



Neutral Citation Number: [2022] EWHC 1590 (Ch)

Case No: C31BS166

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 21 June 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

Between :

(1) JOHN MICHAEL GEE	<u>Claimant/</u>
(2) JOHN P GEE & SONS LTD	<u>Applicants</u>
- and -	
(1) THE ESTATE OF JOHN RICHARD GEE	<u>Defendants/</u>
(2) ROBERT GEE	<u>Respondents</u>

William Moffett (instructed by **Thrings LLP**) for the **Claimant/Applicant**
Francis Ng (instructed by **Royds Withy King**) for the **Defendants/Respondents**

Costs issues dealt with on paper

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.

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HHJ Paul Matthews :

Introduction

1. On 11 March 2022 I heard an application (by notice dated 10 December 2021) by the claimant and by John P Gee & Sons Ltd (“the company”) for relief in connection with the defendants’ alleged breach of a court order dated 14 February 2019. That order was made in proprietary estoppel proceedings by the claimant against the respondents, in which the claimant was successful: see [2018] EWHC 1393 (Ch). In fact, there had already been one earlier (and successful) application before me by the claimant, complaining of another failure to comply with the original order: see [2020] EWHC 1842 (Ch).
2. On 9 June 2022, I handed down judgment in this matter, giving my reasons for holding (amongst other things) that there had been a further breach by the first defendant, that there should be an inquiry into the breach (with appropriate statements of case produced) and that there should be disclosure given in support of the inquiry: see [2022] EWHC 1369 (Ch). However, the inquiry has obviously not yet taken place. I invited written submissions on costs, and received those from the applicants on 15 June 2022, from the respondents on 17 June 2022 and a short reply from the applicants on 19 June 2022. The applicants seek their costs of the application on the indemnity basis and a payment on account of £25,000. Having considered those submissions, I now give my decision on costs.

Calderbank offers

3. There is a preliminary point, concerning correspondence between the parties which is said to be without prejudice save as to costs (so-called “*Calderbank* offers”). But the respondents say that it will not be possible to test the offers made between the parties until the inquiry is concluded, and it is known whether offers have been beaten or not. Therefore, I should either reserve the costs of the application, or order that they be costs in the case. Of those two choices, the respondents favour the latter, costs in the case. They point out that I have reserved the matter to myself, and therefore also say that

“should the point prove determinative, the court is invited to unreserve the hearing so that it can review the offers”.

4. The applicants say that it is not necessary to take the correspondence between the parties into account, because

“there has been no offer which is relevant to the question of costs now before the court: if there had been such an offer which the Respondents wished to rely upon in answer to the Applicants’ application for costs it would necessarily have to have been framed such that it could be relied upon as to its contents now, without any question of waving privilege or ‘unreserving’ the matter. The Respondents could, if they wished, have framed such an offer but they chose not to do so”.

5. I accept the submission of the applicants. I have dealt with the initial application made by the applicants, and it is a matter for the court, in the exercise of its judicial discretion, as to whether it makes an order as to the costs of that application. In that

connection, the respondents are entitled to rely on any admissible offer that they have made, but if the only offers which they have made are admissible only in relation to other matters, then they are not relevant to the exercise of the court's discretion here. At all events, none has been specifically drawn to my attention.

Making a costs order

6. As I have just said, costs are in the discretion of the court (CPR rule 44.2(1)), but, if the court decides to make an order about costs, the general rule is that the unsuccessful party in the proceedings pays the costs of the successful party: CPR rule 44.2(2)(a). However, the court may make a different order: CPR rule 44.2(2)(b). In deciding whether to make an order and if so what, the court will have regard to all the circumstances, including conduct of all the parties and any admissible offer to settle the case (not under CPR part 36) which is drawn to the court's attention: CPR rule 44.2(4).
7. I am satisfied that the court should make an order about the costs of this application. The general rule under rule 44.2(2)(a) requires the court to ascertain which is the "successful party". Here the applicants say that they are the successful parties. They succeeded in obtaining an order that the company be joined as second claimant, and an order that there be (and directions for) an inquiry to determine liability for the breach in question and the appropriate relief to be awarded, with disclosure to be ordered in support once statements of case had been filed and served. All of these things were opposed by the respondents. It is true that no disclosure order was made immediately, but as I said in my written judgment I was satisfied that some disclosure will be necessary in due course. It is clear to me that the applicants are the overall successful parties for the purposes of the general rule under rule 44.2(2)(a).
8. Accordingly, the next question is whether there is reason to depart from the general rule in the present case. The respondent say that the proper order is that costs be in the case because it is unknown at this stage whether the applicants will ever obtain any substantive remedy. That will only be known when the enquiry is concluded. I do not accept this submission. The respondents opposed the idea of the inquiry in the first place. The applicants were therefore obliged to ask for it, and to spend time and money on arguing the point. That should not have been necessary. In my judgment there is no good reason why the respondents should not pay the applicants' costs of and occasioned by the application which they were obliged to make.

The scope of the recoverable costs

9. There is an issue about the *scope* of these costs. The applicants say that these costs should include the costs of the breach issue, which was contested. Their costs in relation to this issue began to be incurred from October 2019 onwards, when they learned of the respondents' threat to commit the breach. There followed an extended dispute by correspondence leading to the breach itself in September 2020. This application for relief in relation to the breach was issued on 10 December 2021 and, as I have said, heard by me in March 2022. The respondents say that costs incurred prior to the breach are not costs of the application, and therefore not within the scope of the order being sought.

10. The court’s jurisdiction to award costs arises from section 51 of the Senior Courts Act 1981, which relevantly provides that

“(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—

(a) the civil division of the Court of Appeal;

(b) the High Court; and

(ba) the family court;]

(c) [the] county court,

shall be in the discretion of the court.”

11. The critical words defining the scope of the court’s jurisdiction therefore are “the costs of and incidental to all proceedings”. The proceeding with which I am currently concerned is the application made by the applicants and dated 10 December 2021. The question accordingly is, what are the costs “of and incidental to” that application. As to this, it is long established that recoverable costs may be incurred *before* the relevant proceeding has begun: see *eg Re Gibson's Settlement Trusts* [1981] Ch 179, 184-88; *ENE Kos v Petroleo Brasileiro SA* [74]-[100]. Indeed, I pointed this out in my judgment in the earlier application in these proceedings which I dealt with in July 2020: see [2020] EWHC 1842 (Ch), [34].

12. In *National Westminster Bank plc v Kotonou* [2009] EWHC 3309 (Ch), Briggs J (as he then was) said:

“35. The question of principle thrown up by that analysis is whether costs incurred in the pursuit of negotiations designed to provide an interim solution to issues forming the subject matter of pending (or contemplated) litigation while leaving the issues to be finally determined at a later date, can (subject to the usual questions of proportionality and reasonableness) form part of the costs of those proceedings.

36. The need to negotiate interim solutions to difficulties thrown up by contemplated or pending claims is a common feature of civil litigation. They include questions as to security for costs, questions as to the liberty of the defendant to use his assets (or assets claimed from him in the proceedings) for his own purposes pending trial, including for the purposes of funding the litigation, and issues as to the interim custody of, and dealings with, property the subject matter of the claim. Such issues are very frequently resolved without either party having to make an interim application, for example during pre-action stages, or by solicitors' correspondence and oral negotiations shortly after the commencement of a claim.

37. In the context of the litigation environment created and encouraged by the CPR and the Woolf Reforms, it seems to me obvious that such negotiations as to the resolution of interim issues should be encouraged, and that, therefore, the costs regime should accommodate the costs of such negotiations as part of the

costs of the litigation, subject to the usual considerations of reasonableness and proportionality.

38. It has for many years been part of the court's analysis of the question whether pre-litigation costs are costs of the proceedings to ask whether those costs related to the creation of materials 'ultimately proving of use and service in the action' or as being costs the incurring of which was 'proper for the attainment of justice' in the case: see *Frankenburg v. Famous Lasky Film, Service Ltd* [1931] 1 Ch 428 at 436 per Lord Hanworth MR, and *Re Gibson's Settlement Trusts* [1981] 1 Ch 179 at 185-187 per Sir Robert Megarry V-C. In my judgment costs incurred in the reasonable negotiation of interim solutions to problems arising between the parties in connection with issues to be decided in contemplated or pending litigation clearly fall within those principles."

13. In my judgment, the position here is similar. The original claimant (now the first claimant) reacted to the threat of what he considered to be a proposed breach of the order made in the original litigation and sought to dissuade the respondents from committing that breach. As it turned out, he was unsuccessful in doing so. But, had he succeeded, it would have saved this further application. And the materials which were produced by those attempts have been relevant to and useful in this application. I have no hesitation in saying that in my judgment the costs of reacting to the threat to commit a breach and the attempts to dissuade the commission of the breach are "incidental to" this application, seeking relief in respect of the breach after the event.

The basis of assessment

14. The next point is the basis of assessment in the present case. The applicants ask for their costs on the indemnity rather than the standard basis. In *Hosking v Apax Partners Ltd* [2019] 1 WLR 3347, [42], [43]. Hildyard J said:

"42. The emphasis is thus on whether the behaviour of the paying party or the circumstances of the case take it out of the norm. The merits of the case are relevant in determining the incidence of costs: but, outside the context of an entirely hopeless case, they are of much less, if any, relevance in determining the basis of assessment.

43. The cases cited show that amongst the factors which might lead to an indemnity basis of costs are (1) the making of serious allegations which are unwarranted and calculated to tarnish the commercial reputation of the defendant; (2) the making of grossly exaggerated claims; (3) the speculative pursuit of large-scale and expensive litigation with a high risk of failure, particularly without documentary support, in circumstances calculated to exert commercial pressure on a defendant; (4) the courting of publicity designed to drive a party to settlement notwithstanding perceived or unaddressed weaknesses in the claims."

15. Here the applicants rely on a number of factors. One is that the respondents sought to argue that what was (in their submission) "a cynical breach of a court order" was not a breach at all. They say that this was unarguable. Secondly, this conduct amounts to a contempt of court, even though it cannot be punished by committal, because the order was not endorsed with a penal notice. Thirdly, the defence was pitched very high, for example that there was "no intelligible basis for a damages award or an account

against the second defendant”. Fourthly, the respondents said that the applicants had delayed, when it was in fact (as I found) the respondents who had been “dragging their heels”. Fifthly, the respondents were noncooperative throughout, even refusing to consent to the application to join the second applicant as second claimant. Fifthly, the respondents sought to throw procedural obstacles in the way of the applicants’ access to justice, for example, by insisting that any claim for damages for the breach should be dealt with in entirely separate proceedings, rather than by way of an inquiry in these proceedings. There were other points as well, but these seem to me to be the most important ones.

16. The respondents say that it was not unarguable that they had not been a breach of the order, that it is wrong in principle to punish litigants for contempt outside the regime in CPR Part 81, that it is proper for litigants to pursue in advance their arguments with vigour, that it was proper to advance an argument based on delay by the applicants, that no extra costs were involved in the company being added as a second claimant, and that it was proper to contend that the separate claim was needed.
17. I remind myself that it is not enough, to take the matter outside “the norm” for a litigant to be *unsuccessful*. The conduct of the litigant must be outside the norm. But in my judgment that test is amply met in the present case. The conduct of the respondents has been clearly aimed, not at resolving the dispute between the parties, but at trying to frustrate, or at least eviscerate so far as possible, the judgment of the High Court originally given in the proprietary estoppel claim. The respondents refused on a previous occasion to deal with the shares in the company as the judge had directed. This led to an earlier application in which further steps, ordinarily unnecessary in ordinary litigation, had to be taken in order to ensure that the original order was made effective. The present application is a result of the respondents continuing to behave in this fashion. It is an obvious case for indemnity costs.

Payment on account

18. Lastly, I turn to the question of detailed assessment and payment on account. The applicants did not provide a schedule of costs, and therefore it is not possible for me to conduct a summary assessment of those costs. The respondents observe that this was an application which lasted less than one day. Therefore, the general rule is that the court should assess the costs summarily: CPR rule 44.6, PD 44 para 9.2. However, because there is no costs schedule, I cannot properly go down that route. I must therefore order a detailed assessment, unless the parties are able to agree the amount of the costs (which, in the circumstances, I consider very unlikely).
19. Under CPR rule 44.2(8), where the court orders costs subject to a detailed assessment, it must make an order for an interim payment on account of those costs “in a reasonable sum ... unless there is good reason not to do so”. The applicants seek such a payment on account. Counsel tells me on instructions that the total costs expended on this application amount to about £50,000. He seeks a payment on account, in the sum of £25,000, that is, approximately 50%. The respondent say that this is “an extraordinary figure for a three-hour hearing for which their counsel filed a six-page skeleton and which concerned land with a surrender value of £63,000”. They asked me to take into account the fact that a schedule of costs was not produced, and suggest that an appropriate figure would be £10,000.

20. In *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), Christopher Clarke LJ said:

“23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.”

21. Judges have been prepared to award interim payments of up to 90% of budgeted costs, at least where costs were to be assessed on the indemnity basis. That is because the scrutiny involved in budgeting, and the more generous basis of assessment, mean that they can be clearer as to what the assessed costs are likely to be. Where there is no budget, but there is a schedule of costs, judges have often awarded between 50 and 60%. However, I have no schedule of costs, and I have therefore to be even more cautious. But I do not think I should be so cautious as not to award an interim payment at all. In my judgment, it would be right in the present case to award £20,000 by way of interim payment, that is, approximately 40% of what counsel tells me has been spent.

Conclusion

22. I will order the respondents to pay the applicants costs of and incidental to the application on the indemnity basis, to be subject to detailed assessment if not agreed. I will further order the respondents to pay the sum of £20,000 on account of those costs, by 4 PM on 4 August 2022. I should be grateful to receive a minute of order, preferably agreed between counsel, to give effect to this costs ruling.