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IN THE HIGH COURT OF JUSTICE Claim No. BL-2020-MAN-000014

BUSINESS AND PROPERTY COURTS IN MANCHESTER

BUSINESS LIST (ChD)

via Microsoft Teams

19 May 2022

Before:

MR JUSTICE FANCOURT:

Vice-Chancellor of the County Palatine of Lancaster

BETWEEN:

DENAXE LIMITED

Claimant

-v-

(1) PAUL COOPER

(2) DAVID RUBIN

Defendants

MATTHEW COLLINGS QC and GARETH DERBYSHIRE (instructed by **FIELDFISHER LLP**) appeared on behalf of the Claimant

DAVID MOHYUDDIN QC (instructed by **BEALE & COMPANY SOLICITORS LLP**) appeared on behalf of the Defendants

Hearing date: 19 May 2022

Approved Ruling

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(Official Shorthand Writers to the Court)

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The Vice-Chancellor:

1. On 6 April 2022, I handed down judgment on an application made by the defendants to strike out the claimant's claim. As a result, I made an order striking out the most substantial part of the claimant's claim, but allowed a residual part of the claim to continue to trial, provided that adequate particulars were given within a specified time. Apart from the main part of the claim which I struck out there were a number of ancillary claims, most of which in fact had been abandoned by the claimant before the hearing of the application. Some of those ancillary claims remained. I shall refer to these categories as “the sale claim”, “the abandoned peripheral claims” and “the remaining peripheral claims”, as Mr Mohyuddin QC has done in his skeleton argument.

2. What falls to be dealt with is the costs of the application, where it is not disputed that the defendants were the successful party, but also the costs of the sale claim and the abandoned peripheral claims other than the costs that were incurred in the strike out application.

3. The costs of the remaining peripheral claims other than the costs of the application I should not deal with at this stage, since those claims are continuing.

4. The application of the defendants that I heard was to strike out the claim and in the alternative for reverse summary judgment. This application in relation to the sale claim was made on a number of different grounds. First, that the defendants had immunity. Second, that the issues raised were res judicata. Third, that the claim was a Henderson v Henderson type abuse of process. And fourth, that the merits of the claim were so weak that summary judgment ought to be granted at this stage. The remaining peripheral claims were also in issue on a summary judgment basis.

5. I held that the defendants had immunity from the sale claim and also that that claim was a clear abuse of process. However, I rejected the res judicata argument and I rejected the application for summary judgment on the sale claim and the remaining peripheral claims.

6. Having found that the claim was the clearest possible abuse of process, as I said in my judgment, it seems to me that, in principle, the costs of bringing that claim ought to be paid by the claimant on an indemnity basis. That is supported by the fact that very substantial claims for a large amount of damages were brought by the claimant against the defendants on a basis that was entirely abandoned before the application was heard, because, as it seems to me, it suited the claimant's purposes at that stage to run a wholly different argument than the one it had originally pleaded.

7. I have therefore no difficulty in principle in holding that the costs relating to the sale claim, by which I mean the costs other than the costs of the application, should be paid on an indemnity basis. And the same, in principle, I consider applies to the abandoned peripheral claims, which were serious and substantial allegations made against the defendants that were then simply abandoned at a later stage.

8. The costs of the hearing of the application, however, are rather different, and in my view some allowance by one means or another needs to be made in favour of the claimant in relation to those costs. The reason for that is that although part of the time and costs in preparing and pursuing the application were concerned with the abuse of process argument, substantial other parts of those costs were concerned with other arguments: the immunity argument, on which the defendants succeeded but which I do not consider should attract an indemnity basis of costs, and the res judicata and

summary judgment arguments on which the claimant succeeded and the defendants failed. It would clearly therefore be wrong in principle to treat the costs of the application in exactly the same way as the costs of the sale claim and the abandoned peripheral claims.

9. Mr Mohyuddin submitted that it should be indemnity basis costs and there should be no reduction by way of a percentage for the costs of the elements of the application on which the defendants were unsuccessful. The argument is therefore the one that always comes into play in these circumstances, where although the defendants were the successful party, it did not succeed on all matters. The question is whether those issues on which they did not succeed should simply be treated as points that were argued along the way but on which the defendants did not succeed, for which no adjustment is appropriate because a party never succeeds on all of their points in a complex matter, or whether they should be regarded as discrete cost centres in relation to different issues, and therefore some percentage reduction is appropriate to mark the fact that the defendants were unsuccessful on them.

10. I consider that the latter is the case. No very substantial costs were incurred either in preparation or in time at the hearing of the res judicata argument, but the summary judgment application required the parties and the court to engage in detail with the merits of the damages claim. Quite a lot of the evidence, and a substantial proportion of the argument, related to those issues.

11. In those circumstances and bearing in mind what I will decide about the basis of assessment, I agree with Mr Collings that a 25 per cent reduction in the defendants’ costs is appropriate. That means that, if the parties’ total costs were roughly equal, the claimant would bear 87.5% of the assessed costs of the application and the defendants 12.5%. That strikes me as fair and reasonable.

12. The next question is what I should do about the basis of the assessment. Some of the application costs related to the abuse of process argument, where in principle the indemnity basis of assessment is appropriate. It would be unsatisfactory, however, to award part of the costs of the same application and hearing on the indemnity basis on detailed assessment and part on the standard basis.

13. I consider, therefore, having made what I consider to be a generous reduction of 25 per cent in favour of the claimant, that that can be regarded as a sufficient allowance against the costs assessed on the indemnity basis overall, and I will make an order that 75% of the defendants’ costs of the application should be paid by the claimant to them, to be assessed on an indemnity basis. Had I directed assessment overall on the standard basis, I would have reduced the 25% deduction that Mr Collings asked for.

14. As I have indicated, none the costs of the claim in relation to the remaining peripheral claims should be dealt with at this stage, and therefore in principle the same approach should be taken in relation to any costs of the application that related to the remaining peripheral claims. That is not a matter that I will seek to take into account when assessing on a broad brush basis the appropriate payment on account, but when it comes to the detailed assessment any costs of the application that are identifiably costs relating to the remaining peripheral claims should not be payable to the defendants.

15. The remaining question is then how to deal with a payment on account of the costs, which is not opposed in principle. The parties helpfully agree that an appropriate proportion of the costs claimed is 60 per cent. The costs claimed by the defendants in relation to the application are £113,660 plus £12,674, bringing those costs up to date, to included today's hearing.

16. The costs in relation to the claim that are not costs of the application were originally said to be £167,681. That figure was then corrected to £165,151.

17. In relation to the costs of the application, a detailed schedule of costs was prepared and served, and in my judgment 75 per cent of 60 per cent of the aggregate of £113,660 and £12,674 should be paid on account in respect of those costs.

18. Mr Mohyuddin seeks a similar payment in relation to the costs of the action. However, there has been no statement of costs provided. The amount of costs is clearly substantial, although Mr Collings has been able to identify that the figure of £165,000-odd should properly be reduced to about £140,000, given what the defendants' solicitors have said about the costs of the action that are attributable to the remaining peripheral claims.

19. The question, as Mr Mohyuddin put it in argument, is whether the court feels that it is in a position to form a view on a reasonable sum to be paid, without a more specific indication of what the £165,000 claimed comprises, what costs it relates to. Mr Collings submits that there really is nothing more than the letter dated 16 May 2022 from the defendants' solicitors, which identifies the figure of £167,681 that at that stage was being claimed. That figure, I note, includes costs of and caused by the application to amend and the costs of the remaining peripheral claims.

20. I do not consider that I am today in a position to perform a reasonable assessment of what those costs relate to and the extent to which a payment on account should be made. There is really nothing in terms of a breakdown of that figure. It is a substantial figure. Obviously there will be some costs of the claim that are not included in the costs of the application. But I feel unable, other than by a complete stab in the dark at the right figure, to say what is a reasonable sum to be paid on account. I therefore will not make an order today for such a payment on account.

21. The figure that I have ordered to be paid, whatever it is when it is calculated, if it is less than the money that is already paid into court, it should clearly be discharged from the monies that are already in court. If it is more, the monies in court should be paid out in part satisfaction.

22. I do not believe the parties have dealt specifically with the question of costs of the application to amend the claimant's particulars of claim. It may be that those do not need to be dealt with separately. I shall allow the parties to come back on that in just a moment.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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