Neutral citation number: [2023] EWHC 1644 (Ch)

Case No: CR-2021-MAN-000222

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN MANCHESTER
INSOLVENCY AND COMPANIES LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Thursday, 16 March 2023

BEFORE:

HIS HONOUR JUDGE HODGE KC
Sitting as a Judge of the High Court

IN THE MATTER OF LLOYDS BRITISH TESTING LIMITED (IN LIQUIDATION)

BETWEEN:

MANOLETE PARTNERS PLC

Applicant

- and -

IAN RUSSELL WHITE

Respondent

MR JOSEPH CURL KC and **MR Jon COLCLOUGH** (instructed by **Addleshaw Goddard LLP**, Manchester) appeared on behalf of the **Applicant**

MR TOM ASQUITH (instructed by **Farleys Solicitors LLP**, Preston) appeared on behalf of the **Respondent**

APPROVED JUDGMENT

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(Official Shorthand Writers to the Court)

JUDGE HODGE KC:

1. On Monday 13 March I heard an application by Manolete Partners Plc arising from a substantive judgment which I had delivered on an originating insolvency application brought by them in respect of Lloyds British Testing Limited against its former controlling director and principal shareholder, Mr Ian Russell White, which had, after a three day hearing, resulted in a judgment in the applicant's favour, dated 25 August 2022. The applicant sought relief effectively requiring Mr White to draw down on his occupational pension scheme in order to satisfy the judgment debt, at least in substantial part.

2. The hearing on Monday concluded at about 3.00 pm and I adjourned to consider my judgment. Working over the last two days, I released a draft judgment, on the usual confidential terms, at 8.36 am this morning with a view to it being formally handed down at 2.00 pm this afternoon. The neutral citation reference for the judgment is **[2023] EWHC 567 (Ch)**. I indicated that any typographical corrections should, if possible, be communicated to me by 1.00 pm this afternoon so that the judgment could be handed down in approved form at 2.00 pm. I appreciated that in the case of Mr Colclough (of counsel), who appears for the applicant with Mr Joseph Curl KC, who represented the applicant at the hearing before me on Monday, that might create certain difficulties because Mr Colclough was engaged in another matter before me remotely this morning at 10.30 am which, in the event, only concluded at about 12.05 pm.

3. At 1.16 pm this afternoon, I received an email from Mr Asquith thanking me for the draft judgment and indicating that he had located only one extremely minor typographical correction. About a minute later, I received an email from Mr Colclough indicating that he had no corrections to make to the judgment. I thereupon converted the draft into an approved form of judgment and uploaded it in approved form to CE-File as Case Event 138. As I was doing that, Mr Asquith sent a further email to me, timed at 1.20 pm. That email reads as follows:

> *"Whilst the respondent recognises that this is not the time for further submissions, it is appropriate to draw your attention to the fact that Mr White does not consider paragraph 77 of the judgment to reflect the full picture. Whilst the company did indeed purchase the property initially, it was later purchased by Mr White and other directors with their funds. The documentary evidence attached shows the later sale and purchase. We would note that this issue had not been raised by the applicant in Ms O'Callaghan's first witness statement. We respectfully submit that this explains the absence of evidence before the court on this point as it was not ventilated between the parties in evidence. Whilst paragraphs 24 and 25 of Mr White's first witness statement are correct to state that the property was purchased using company funds, it was then purchased by the pension scheme. Accordingly, Mr White's position is that the company did not fund Mr White's benefit under the scheme and so the court should not take into account the matters set out at paragraph 77 of the draft judgment when it comes to exercising its discretion."*

4. There were three pdf forms attached to Mr Asquith's email. The first is a letter from Dundas & Wilson LLP, solicitors, dated 5 December 2005 to Lloyds British SSAS. The second is the draft of an agreement, dated on the front sheet 2006, and on the first page 2005, with no other date inserted, and purporting to be made between the company, Lloyds British Testing Limited, and Mr Hayden Davis, Mr Ian White, and Mr Trevor Dale (as trustees of Lloyds British SSAS) relating to the sale of the Swansea property. The third attachment is a property feasibility report prepared for the trustees of the pension fund on 24 October 2005.

5. I responded to Mr Asquith's email at 1.43 pm this afternoon. I stated that I had already finalised my draft judgment before receiving his email under reply. I stated that I had determined the matter on the basis of the evidence that was before me. I cited from paragraph 24 of Mr White's witness statement as follows:

> "The Lloyds British SSAS purchased the leasehold property known as Lloyds British Engineering, Crymlyn Burrows, Swansea SA1 8PX, which is registered at HM Land Registry with Title Number CWM432674 ('the Property') in 2004. The purchase was made using the company's funds."

I pointed out that had I delivered an extemporary judgment, there would have been no opportunity to put in supplementary evidence; and I did not consider that I should permit this now, just before the judgment was being formally handed down in writing.

6. At the commencement of this hand down hearing, Mr Asquith has invited the court, in so far as this further evidence might be relevant to the exercise of the court's discretion, to take it into account. Mr Colclough, who appears without the leading counsel, Mr Curl KC, who had appeared before me on Monday (because Mr Curl had previously made it clear that he had another commitment this afternoon), objects to Mr Asquith's attempt to re-open my judgment at this late stage. Mr Colclough makes the following points:

7. First, that the evidence given by Mr White in his witness statement is entirely clear. That evidence was that the pension fund purchased the leasehold property using company funds. Mr Colclough points out that Mr White was sitting behind counsel throughout the hearing, which was in open court in Manchester on Monday, and that he had given instructions to Mr Asquith on other matters during the course of the hearing. Second, Mr Colclough makes the point that Mr Asquith is now seeking to put three pdf forms, sent as an attachment to an email some 38 minutes before the hand down, into evidence. Third, Mr Colclough points out that, at its highest, the pdf forms show that the pension scheme appears to have purchased the leasehold interest from the company. But Mr Colclough makes the point that the company was the principal employer under the pension scheme and therefore it was the employer that had funded the pension scheme in any event. Mr Asquith accepts that further evidence, in particular in the form of bank statements showing the movement of funds, might be required for the court to adjudicate finally upon this aspect of the matter.

8. I do not consider that it is appropriate to allow this further evidence in at this late stage. I have already spent a considerable time in preparing a draft judgment, setting out my considered views on the evidence that was before me. The application notice is dated 22 September 2022, and the supporting evidence of Ms O'Callaghan, a solicitor and legal director with Addleshaw Goddard, the applicant's solicitors, was submitted on the same date. There have been no less than three case management orders, made by DJ Woodward, on 14 December 2022, 1 February 2023 (which granted an extension of time for Mr White's witness evidence), and a later order, made by consent, which is undated, extending time - I think - for the applicant's evidence in reply. Mr White's witness statement is dated 8 February 2023, and Ms O'Callaghan had submitted evidence in reply on 28 February 2023.

9. It would not be fair to the applicant to allow further evidence to be submitted now. Moreover, I have already considered the matter on the basis of the evidence that was placed before me, and I have reached my conclusion. It would not be right to re-open that by reference to further evidence that could have been placed before the court but was not.

10. For those reasons therefore, I propose to hand the judgment down in the form in which I sent it out at about the same time as Mr Asquith was sending his most recent email to me.

11. So, I formally hand down judgment in the form of the written, approved judgment. I fully understand that Mr Asquith has acted perfectly properly in trying to follow his client's instructions. That concludes this extemporary ruling.

Judgment on costs

12. This is my extemporary ruling on the costs of this insolvency application in which I have just handed down a substantive judgment and delivered a short, supplemental extemporary ruling.

13. The successful party on this application is undoubtedly the applicant. The applicant has succeeded in obtaining an order directed to requiring the respondent, Mr White, to access his substantial occupational pension with a view to the pension monies being capable of being applied in partial satisfaction of his judgment debt to the applicant resulting from the order that I made on 25 August last year following a contested three day misfeasance trial.

14. Mr Colclough, appearing for the applicant, seeks all of the costs of the application without any discount. For the respondent, Mr Asquith submits that whilst the applicant has been the successful party, the costs to be awarded in its favour should be discounted by 50 per cent or, alternatively, by some other percentage, anywhere between 50 to 99 per cent of the applicant's costs.

15. Essentially, Mr Asquith relies on the following matters: First, although successful, the applicant has not been entirely successful. The applicant effectively abandoned, during the course of the hearing, its application for a contingent third party debt order: see paragraph 34 of the judgment. The applicant also failed to persuade the court that it should make an order, at this stage, under section 39 of the Senior Courts Act ,notwithstanding that there has been no refusal on the part of Mr White, to date, to access his pension fund in accordance with my court order.

16. As well as those defeats, Mr Asquith relies, second, upon the way in which the relief sought by the applicant has changed over time. He has referred me to paragraphs 14 to 16 of my judgment, in which I describe the way in which the relief claimed by the applicant has shifted during the course of this application. He has also reminded me of the relief that I propose to grant, which is more restricted still, as set out at paragraph 80 of my handed down judgment. Mr Asquith submits that money has been spent, and time incurred, in dealing with discrete points on which the applicant has, in the event, either not been successful, or has not pursued.

17. The third matter on which Mr Asquith relies is the lack of any pre-application engagement on the part of the applicant with Mr White and his solicitors. He points to the fact that a lot of time and effort could have been saved had the applicant approached Mr White for details of his pension arrangements before issuing the present application. In the event, in response to evidence adduced by Mr White, the applicant did not seek to pursue any relief in relation to two of Mr White's three pension schemes. The evidence in relation to those provided by Mr White in response to the applicant's evidence could have been avoided had there been such pre-application engagement.

18. For all of those reasons, whilst accepting that the applicant is entitled to some of the costs it has incurred, Mr Asquith submits that there should be a substantial discount from those costs.

19. Mr Colclough resists any such reduction. He points to the fact that it is a commonplace of contested litigation that any successful party may well suffer loss on some of the issues. That is no reason to refuse to award a party all their costs. So far as the shifts

in the case are concerned, Mr Colclough reminds me of what I have said at paragraph 17 of my judgment: that whilst there has been a substantial reformulation of the relief sought by the applicant on this application, the court's focus should be on the substance rather than the form. The issue has remained the same throughout; and I expressed myself entirely satisfied that Mr Asquith had been put at no disadvantage by the shift in the focus of the relief sought on this application by Mr Curl.

20. So far as matters of conduct are concerned, Mr Colclough responds by pointing to the fact that Mr White is a substantial judgment debtor who has paid not a penny towards the satisfaction of his liability. Moreover, he offered no, or limited assistance, about what remains in his pension pot with his former company.

21. I have had regard to all of those submissions. I have had regard to the extent to which, although successful, the applicant has not succeeded on all aspects of its claim. I have had regard to the conduct of the parties, both prior to, and during, the course of the hearing, the latter of which was entirely appropriate on both sides.

22. I accept Mr Colclough's point that a successful party may lose on certain issues. The real question with which the court must engage is the extent to which a lack of success on those issues has caused costs to be incurred on either side. I am satisfied, here, that the applicant's relative lack of success on certain issues has not in any way added materially to the costs of the proceedings in such a way as to justify any discount from the award of costs that would otherwise fall to be made in the applicant's favour.

23. For those reasons, I am satisfied that I should award the applicant the entire costs of the application; and, if asked, I will proceed to a summary assessment of those costs on the basis of the statements of costs that are before the court.

24. That concludes this second extemporary costs ruling.

Summary assessment of costs

25. Having delivered a second, short extemporary judgment awarding the applicant all of its costs of the application, I now have, inevitably, to undertake a summary of the costs.

In doing so, it is appropriate, in light of the submissions I have received, to look at the costs schedule for the unsuccessful respondent, as well as the successful applicant. That is because the respondent, through Mr Asquith, challenges the hourly rates claimed by the applicant's solicitors.

26. I acknowledge that the hourly rates claimed are considerably in excess of the guideline hourly rates applicable to litigation in Manchester. Those guideline hourly rates were prescribed as recently as the summer of 2021; and, at the time they were promulgated, a decision had been taken not to create a separate, and special, category for high value business and property work in the regions. The guideline hourly rates for a grade A fee earner are £261, as against the £490 at which the principal fee earner retained in this litigation by the applicant, Ms O'Callaghan, has been charged out.

27. However, whilst the respondent's principal fee earner, Mr Hague, is charged out at £350, the total figures for the respective firms of solicitors are £16,628.50 for Addleshaw Goddard, for the applicant, as against £27,145 for the respondent's solicitors. I cannot accept that that disparity is attributable to the fact that Addleshaw Goddard had previously been involved in misfeasance proceedings which have given rise to the judgment debt, whilst the respondent's solicitors, Farleys, have had to come to the matter afresh. As Mr Colclough points out, this enforcement application is discrete from the factual issues which gave rise to the judgment debt itself. I do not accept that the difference in the number of hours expended, magnified by the lower hourly rate charge by Farleys Solicitors, is attributable to the recent appearance on the scene of the respondent's solicitors.

28. I have to consider whether the solicitors' charges are reasonable and proportionate. I acknowledge that the hourly rates are high; but it seems to me clear, from the difference between the two sets of charges levied by the two firms of solicitors, that Addleshaw Goddard must have dealt with the matter more expeditiously, and with a reduction in the number of hours spent. Looking at hourly rates is, as Mr Colclough says, only part of the picture. One needs also to look at the number of hours expended. When I see that the respondent's solicitors' charges are £27,145, I consider that, notwithstanding the higher hourly rates charged by Addleshaw Goddard, the resulting charge of £16,628.50 is entirely reasonable and proportionate.

29. I therefore propose, in principle, to allow the solicitors' element of the applicant's costs in full.

30. I do not consider that there should be any deduction for the considerable correspondence that is said to have attended the initial hearing before DJ Woodward. I do not consider the time spent should not be recoverable. DJ Woodward ordered that the costs should be costs in the application; and the reality is that, at the time the matter came before DJ Woodward, there was no evidence in answer to the application. So I can see why, initially at least, the applicant should have been looking for a final order.

31. Having looked at the correspondence, it does not seem to me that I should make any disallowance of costs in relation to the correspondence and time attending on that first hearing. The attendance at that first hearing had to appear somewhere; and I do not consider that I should make any deduction to reflect the fact that it appears in the section headed "Time spent on documents."

32. So, for all of those reasons, I will allow the applicant's solicitors' charges in full.

33. When one comes to counsel, however, it does seem to me that there is a complete mismatch between the positions of the two sides. Mr Asquith, and his two predecessor counsel, have charged, in total, just under £16,000. As against that, Mr Curl's fees are £26,000, and Mr Colclough's a further £8,000, making £34,000 in total. That is more than twice the amount spent on counsel's fees by the respondent. Mr Asquith makes the point that this was simply an enforcement application which did not merit a leading counsel's fee of £26,000, representing what must have been five full days of work. Mr Asquith submits that there is no reason why Mr Colclough could not have represented the applicant. It was not reasonable for the applicant to instruct leading counsel. In those circumstances, Mr Asquith submits that I should disallow the fees of Mr Curl, and only allow those of Mr Colclough.

34. On the other hand, if I allow Mr Curl's fees, I should both reduce them, and also disallow the fee for Mr Colclough, on the grounds that he was an unnecessary addition. I should have regard, not to the preferences of the receiving party, but to what is reasonable and proportionate for the paying party to pay; and I should bear in mind that

since this is a standard basis assessment, any doubt should be resolved in the respondent's favour as the paying party.

35. Mr Colclough makes the point that it was the respondent's choice to mount a full challenge to two previous High Court decisions in relation to the potential application of the prohibition in section 91 (2) of the Pensions Act 1985. On that footing, it was entirely reasonable for the applicant to wish to bring in, and retain, leading counsel. He points to the fact that Mr Curl had no previous background in this case; and that it was therefore entirely appropriate for the applicant to continue to instruct Mr Colclough, as the junior counsel who had familiarity with the case.

36. Notwithstanding all of those points, and looking at counsel's fees in total, it does seem to me that it is both unreasonable and disproportionate for the applicant to have incurred a total of £34,000 on counsel, apportioned as to £26,000 to Mr Curl and £8,000 to Mr Colclough. If it was the applicant's wish to retain leading counsel, then that counsel should have focused solely on the section 91 point if Mr Colclough was to be retained in addition.

37. I have to look at leading counsel's fees in the round and in total. In doing so, I bear in mind the total fees charged by counsel for the respondent of just under £16,000. It is not for this court to say how counsel's fees should have been apportioned between leading and junior counsel if two counsel were to be engaged. I have to bear in mind that this was a short, one day application, without any live witness evidence. I have to bear in mind that the documentation before the court was relatively limited. The core bundle, comprising the application notice, the orders, the evidence and some correspondence, totalled only 44 pages, extremely modest by the standards usually seen in this court. The exhibit bundle was, again, a relatively modest 276 pages; and the authorities bundle ran to what again, in this court's experience, is a relatively modest 204 pages. The issues were limited. I have been able to produce a written judgment of some 80 paragraphs between 3.00 pm on Monday and 8.30 am this morning.

38. Bearing all of those factors in mind, it seems to me that the reasonable and proportionate amount to allow for counsel's fees is a total figure of £20,000.

39. I therefore propose summarily to assess the costs in the aggregate of £16,628.50 for solicitors, £20,000 for counsel and £218 for court costs. So I will summarily assess the costs in the aggregate of those three sums at £36,846.50. I am told there is no VAT applicable to those costs.

40. That concludes this third extemporary ruling on costs.

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

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