

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST
(ChD)
[2022] EWHC 3048 (Ch).

Case No: BL-2019-002023

The Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Thursday, 17th November 2022

Before:
THE HONOURABLE MRS JUSTICE SMITH

B E T W E E N:

THE FINANCIAL CONDUCT AUTHORITY

and

- 1) KONSTANTINOS PAPADIMITRAKOPOULOS
- 2) DIMITRIS GRYPARIS

MR A GEORGE KC & MR R FAKHOURY appeared on behalf of the Claimant
MR G BRODIE KC & MR POWER[?] appeared on behalf of the First Defendant
MR A HUNTER & MS SAGAN[?] appeared on behalf of the Second Defendant

JUDGMENT
(Approved)

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MRS JUSTICE SMITH:

1. The First and Second Defendants now apply at this consequential hearing for costs against the Claimant (“**the FCA**”), further to my judgment on the First Defendant’s strike out application ([2022] EWHC 2792 (Ch), “**the Judgment**”).
2. As I explained in paragraph two of the Judgment, the basis for the application was that in investigating, building and formulating a civil claim against the First Defendant, the FCA had made use of material (“**the MLA Material**”) obtained through mutual legal assistance requests without first obtaining the consent of the relevant overseas authority. In doing so, it was contended by the First Defendant that the FCA had breached the absolute prohibition against collateral use of MLA Material contained in section 9(2) of the Crime (International Co-operation) Act 2003 (“**the 2003 Act**”).
3. Although the strike out application was made by the First Defendant, I recorded in the Judgment at [10] and [11] that the Second Defendant was an interested party for the reasons there set out. The Second Defendant was represented by counsel at the hearing of the application to address the first of the four issues that were before the Court.
4. Those four issues are set out in [3] of the Judgment. I found in favour of the First and Second Defendant on the first issue and in favour of the First Defendant on the second and third issues. However, for the reasons set out in detail in [100]-[105] of the Judgment, I refused to strike out the FCA’s claim, that being the fourth issue.
5. In my conclusion at [106] I said this:

“Notwithstanding that I am not prepared to strike out this case, I have found that (i) there has been impermissible collateral use of MLA Material provided by the SVG authorities (prior to the date on which consent was given), albeit of a relatively *de minimis* nature...; and (ii) there has been impermissible collateral use of MLA Material provided by the Greek Authorities, which use is potentially continuing despite the fact that no consent had ever been given. In the circumstances, I consider that the proper course is for me to take steps to mark the court’s disapproval of the FCA’s conduct, thereby paying proper regard to (amongst other things) the importance of international comity, whilst at the same time seeking to ensure (in so far as is possible in the circumstances) a level playing field”.

6. One of the steps I had in mind was the potential to make a costs order in favour of the First Defendant notwithstanding that the First Defendant had ultimately lost the strike out application. At [109] of the Judgment, I therefore said this:

“Finally, I have also considered whether it would be appropriate to require the FCA to pay the costs of this application, notwithstanding that, ultimately, I have rejected the strike out application. My preliminary view is that the FCA should be ordered to pay the costs, but I am inclined to give the parties the opportunity to address me further on the point before I form a concluded view”.

I therefore invited submissions on the point to be made by the parties at the consequential hearing.

The General Rule

7. The starting point, as Mr George KC correctly says in his skeleton argument on behalf of the FCA, is CPR 44.2(2)(a), which provides that: “the general rule is that the unsuccessful

party will be ordered to pay the costs of the successful party”. However, CPR 44.2(2)(b) makes clear that “the court may make a different order”.

8. In *Kastor Navigation Co Limited & Anor v Axa Global Risks (UK) Limited* [2004] 4 Costs LR 569, the Court of Appeal held at [143] that the words “successful party” mean “successful party in the litigation”, not “successful party on any particular issue”. I agree with Mr George that applying that decision analogously to the context of an interim application, the Court must determine which party was successful in the overall application as opposed to necessarily looking at any individual issue arising in the application.
9. In *The London Borough of Tower Hamlets v The London Borough of Bromley* [2015] EWHC 2271 (Ch), Norris J held at [9] that “[o]ne should depart from the general rule only where the needs of justice and the circumstances of the particular case require, and a measure of caution is needed”.

The Submissions of the Parties

10. The FCA says that the application to strike out has failed. Accordingly, the FCA is strictly to be regarded as the successful party in the application and the general rule would result in the FCA recovering its costs. However, Mr George accepts, realistically, that subject to the question of appeal, it is appropriate for the court to depart from the general rule in this case as a mark of disapproval, given the court’s finding of breach of section 9(2) of the 2003 Act.
11. Accordingly, the FCA submits that an appropriate and proportionate order would be for the First Defendant’s costs to be “in the case”, rather than an order requiring the FCA to pay the First Defendant’s costs. This, says Mr George, would strike an appropriate balance between the public interest in the court marking its disapproval of the FCA’s conduct and the public interest in the effective pursuit of proceedings of this nature involving serious allegations of market abuse. The FCA also says that an order of First Defendant’s costs in the case will reflect the court’s finding in the Judgment that the FCA has not behaved improperly or unreasonably together with its finding that the springboarding in relation to the Greek MLA Material appeared to be of “limited compass”.
12. The First Defendant rejects this approach, arguing, through Mr Brodie KC, not only that he is entitled to his costs of the application on the grounds that he was successful on three out of the four issues before the court, but also that those costs should be on the indemnity basis. The First Defendant points to the fact that the court has indicated that it expects the FCA retrospectively to remedy the abuse of process by obtaining consent from the Greek Authorities. Pending the outcome of that exercise, the First Defendant reserves its position as to appeal and strike out.
13. In so far as the Second Defendant is concerned, Mr George submits that he is in a different position from the First Defendant and should not recover his costs of the application. Mr George points out that the Second Defendant’s attendance at the hearing was for the express purpose of dealing only with the first issue that was before the court, a purely legal issue of construction, and that the First Defendant succeeded on that issue in any event. Effectively, Mr George says that the sole question with which the Second Defendant was concerned at the hearing was already being advanced by the First Defendant before the court. Mr George also points to the fact that the only independent argument raised by the Second Defendant did not in fact need to be decided by the court (see paragraph [74] of the Judgment) and he says that it would be wrong in principle to award the Second Defendant his costs in those circumstances. The FCA does not, however, suggest that the court does not have jurisdiction to award costs in favour of the Second Defendant in the context of the application.
14. On behalf of the Second Defendant, Mr Hunter KC rejects the FCA’s arguments, pointing

out that the Second Defendant is a party to the proceedings, that he is not immune from the jurisdiction of the court on costs (such that an order could have been made against him), that he was plainly an interested party, as acknowledged in the Judgment, and that he was entitled to be represented at the hearing of the application in order to address the first issue before the court. There was nothing improper or inappropriate in him being so present, and where the arguments on the first issue succeeded, it is not disproportionate to award him his costs.

Decision

15. Dealing first with the principle of costs, I consider that the appropriate order on costs is that the FCA should pay the First Defendant his costs of the application. My reasons are as follows:
 - a. I consider that the needs of justice and the special circumstances of this case require a departure from the general rule. This much is accepted by the FCA. Whilst I accept that a measure of caution is required before deviating from the general rule, the circumstances of this case are such that it seems to me to be in the interests of justice that the First Defendant should have his costs.
 - b. The First Defendant was in any event successful on each of the first three issues and he has also succeeded in the sense that I have required the FCA to seek consent retrospectively from the Greek Authorities (an issue which, as at today's date, remains unresolved). I have also held that the MLA Material directly obtained via the MLA process will not be admissible in the proceedings.
 - c. Although Mr George is right to say that I have found that the FCA's conduct was in good faith, nevertheless, I have also found that it amounted to an abuse of process and that it has given rise to the scope for both potential and actual unfairness to the First Defendant (at [101] of the Judgment). In the circumstances, I have found that the FCA's conduct was deserving of disapproval (at [106] of the Judgment).
 - d. I do not consider that an award of costs in the case would be sufficient to reflect that disapproval. If the FCA were to win at trial, they would not be required to pay the First Defendant's costs of the application (although they would not be able to recover their own costs). However, in my judgment, the First Defendant should not have found himself in a position where this issue had to be ventilated and is entitled to recover his costs regardless of the outcome at trial.
 - e. Finally, I am not at all clear why the FCA did not take steps in advance of the hearing to resolve the issue of Greek consent. Their failure to do so is now going to lead to yet further delay in these proceedings.
16. For all those reasons, the First Defendant should have his costs of the application.
17. As for the Second Defendant, I accept the submissions of Mr Hunter that there was good reason for him to be represented at the hearing of the application; the Second Defendant is a party to the litigation and, as is clear from the Judgment, the Court found Mr Hunter's submissions on the first issue extremely helpful. The First and Second Defendant prevailed on the first issue. I do not consider in those circumstances that it would be appropriate, or consistent with the interests of justice, to make no order in relation to the Second Defendant's costs. Accordingly I order that the Second Defendant should also have his costs of the application.
18. I turn then to deal with the basis on which the costs should be awarded. The First Defendant, but not the Second Defendant, seeks indemnity costs.
19. The court's jurisdiction to make an award of costs on an indemnity basis arises from CPR 44.3(1)(b). Whereas costs on the standard basis must be proportionate and any doubt as to whether the costs were reasonably and proportionately incurred must be resolved in favour

- of the paying party, costs on the indemnity basis are not subject to the requirements of proportionality and any doubt as to whether costs were reasonably incurred must be resolved in favour of the receiving party.
20. In deciding what order to make about costs, the court will have regard to all the circumstances of the case, including the conduct of the parties, see CPR 44.2(4) and (5). The principles to be applied by the court on an application for indemnity costs were clearly articulated in the leading authority of *Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879 by Lord Woolf CJ at [31]-[32] and by Waller LJ at [39]. In summary, the court has a wide and generous discretion in making orders about costs. An order for indemnity costs will be justified where either the conduct of the parties or other particular circumstances of the litigation, or both, are such as to take the situation “out of the norm”. As Lord Woolf observed, “[t]hat is the critical requirement”.
 21. Mr George referred me to the case of *Three Rivers District Council & Others v The Governor and Company of the Bank of England* [2006] 5 Costs LR 714, a judgment of Tomlinson J, at page 731, where he set out the test to be applied by the court following the guidance given by Lord Woolf in *Excelsior* and a number of other cases.
 22. In particular, and amongst other things, he said this:
 - “(1) The Court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.
 - (2) The critical requirement before an indemnity order can be made in the successful defendant’s favour is that there must be some conduct or some circumstance which takes the case out of the norm.
 - (3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an *a fortiori* ground, but rather unreasonableness”.
 23. Doing the best I can to balance the competing interests, many of which I have already identified in relation to the principle of costs, I consider that an award of indemnity costs is not appropriate in all the circumstances of this case.
 24. This is an extremely unusual case in which it is accepted by the FCA that (notwithstanding it is the ultimate winner of the application) it should not recover its costs for the reasons that I have identified.
 25. In my judgment, an award of costs in the First Defendants’ favour (an unusual award of costs in all the circumstances) is sufficient to mark the court’s disapproval of the FCA’s conduct and it is unnecessary, and would be contrary to the interests of justice, to make an award of indemnity costs. Furthermore, as Mr George rightly points out, in [105(iii)] of the Judgment, I observed that “[i]t is not suggested that the FCA has behaved improperly or unreasonably, merely that it has been mistaken in its approach”. Although Mr Brodie now submits that the FCA acted negligently in not obtaining the requisite consent and that it cannot simply be regarded as having made a mistake, nevertheless it was not suggested at the hearing of the application that the FCA had behaved unreasonably, as I recorded in the Judgment. Accordingly, I do not consider that it would be appropriate to make an award of indemnity costs.
 26. Turning then to the question of the assessment of costs. the First Defendant has provided a Costs Schedule and submits that I should send his costs off to detailed assessment subject to inviting me now to make an order for an interim payment (in circumstances where I have

- awarded costs on the standard basis) of 70% of his Costs Schedule.
27. The First Defendant's Costs Schedule, which I was taken through in some detail, identifies a total figure for the costs of this one day application as being £518,915.29. I consider that to be an extraordinarily high figure for an application that was made in circumstances where there had been two previous hearings before this court, at which, on each occasion, skeleton arguments were submitted by counsel which dealt with the main issues arising on the strike out application, those issues were issues of law and they were well understood.
 28. Mr George identified various aspects of the Costs Schedule which he said simply had no credibility, and I am bound to say that I agree with him. There is an enormous amount of work charged by the senior associate involved (something in the region of 54 working days or 11 working weeks – a staggering amount of time for a one day hearing), which includes a number of conferences taking place in Greece (in respect of which travel and accommodation is charged), where the First Defendant is based. At a number of those conferences, both leading and junior counsel also appear to have been present. I find that extraordinary in circumstances where this application was, as I have said, primarily dealing with a question of law. I do not see why any issues that needed the involvement of, and instructions from, the First Defendant himself could not have been dealt with via a remote platform, at least by some members of the legal team.
 29. I also note, as Mr George pointed out, that the fees of counsel for today's hearing, which is a consequential hearing in respect of which I received a skeleton argument from the First Defendant running to four pages, amount to something in the region of £42,000, and indeed approximately £48,000 has been charged by counsel since the Judgment. That is to be compared with a figure of something in the region of £8,500 for counsel for the Second Defendant, who provided a far more detailed skeleton argument for this hearing. I also note that the rates identified on behalf of the solicitors for the First Defendant are higher than the guideline hourly rates, without any attempt to justify why that is so.
 30. All in all, I do not consider that I can sensibly or properly place any reliance on the First Defendant's Cost Schedule, notwithstanding that Mr Brodie has told me that the Costs Schedule was prepared with the assistance of a costs draftsman.
 31. In circumstances where I do not consider that I can properly place any reliance on it, I am not prepared to make any award for interim payment based on the Costs Schedule. Instead, the First Defendant's costs will go off for a detailed assessment in due course.
 32. The Second Defendant provided a Cost Schedule amounting to some £83,440. Mr George made only a minor criticism in respect of this document, pointing out that the rates of a Grade-A partner were above the guideline hourly rates, but noting that the partner had spent very few hours on the matter in any event.
 33. I am invited by Mr Hunter to make a summary assessment of costs on the basis that the hearing of the application was a one day hearing. In my judgment, it would be appropriate to make a summary assessment of the Second Defendant's costs and I will summarily assess those costs in the figure of £70,000 to be paid within 14 days by the FCA.

End of Judgment.

Transcript from a recording by Ubiquis
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiquis.com

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