieh leads me to conclude that she (perhaps in addition to others) also has some beneficial interest in the company, but I am satisfied that Mr Ward has a significant beneficial interest in Ebonair and is in a position to exercise at least significant control over its actions.”

31. She therefore rejected this part of Mr Ward’s defence, holding that ownership of Ebonair was not a reason why Mr Ward could not have reached the alleged partnership agreement with Mr Donnellan. The Ward parties therefore failed on the Ebonair issue.

### **The judge’s ultimate conclusions**

32. Having carefully weighed the evidence, the judge found at [404] that there was no partnership as alleged by Mr Donnellan. She also held at [406] that there was no joint venture either. The Partnership Claim therefore failed, even though the Ward parties had failed on the Ebonair issue.
33. Having reached that conclusion she went on to say at [407] that it followed from her decision on the partnership issue that Mr Keane held Flats 10, 11, 13, 14, 15, 16, 17 and 18 on trust for Ebonair (not for the alleged partnership); and Ms Howard held Flats 2, 3 and 4 on trust for Ebonair (not for the alleged partnership). Thus, the Part 20 Claim succeeded.
34. Finally, she turned to the Possession Claim. As to that, she said at [473]:

“I have held above that Mr Keane holds the flats in his name in Creative House on trust for Ebonair (rather than for the alleged partnership). It follows that the possession claims he brings against Luxap, CBA and Ebonair should be dismissed, and

Ebonair’s counterclaim for a declaration that it holds a 100% beneficial interest in the leasehold of Flats 13 and 14 is granted.”

### **The costs judgment**

35. The parties prepared skeleton arguments for the costs hearing which referred to certain authorities, to which I will return. Although the judge did not refer to them in her judgment, she did refer to some of them in giving her reasons for refusing permission to appeal. She dealt first with the Partnership Claim. She recognised that the starting point was that the successful party gets their costs; and also that the case generally raised a substantial number of issues. But she went on to say:

“However, given the very substantial dishonesty I found on the part of Mr Ward and, therefore, the Ward parties in the way that they advanced their case and the effect that that had on the conduct ... not only of the trial... but also the proceedings leading up to it and the proliferation of issues that caused ... where the questions of the ownership and interest of Ebonair took up a very, very substantial part of the judgment, it seems to me that that it is not appropriate for Mr Ward and Ebonair to benefit from that dishonesty or to be paid in respect of costs they incurred in respect of that dishonest case.”

36. She continued:

“... I have considered what the appropriate order is to make. It seemed to me that, on any view the Ward parties should not get the costs incurred in relation to advancing that dishonest case and that they should pay the Donnellan parties’ costs of that case and, taking both those into account, I am going to say no order as to costs.”

37. She dealt next with the Part 20 Claim. Although she recognised that Ebonair was the successful party she again decided to make no order for costs:

“... because it seems to me that the issues very much followed and formed part of the matters in dispute on the main claim for the same reasons.”

38. She did not deal specifically with the Possession Claim. But the order that she ultimately made in relation to that claim was one which awarded costs against Mr Keane.

39. In her reasons for refusing permission to appeal, the judge said:

“... the decision reflects my assessment of the time taken up by and impact of the dishonest case on the trial and the proceedings overall – the dishonest case had a very substantial impact on the conduct of the trial (and the proceedings overall), being the subject of a very substantial part of the evidence and

submissions at trial, and it very substantially increased the costs of the claim and the Part 20 claim. I decided no order as to the costs of the claim and Part 20 claim was more appropriate than (e.g.) to deprive D1-3 of their costs of the dishonest case and order them to pay the costs of the Claimant, the Third Party and the Fifth Party of that part of the case on the indemnity basis.”

## **The CPR**

40. Costs are dealt with in Part 44 of the CPR. Rule 44.2 relevantly provides:

“(1) The court has discretion as to—

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs—

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order

...

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and...

(5) The conduct of the parties includes—

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction—Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue;

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim; and...”

41. I should also refer to rule 44.3 which relevantly provides:

“(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs—

(a) on the standard basis; or

(b) on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.”

42. Naturally, it is common ground that, in exercising the power to make an order for costs under rule 44.2, the trial judge has a wide discretion and is better placed than an appeal court to make an order which best fits the justice of the case. The Respondents say that the judge’s decision to make no order for costs in relation to the Partnership Claim and the Part 20 Claim was within the permissible limits of her discretion. The Appellants, on the other hand, say that the judge’s exercise of her discretion was flawed because she did not take into account the extent of Mr Donnellan’s dishonesty, and she only paid lip service to the principle that costs follow the event.
43. In view of some of the submissions advanced I must make it clear that the scope of this appeal is limited to the question whether the judge was wrong to have exercised her discretion as she did on the basis of her conduct of and findings in the three claims.

#### **Dishonesty in pursuing a successful case**

44. It is important for a judge who is asked to take dishonesty into account when making a costs order at the end of a trial to consider what is likely to occur on assessment. Even if the losing party is ordered to pay the winning party’s costs, the winning party will not, on any assessment, be entitled to recover the costs of seeking to maintain a dishonest case, because such costs would not have been reasonably incurred: *Northstar Systems Ltd v Fielding* [2006] EWCA Civ 1660, [2007] Costs LR 264; *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS* [2009] EWHC 1696 (Ch), [2010] 5 Costs LR 657.
45. The court’s powers in relation to the putting forward of a dishonest case include (a) disallowance of that party’s costs in advancing that case, (b) an order that he pay the other party’s costs attributable to proving that dishonesty, and (c) the imposition of an additional penalty which, while it must be proportionate to the gravity of the misconduct, may in an appropriate case extend to a disallowance of the whole of the successful party’s costs, or an order that he pay all or part of the unsuccessful party’s costs: *Bank of Tokyo-Mitsubishi* at [19] (ii).
46. Where the court is asked to make some out-of-the-ordinary costs order in consequence of the alleged misconduct of the party against whom the application is made, the court must bear constantly in mind the conduct of the party making the application: *Bank of Tokyo-Mitsubishi* at [28].
47. *Hutchinson v Neale* [2012] EWCA Civ 345, [2012] 5 Costs LR is an instructive case. It concerned a boundary dispute. In the course of proceedings Mr Hutchinson, the defendant to the claim, dishonestly altered a plan attached to an abstract of title.

Instead of admitting their dishonesty the defendants made witness statements alleging that Mr Neale, the claimant, had been responsible for the forgery. The claim failed, and the trial judge made a detailed order for costs, the overall result of which was that the successful defendants received none of their costs of defending the claim, even those which had been reasonably and necessarily incurred. This court set that order aside. At [28] Pitchford LJ said:

“The starting point for the consideration of any order for costs of an action is (CPR 44.3(2)(a)) that costs should follow the event. It is from this point that the court will, in an appropriate case, consider the conduct of the parties (rule 44.3(2)(b)). There is no general rule that a finding of dishonest conduct by the successful party will replace the usual starting point. What is required is an evaluation of the nature and degree of the misconduct, its relevance to and effect upon the issues arising in the trial, and its tendency to create an unwarranted increase in the costs of the action to either or both of the parties. As Briggs J observed at para 19 of his judgment in *Bank of Tokyo* the full range of measures is available to ensure that the dishonest but successful party does not gain, and the honest but unsuccessful party does not lose, in consequence of the wrongdoing established.”

48. I note at this point that the objective is not merely that the dishonest but successful party does not gain from his dishonesty but also that the *honest* but unsuccessful party does not lose. This is not addressing a situation where the unsuccessful party is also dishonest.

49. At [30] Pitchford LJ stressed the point that the fact was that the claimant had launched an action on grounds which failed. He pointed out that the defendants’ dishonesty was isolated from the issue upon which the claim was founded. It was not a case in which the grounds upon which the claim was brought was infected by that dishonesty. At [31] he said:

“At issue is whether the defendants’ dishonesty so infected the action that justice requires that they should recover no costs at all in successfully defending the action. For the reasons I have given, it cannot be said that the defendants brought the action on themselves or conducted the proceedings as a whole as an abuse of the process of the court. The judge placed weight upon the fact that Mr Neale was justified in proceeding to trial in order to clear his name. However, it must be remembered that the judge separately provided for the costs of that exercise. In my view, the judge’s starting point should have been an order for costs in the defendants’ favour subject to adjustments to ensure that they did not recover any costs which may have been incurred in advancing a dishonest case.”

50. Applying that approach to the facts, this court decided that Mr Neale (the unsuccessful claimant) should pay 70% of Mr Hutchinson’s costs, to be assessed on the standard basis if not agreed. The court also directed that on the assessment there

should be no further deduction by the costs judge solely or mainly on the ground of Mr Neale's misconduct in altering the plan.

### **Dishonesty on both sides**

51. In his skeleton argument Mr Arnold, appearing for Ms Howard, relied on the decision of this court in *Intrigue Shipping Inc v Nikitin* [2013] EWCA Civ 749, [2013] 5 Costs LR 689. That concerned an order for costs made after a mammoth trial in the Commercial Court. Intrigue had brought an action alleging that Mr Nikitin had participated in four corrupt schemes which had diverted funds to which Intrigue was entitled. Intrigue failed at trial on its primary case, but it succeeded in part on its secondary case. In deciding what order to make the trial judge stated that Intrigue's success was limited. It recovered approximately 12% of its claims. The judge noted that he had rejected the primary case. Nevertheless, he found that for the purposes of costs, Intrigue was to be regarded as the successful party. Having referred to the rules, the judge said:

“In order to reach a fair determination upon costs as between the claimants and Mr Nikitin and the Standard Maritime defendants, I must particularly consider (i) the extent to which the claimants were successful and (ii) the conduct of these parties before and after the proceedings were brought. I have already said that the claimants' success was limited.”

52. He made findings about dishonest evidence given on behalf of Intrigue, which was widespread, and criticised Intrigue's disclosure of documents. He said that Intrigue's primary contentions of corrupt conspiracies were pursued almost entirely on the basis of dishonest evidence. It was those primary contentions which failed at trial. But he also found that Mr Nikitin had given dishonest evidence. This, then, was a case in which dishonest evidence was given on both sides.

53. The judge balanced a number of factors and expressed his ultimate conclusion as follows:

“Balancing these considerations I conclude that I should not order any payment of costs as between the claimants on the one hand and Mr Nikitin and the Standard Maritime defendants on the other hand. They should all bear their own costs. This involves a major departure from the general rule, but I consider that it is justified particularly (i) because the claimants failed in their primary case, and (ii) because of the conduct of the claimants before and during the proceedings.”

54. This court, dismissing the appeal, said that the judge had correctly directed himself and that his order was within the bounds of his discretion. Rimer LJ said at [52]:

“In my judgment, the judge committed no error of principle in arriving at the costs decisions he did in the three actions, including in the Intrigue action. ...He decided to make no order in each action, because the considerations relating to each action led him to the view that was the fair way to dispose of

the costs issues. *In having specific regard, as he did, to the fact that the claimants failed in their primary cases, he no doubt had regard to the fact that that part of the litigation accounted for the greatest cost and effort.* Whilst, as Mr Berry accepted, one might expect that claimants who nevertheless still achieved a material success on a fraud claim ought ordinarily to recover at least part of their costs, the judge took into account in deciding otherwise the claimants' dishonest conduct of their cases. That was obviously a powerful consideration: courts do not look sympathetically on dishonest litigants. It may perhaps be, particularly bearing in mind the dishonesty there was also on the part of the Nikitin parties, that other judges might have been a little more lenient, and might have awarded the claimants at least part of their costs. But whether other judges would or might have done so is neither here nor there. No-one was in a better position than this very experienced judge, after 76 days of exposure to this heavy litigation, to make a decision as to what, if any, costs order to make. In my judgment, he made no error of principle in his approach to the order he made." (Emphasis added)

55. This, then, was a case in which the successful party failed on its primary case which accounted for most of the cost and effort. In this case, by contrast, the Ward parties succeeded on the whole of their case, even though Mr Ward lost on the Ebonair issue.
56. HHJ Hodge QC, sitting as a judge of the Business and Property Courts, addressed the question of dishonesty on both sides in *Ahuja Investments Ltd v Victory Game Ltd* [2021] EWHC 2730 (Ch). He said at [47]:

"In the course of advancing his claim on behalf of the claimant, Mr Singh was found to have concocted false evidence about what had taken place at a meeting on 9 February. As against that, the court found that Mr Pandher and his wife, on behalf of the defendants, had colluded to fabricate false evidence as to the events of 12 February 2016. In particular, they had manufactured a false fax said to have been sent to their solicitors; and that they had done so deliberately, in order to bolster their false defence."

57. It is, I think, useful to quote a large part of the judge's reasoning:

"[51] It is necessary to stand back and assess the underlying nature and motivation of this litigation. I am satisfied that the claim was brought in order to avoid repayment of the £800,000 loan, and the outstanding month's interest instalment. Although the claim arose out of a fraudulent misrepresentation on the part of the defendants, at all times the claimant knew that the representation had had no effect whatsoever on his decision to purchase the property. *The basis of the claim was fundamentally false.*

[52] The claim was met, in return, in part with lies. But I have no doubt that *those lies were spawned by the prosecution by the claimant of a false claim*, expressly in order to evade his liabilities under the loan agreement.

[53] I emphasise that this is not a case where a claim was brought to expose a fraud on the part of the defendants. *The claim advanced was a dishonest one, which spawned a dishonest defence*, but the claim was not brought to vindicate the claimant's good name or to preserve its treasured reputation. This was a case entirely about money. *What caused the costs to be incurred in the first place was the institution of this claim in order to avoid the claimant's liabilities under the loan agreement.*" (Emphasis added)

58. At [55] HHJ Hodge QC said:

"The successful parties are the defendants. It would be wholly wrong to ignore that success by making no order as to costs, as suggested by Mr Holland. That would be to penalise unduly one of two dishonest parties and to ignore the fact that one of those two dishonest parties has succeeded on a claim that was fundamentally rooted in the prosecution of a dishonest claim by the unsuccessful party."

59. He went on to explain how he would put into practice the principles that he had identified. I quote it in full because in my view it is an exemplary approach to a difficult situation:

"[56] If I look at the position solely under CPR 44.2, and ignore the Part 36 offer, then I would have ordered the claimant to pay a proportion of the defendants' costs. In fixing that proportion, I have to ensure that I not only disallow the defendants' costs of advancing a dishonest defence, but also that I compensate the claimant for its costs of establishing that dishonesty. I must also bear in mind the need to impose a costs sanction proportionate to the gravity of the defendants' misconduct but also proportionate to the dishonesty of the unsuccessful party which has led to this litigation.

[57] I do not consider that it would be sufficient simply to disallow an indemnity basis of assessment of the costs in the defendants' favour and simply to order an assessment of the costs on the standard basis. That would not sufficiently reflect the consequences of the dishonest defence advanced by the defendants. In my view, there should be an order for costs in the defendants' favour, subject to adjustments to ensure that they recover no more costs than would have been incurred in advancing an entirely honest case, and adjusted to ensure that the claimant does not find itself bearing the costs of resisting those parts of the defence that were dishonest.

...

[59] Doing the best I can, I have concluded that, ignoring the Part 36 offer, the appropriate order for costs would have been to require the claimant to pay 75% of the defendants' costs. I do not consider that the position is affected by the contractual provision as to costs. So far as the second defendant is concerned, there is no contractual entitlement to costs in any event."

### Overview of the costs order

60. The effect of the judge's order is that the Ward parties, despite being the successful parties, are not entitled to recover any of their costs in successfully resisting the Partnership Claim or in advancing the Part 20 claim, not even those which were reasonably and properly incurred. Nor are they entitled to recover any part of their costs in relation to the successful Part 20 Claim. Nor are they entitled to recover any of their costs in exposing the dishonesty of Mr Donnellan in advancing the Partnership Claim. That dishonesty also permeated the Part 20 Claim and the Possession Claim because in both of those claims the main plank on which the Donnellan parties relied was the dishonest trust deeds. No financial penalty of any kind is imposed on Mr Donnellan.
61. I agree with HHJ Hodge QC (now KC) that that is wrong in principle. Although the judge said that the starting point was that the unsuccessful party must pay the successful party's costs, she departed far too readily from that starting point.
62. The judge referred to the effect of Mr Ward's dishonesty on the trial and "the proceedings leading up to it"; but it is entirely unclear to which proceedings she was referring. It may be that she was referring to deficiencies in disclosure, as Mr Donnellan submitted, although it is not clear that that is what she had in mind. In fact, there had been complaints about Mr Ward's late disclosure of documents, but in her main judgment the judge held at [37] that there had been no significant breach by Mr Ward of his disclosure obligations. Moreover, there is no finding in the main judgment that Mr Ward's dishonesty had in some way prompted Mr Donnellan to advance his own dishonest claim, or prompted Mr Donnellan to institute the Partnership Claim. As in *Ahuja* the claim was fundamentally false; and the false claim spawned a partially false defence.
63. This was not a case like *Intrigue* in which the successful party had failed on its principal claim. On the contrary the Ward parties were successful on all the claims. Nor is it a case like *Hutchinson* where the unsuccessful party was honest but the successful party was not. As in *Hutchinson*, the fact is that Mr Donnellan launched an action on grounds that failed, and which was supported by dishonest evidence.
64. As Lord Clarke said in *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 WLR 2004 at [53]:

"As to costs, in the ordinary way one would expect the judge to penalise the dishonest and fraudulent claimant in costs. It is entirely appropriate in a case of this kind to order the claimant

to pay the costs of any part of the process which have been caused by his fraud or dishonesty and moreover to do so by making orders for costs on an indemnity basis. Such cost orders may often be in substantial sums perhaps leaving the claimant out of pocket. It seems to the court that the prospect of such orders is likely to be a real deterrent.”

65. In this case that claimant is Mr Donnellan.

66. In the critical part of her costs judgment the judge said:

“It seemed to me that, on any view the Ward parties should not get the costs incurred in relation to advancing that dishonest case and that they should pay the Donnellan parties’ costs of that case and, taking both those into account, I am going to say no order as to costs.”

67. What this leaves out of account is that the Donnellan parties ought to have been ordered to pay the Ward parties’ costs of exposing Mr Donnellan’s dishonesty, as well as the costs reasonably incurred by the Ward parties in resisting Mr Donnellan’s failed (and dishonest) claim. In other words, the judge’s approach was one-sided; and failed to consider the conduct of both the Ward parties and Mr Donnellan. Indeed, nowhere in her judgment on costs does she refer to her findings about Mr Donnellan’s dishonesty. That omission is all the more surprising since Mr Donnellan’s dishonesty infected all three claims. This part of the judgment also leaves out of account the fact that none of the costs (including the costs of the evidence on the Ebonair issue) would have been incurred if Mr Donnellan had not chosen to litigate in the first place.

68. Moreover, the judge seems to me to have overstated the *legal* relevance of the Ebonair issue to the Partnership Claim. Mr Donnellan’s claim was that a partnership existed and that it had been expressly agreed. The relevance of the Ebonair issue did not go to the existence (or not) of the partnership, but to what amounted to partnership property, if there were a partnership as Mr Donnellan claimed.

69. When she came to deal with the Part 20 Claim the judge said that she would make no order for costs because the issues raised in that claim “very much followed and formed part of the matters in dispute on the main claim”. I consider, with respect, that her observation is unsustainable. One of the main issues in the Partnership Claim was who was the beneficial owner of Ebonair. But the Part 20 Claim was brought by Ebonair itself against (among others) Mr Keane and Ms Howard for declarations that they held their leases on trust for Ebonair. Ebonair is a corporation with legal personality. Who is the ultimate owner of Ebonair is entirely irrelevant to the question whether Mr Keane or Ms Howard held their leases on trust for that corporation. The dishonesty of Mr Ward in relation to the Ebonair issue had no bearing on the issues raised in the Part 20 Claim. By contrast, the dishonesty of Mr Donnellan did, because the defence to the Part 20 Claim was based on the dishonest trust deeds.

70. The judge did not specifically deal with the Possession Claim. But success or failure on that claim also depended on whether the leases were held on trust for Ebonair or the alleged partnership. Once again, who was the beneficial owner of Ebonair had nothing to do with the Possession Claim. That position seems to me to have been

reflected in the costs order that the judge in fact made in relation to the Possession Claim; namely that the unsuccessful claimant (Mr Keane) should pay the costs of the successful defendants (Ebonair and Luxap).

71. Although the trial judge undoubtedly has a very wide discretion when considering what order for costs to make, I am reluctantly driven to the conclusion that in this case the judge erred in principle such that her order cannot stand. I consider, therefore, that we must exercise our discretion afresh.
72. Although it is desirable for the court to make a global order dealing with the costs of all the actions tried together, I do not consider that that is possible in this case. As I have explained, Mr Ward's dishonesty in relation to the beneficial ownership of Ebonair is not relevant to the issues raised in the Part 20 Claim. On the other hand, Mr Donnellan's dishonesty is relevant to all the claims. As Pitchford LJ emphasised in *Hutchinson*, what is required is an evaluation of the relevance of dishonesty to the issues arising in the trial. Where several trials are conducted together, I consider that the judge must evaluate the relevance of the dishonesty to each of the trials.
73. I recognise that this approach may leave a costs judge with a difficult exercise, but I consider that that is necessary if justice is to be done to all parties.

### **The Part 20 claim**

74. I deal with this claim first, because it is relatively straightforward. Ebonair brought the Part 20 Claim against (among others) Mr Keane and Ms Howard for declarations that they held their leases on trust for it. They defended that claim unsuccessfully, on the basis of the trust deeds which the judge found to be bogus. But there was no finding that they themselves were dishonest.
75. Mr Donnellan was not a party to the Part 20 Claim, and there is no application for a third party costs order against him in relation to that claim.
76. Since Ebonair was the successful party in the Part 20 Claim, the starting point is that the unsuccessful parties (Mr Keane and Ms Howard) should pay its costs. Mr Keane emphasises that he complied with all his procedural obligations; and that he was drawn into the proceedings as a nominee. He also says that there were difficulties in accessing disclosed documents.
77. Although Mr Keane submitted to us that he remained neutral in relation to the Part 20 Claim, it is pertinent to note that:
  - i) His Defence to the Part 20 Claim positively averred that he held the flats in issue on trust for Mr Donnellan and Mr Ward as partners in the alleged partnership.
  - ii) As the judge recorded at [51] Mr Keane had a financial interest in the success of Mr Donnellan's partnership claim.
78. In her Defence to the Part 20 Claim Ms Howard also positively averred that she held the flats in issue on trust for Mr Donnellan and Mr Ward as partners in the alleged partnership. She also positively averred that it was Mr Ward himself who specifically asked her to become the legal owner of those flats as nominee for the partnership.

Again, it cannot plausibly be said that she remained neutral in relation to the Part 20 Claim. As the judge found at [59] she had thrown in her lot with Mr Donnellan and regarded her own interest in the proceedings as inseparable from his.

79. Ms Howard relies on a letter that she sent to Mr Donnellan on 4 May 2020. In that letter she told Mr Donnellan that she agreed to be bound by the outcome of his claim against the Ward parties in the action. She added:

“I accept that I hold the leases at Creative House as trustee for the partnership...

You have confirmed to me that you will not look to me for payment of legal expenses and this will be deducted from your share...

Your solicitor has advised me to obtain independent legal advice before returning this letter, and I have decided that this is not necessary.”

80. There is no suggestion or evidence that this letter was sent to Mr Ward or Ebonair. Any arrangement evidenced by this letter is a matter between Ms Howard and Mr Donnellan.
81. As I have said, who was the ultimate owner of Ebonair was irrelevant to the Part 20 Claim. The dishonesty of Mr Ward in relation to the Ebonair issue had no bearing on the issues raised in the Part 20 Claim. In so far as there was an evidential overlap, that came about because of Mr Keane’s and Ms Howard’s positive averments about the alleged partnership in their Defence to that claim.
82. I do not regard these points as justification for departing from the starting point. Whether Mr Keane was drawn into the proceedings as a nominee (presumably for Mr Donnellan) is a matter between him and Mr Donnellan. Compliance with procedural obligations by an unsuccessful party is only to be expected and cannot justify a departure from the starting point. I would therefore order Mr Keane and Ms Howard to pay Ebonair’s costs of the Part 20 Claim to be assessed on the standard basis if not agreed.
83. There is, in my view, a further reason why the judge’s order in relation to the Part 20 Claim cannot stand. The outcome of the Part 20 Claim and the Possession Claim stand or fall together. The judge recognised that at [473]. Yet the costs orders that she made in relation to the Part 20 Claim and the Possession Claim are inconsistent. She made no order for costs on the Part 20 Claim but ordered the unsuccessful claimant (Mr Keane) to pay the costs of the Possession Claim. There can be no rational explanation for that inconsistency.

### **The Partnership Claim**

84. The Partnership Claim was brought by Mr Donnellan alone. Although Mr Keane and Ms Howard gave evidence in support of his claim, they were not parties to it and there can, therefore, be no question of making any costs order against them in relation to that claim.

85. Mr Donnellan asserts that there were deficiencies in supplying materials to the single joint expert. He also says that there were failures in disclosure and late disclosure which affected the conduct and scope of the proceedings. These were not matters which the judge explicitly referred to in the course of her judgment on costs although, as I have said, in her main judgment she found that there was no significant breach of disclosure obligations. But to the extent that they are relevant, they might merit modest reduction from the costs which a successful party would otherwise be entitled to recover. He also refers to the progress of a different action brought by CBA and Mr Ward, which was eventually struck out. His argument appears to be that the case for Mr Ward in the Partnership Claim had been determined by prior proceedings. If that was the argument, the time to present it was at the trial of the Partnership Claim (at which he was represented by both leading and junior counsel).
86. Mr Donnellan also says that the scope of the inquiry ordered by the judge at paragraph 14 (d) of her order is too wide. Any complaint about the scope of the inquiry would have to be made by cross-appeal, which has not been done. It has no relevance to the current appeal.
87. In formulating an order relating to the costs of the Partnership Claim there are the following important considerations:
- i) First, the costs of the Partnership Claim were incurred solely because Mr Donnellan chose to bring it.
  - ii) Second, it must be recognised that the Partnership Claim failed in its entirety. The starting point that the unsuccessful party should pay the successful party's costs must be given proper weight.
  - iii) Third, Mr Donnellan supported his case by dishonest evidence. The Ward parties ought in any event to recover their costs of proving that dishonesty.
  - iv) Fourth, the Ward parties should not be entitled to recover any part of their costs incurred in advancing a dishonest case. This can be achieved either by reducing the proportion of costs to which, as the successful parties they would otherwise be entitled to recover, or by a direction to the costs judge to disallow the costs of advancing the dishonest case.
  - v) Fifth, Mr Donnellan ought to be able to recover his costs of proving that dishonesty.
  - vi) Sixth, any costs order must not unduly penalise one of two dishonest parties.
88. The judge seems to have taken the view that the costs incurred by the Ward parties in advancing the dishonest case and the costs incurred by Mr Donnellan in exposing that dishonesty were roughly equal and so balanced each other. Although Mr Polli KC submitted, with some force, that the judge's evaluation in that respect was flawed, it must be recognised that the judge was in a far better position to make that evaluation than this court. In addition, Mr Polli placed weight on the time that the various witnesses spent giving evidence; but the incidence of costs is not so limited. It would include pre-trial costs, such as the costs of disclosure, the preparation of statements of

case and witness statements and so on. I would not disturb the judge's conclusion in that respect.

89. Nevertheless, what the judge overlooked in striking that balance was the costs incurred by the Ward parties in exposing Mr Donnellan's dishonesty. Nor did she visit any financial penalty on Mr Donnellan for supporting his failed case by dishonest evidence. She also gave little if any weight to the principle that the unsuccessful party should pay the successful party's costs. In addition, she did not take into account the fact that the only reason that any costs were incurred in relation to the Ebonair issue was that Mr Donnellan had chosen to litigate.
90. Weighing all those considerations together and necessarily applying a broad brush approach I would order Mr Donnellan to pay 50% of the Ward parties' costs of the Partnership Claim to be assessed on the standard basis if not agreed. I would also direct that, as in *Hutchinson*, there should be no further deduction by the costs judge solely or mainly on the ground of the Ward parties' dishonesty in relation to the Ebonair issue.

**Lord Justice Arnold:**

91. I agree.

**Lady Justice Falk:**

92. I also agree.