



Neutral Citation Number: [2023] EWHC 1923 (Ch)

Case No: HC-2016-002798

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27/07/2023

Before:

MR JUSTICE MICHAEL GREEN

Between:

RAS AL KHAIMAH INVESTMENT AUTHORITY

Claimant and Defendant to Counterclaim

-and-

FARHAD AZIMA

Defendant and Counterclaimant

-and-

STUART PAGE

First Additional Defendant to Counterclaim

-and-

DAVID NEIL GERRARD

Second Additional Defendant to Counterclaim

-and-

DECHERT LLP

Third Additional Defendant to Counterclaim

-and-

JAMES EDWARD DENNISTON BUCHANAN

Fourth Additional Defendant to Counterclaim

Thomas Plewman KC, Frederick Wilmot-Smith and Sophie Bird (instructed by **Burlingtons LLP**) for the **Claimant and Defendant to the Counterclaim**
Fionn Pilbrow KC and Aarushi Sahore (instructed by **Charles Fussell & Co LLP**) for the **Second Additional Defendant to the Counterclaim**
Craig Morrison KC and Robert Harris (instructed by **Enyo Law LLP**) for the **Third Additional Defendant to the Counterclaim**
Antony White KC and Ben Silverstone (instructed by **Kingsley Napley LLP**) for the **Fourth Additional Defendant to the Counterclaim**

Hearing dates: 19 July 2023

Approved Judgment

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MR JUSTICE MICHAEL GREEN

Mr Justice Michael Green :

Introduction

1. I am the assigned Judge to these proceedings and on 19 July 2023 I held a Costs and Case Management Conference (“CCMC”). The only outstanding issue from that hearing, on which I reserved judgment, is the parties’ costs budgeting. The other issues were security for costs and directions to trial, both of which were disposed of by consent.
2. The costs that the parties anticipate spending on this litigation are eye-wateringly high. In respect of an eight to ten week trial listed for May 2024, Mr Azima, the Counterclaimant, is now budgeting for total costs of £21,558,473.37, including estimated future costs of £12,363,245.97. In an earlier iteration of his costs budget on 30 March 2023, Mr Azima had calculated that he would spend £4 million more. The three separately represented Additional Defendants have a combined total budgeted costs figure of £24,945,315.27.
3. The main disputed items are in relation to Mr Azima’s costs budget, although many other items have been agreed. I am pleased to say that Dechert’s and Mr Gerrard’s costs budgets have been agreed by Mr Azima. There are a couple of points with which Mr Azima takes issue in respect of Mr Buchanan’s costs budget.
4. I have delivered a number of judgments in these proceedings – see for example [2022] EWHC 1295 (Ch) and [2022] EWHC 2727 (Ch), the latter of which was recently upheld by the Court of Appeal at [2023] EWCA Civ 507. I respectfully refer to and adopt those judgments for the detailed background to these proceedings which I will not repeat. I will also use the same definitions and abbreviations that I have used previously.

Costs budgeting

5. I did query at the hearing whether the Court could make any meaningful assessment of the parties’ future costs in a case of this size and complexity. I was reminded however that on 13 May 2022 I made an Order by consent that costs budgeting would apply to these proceedings. Nevertheless I remain of the view that it is not really possible, save in very broad terms, to assess the reasonableness of particular costs items and that, in a case such as this, it is invidious to do so, particularly as that assessment effectively fixes the recoverable costs of the winning party, subject to exceptional circumstances and any different basis of assessment that is ordered.
6. Nevertheless, I am obliged by CPR 3.15(2) to make an assessment as to the reasonableness and proportionality of the disputed items. Under CPR 3.15(2) I am only concerned with future costs, not incurred costs. I can record the extent to which incurred costs are agreed, but it is only in relation to budgeted future costs that I am meant to make “*appropriate revisions*”. I am able to comment on the incurred costs (CPR 3.15(4)) and can take such comments into account when considering the reasonableness and proportionality of the budgeted costs (CPR 3.17(3)(b)). The Additional Defendants invite me to do that in relation to Mr Azima’s costs.

7. However this power to comment on incurred costs is expected to be used “*sparingly*” (see para 6.70 of the Chancery Guide). The power was used by Coulson J, as he then was, in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 481 (TCC) but, as Mr Plewman KC on behalf of Mr Azima submitted, that was a fairly straightforward construction case of the sort of which that Judge had tremendous experience and he was therefore able to assess what would be a reasonable overall level of costs. This case is very different and I think it is impossible for a Judge to have a feel for what would be a reasonable amount of costs to spend overall on this sort of case.
8. By para 12 of CPR PD 3D, the Court does not “*undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.*”
9. The Additional Defendants complained about the lack of engagement from Mr Azima after their costs budgets were exchanged on 30 March 2023. Revised costs budgets were exchanged on 11 July 2023, together with budget discussion reports on the following day. The disputed items further narrowed between then and the hearing.

Context

10. Before looking at the remaining disputed items, I should deal with two general points that were made by the Additional Defendants: (1) Mr White KC on behalf of Mr Buchanan made some submissions as to proportionality and in particular the amount that is truly at stake in these proceedings; and (2) Mr Pilbrow KC on behalf of Mr Gerrard made submissions as to the source of Mr Azima’s funding of this litigation. In respect of the disputed items they both adopt the submissions of Mr Morrison KC on behalf of Dechert; but they say that these overarching points should be borne in mind in considering whether I should indeed assess those items at the level proposed by Dechert.
11. Mr White KC’s characteristically succinct submissions focused on Mr Azima’s claimed losses which he says have now reduced considerably or were really unsustainable as a matter of law. He said that there are four main heads of loss claimed by Mr Azima:
 - (1) Pecuniary losses – these were at one time valued at \$13,861,186 based on losses allegedly suffered by Mr Azima’s businesses but these have been largely abandoned as they offended the principle against reflective loss; the claimed losses now stand at only \$36,058 based on losses in relation to computer equipment.
 - (2) Damages for distress arising from misuse of private information and breach of confidence – Mr White KC said that recent cases show that these damages are very modest in amount and could not in this case exceed £50,000.
 - (3) Exemplary damages – but these too are said to be generally modest in value.
 - (4) Disgorgement of profits – Mr White KC submitted that this would require that Mr Azima prove that Mr Buchanan had received a benefit from Mr Azima and

the professed non-reliance on the Iniquity Documents that founded the original claim against Mr Azima will make that task much harder.

12. Mr Plewman KC responded to these points by saying that it is far too early to say that there will not be substantial damages awarded to Mr Azima at the end of the trial and the claims to exemplary damages and a disgorgement of profits remain on the pleadings and the Additional Defendants have not sought to strike them out. Furthermore, in addition, Mr Azima is claiming back the damages he had to pay RAKIA, together with interest and the costs orders against him, all of which could amount to quite a lot.
13. It seems to me that I cannot make any sort of realistic assessment of the likely level of recovery that will be made by Mr Azima. In the context of costs budgeting, I have to assume that Mr Azima succeeds in proving all aspects of his case and that a standard basis of assessment of costs is awarded in his favour. (If indemnity costs are awarded, then the costs budgeting becomes virtually irrelevant.) The Additional Defendants have agreed to Mr Azima spending over £18.5 million which on the face of it is disproportionate to what they say the claim is worth. While Mr White KC's submissions certainly put the costs budgets in context, the unusual circumstances of this case mean that I do not think that it really affects what I should approve.
14. I take a similar view to Mr Pilbrow KC's submissions as to the source of Mr Azima's funding of this litigation. He said that the evidence suggests that Mr Azima is being funded by Eurasian Natural Resources Corporation and that it is doing so for its own entirely uncommercial reasons. This has meant that Mr Azima is unconstrained in his spending and is therefore conducting the litigation in a totally disproportionate manner, as evidenced by the fact that he was able to reduce his budget by £4 million for no explicable reason.
15. Mr Plewman KC said that there is no obligation on Mr Azima to disclose how the litigation is being funded and the Additional Defendants are protected by the security for costs that have been and will be provided by Mr Azima to them. Again, I do not feel that this point assists in determining what is a reasonable and proportionate sum to spend on this litigation.

Mr Azima's costs budget

16. I therefore turn to the specific items in dispute. Mr Morrison KC took the lead on these on behalf of the Additional Defendants and there was argument over three such items:
 - (1) Disclosure: Mr Azima seeks approval for £1,467,000 on future estimated costs of disclosure; the Additional Defendants are prepared to agree £578,000;
 - (2) Trial Preparation: Mr Azima seeks approval for £5,857,000; the Additional Defendants are prepared to offer the same figure agreed for Dechert's trial preparation costs of £4,184,271;
 - (3) Trial: Mr Azima seeks approval for £2,505,410; the Additional Defendants are again prepared to offer the same figure agreed for Dechert's trial costs of £1,612,360.

(1) Disclosure

17. Mr Azima has incurred costs to date in respect of disclosure of over £3.6 million. Mr Plewman KC said that these higher than expected amounts have been caused by the nature of the allegations that Mr Azima has had to investigate against the Additional Defendants which is that they orchestrated a sophisticated fraud and then a cover up of their illegal hacking. There were also extensive failures of disclosure in the first trial. All of which has meant that Mr Azima has used the services of private investigators which bore fruit in the sense that extensive further evidence has come to light which has not only led to this retrial but also Mr Azima's claim to set aside the original judgment for fraud. Mr Azima has used the section 1782 process in the United States to obtain evidence from third parties but this has meant incurring US lawyer fees. He also incurred lawyers' fees for the third parties providing disclosure and investigation costs. While some details of the investigations and third parties have been provided, Mr Plewman KC said that they were necessarily constrained by privilege and confidentiality from revealing exactly what they have been doing and indeed what further investigations will be undertaken.
18. Mr Morrison KC submitted that these very high incurred costs on disclosure should be taken into account in assessing the reasonableness and proportionality of the estimated costs. However I do not see that I can properly do that in the circumstances of this case where it has been necessary for Mr Azima to attempt to uncover what he says is the serious wrongdoing of all the Defendants and which has got him to the stage where he has been able to make the allegations that he does and perhaps receive disclosure from the Additional Defendants, particularly Dechert, that will assist in his claim. I cannot say now that those incurred costs were so unreasonable and/or disproportionate that they should affect what Mr Azima should reasonably spend in the future on disclosure.
19. I can fully understand why Mr Azima wishes to continue his investigations but that is the element of his estimated costs that the Additional Defendants object to. Mr Azima's estimated future costs on disclosure are a total of £1,467,000, of which there are estimated costs of £568,000 for solicitors' and counsel's fees, principally for reviewing the disclosure of the Additional Defendants. The Additional Defendants have agreed to that amount plus £10,000 for "*reproduction/miscellaneous fees and expenses.*"
20. The dispute is as to the further disbursements in respect of:
 - (1) US lawyer fees of £300,000 for the ongoing section 1782 process;
 - (2) Third party legal fees (for the lawyers acting for Mr Page, Mr Grayson, Mr Halabi and Mr Robinson) at £389,000;
 - (3) An independent barrister used to review documents provided by Mr Page and third party costs for providing disclosure at £170,000;
21. These amounts total £859,000. Mr Plewman KC submitted that they are costs that Mr Azima has to bear and which would be recoverable as part of a standard basis costs assessment. He said that they include the costs associated with the third party disclosure application that Mr Azima has made against Stokoe Partnership in respect

of the three devices in their possession which are thought to contain relevant material for these proceedings. I am separately considering a number of applications in relation to those devices.

22. Mr Morrison KC complained that little detail has been provided about these proposed costs to be incurred in relation to disclosure and that it was incumbent on Mr Azima to prove what they are and that they are reasonable and proportionate. I do not think that that is the way it necessarily works. There are difficulties for a party in disclosing too much information about investigations that are being conducted into serious alleged wrongdoing by the parties wishing to know that information. It is for me to decide if, in the context of these proceedings and from the detail that has been provided, those costs seem reasonable and proportionate. I am satisfied that they are and will approve them.

(2) Trial Preparation

23. Mr Morrison KC attacks both the estimated solicitors' fees for trial preparation - £822,500, which includes 600 hours of Band A Partner time – and counsel's brief fees, which total an extraordinary £4,900,000. He says that, for various reasons, Mr Azima's costs should be allowed at the same level as Dechert's which are £447,500 for solicitors' fees and £3,675,000 for counsel's brief fees. Even though Mr Azima is facing three different legal teams for each of the Additional Defendants, Mr Morrison KC submitted that the bulk of trial preparation would be conducted by counsel, particularly when there is such a big team of two senior silks and three junior counsel, and that in any event there will be a greater burden on the Additional Defendants' counsel because Mr Azima will be calling more witnesses than them.
24. The latter point I do not accept and indeed I consider that there is inevitably a greater burden on a claimant and particularly so in a case like this. However, I do agree with Mr Morrison KC that Mr Azima cannot have it both ways and say that the size of the brief fees is justified by reference to the amount of trial preparation work that the counsel team will be required to undertake, at the same time as saying that his solicitors need also to spend an enormous number of hours at Partner level to assist in that trial preparation. It also does not sit well with Mr Azima's relatively trivial objection to Mr Buchanan's solicitors' costs for trial where Mr Buchanan has a far smaller team of counsel. So it does seem to me that the estimated solicitors' fees are excessive.
25. As to counsel's brief fees, Mr Morrison KC pointed out that Mr Azima's senior leading counsel, Mr Tim Lord KC, took silk at the same time as Dechert's leader, Mr Tom Adam KC, yet the former has a brief fee of £2.5 million compared with the latter's £2 million. Mr Azima has also chosen to have a much more senior second silk than Dechert and has one more junior in the team.
26. I do not think the size of the team or the choice of leading counsel to be unreasonable, bearing in mind that there should be a corresponding reduction in the solicitors' fees, but I do think that overall the amount being charged in respect of brief fees is excessive. Mr Plewman KC basically responded by saying that this was the market rate, but even if that is what one of the clerks' teams at Brick Court Chambers managed to secure for its counsel team, it does not make it a reasonable amount that

the court should endorse, even taking into account the unusual circumstances of this litigation.

27. In conclusion I will reduce counsel's brief fees by £500,000 to £4.4 million; and I will reduce the solicitors' estimated fees to £500,000. By my calculation that means that the revised figure for Mr Azima's estimated costs for trial preparation is £5,034,500.

(3) Trial

28. The difference between Mr Azima's and Dechert's estimated costs for trial is caused by the same factors as set out above: higher refresher rates for counsel; a larger team of counsel; and more solicitors attending the trial. The latter two points, I do not think are unreasonable, but again I do consider that there needs to be an adjustment to counsel's fees. There is approximately a £200,000 difference between Mr Lord KC's refreshers and those of Mr Adam KC. The difference is greater between Mr Plewman KC and Mr Morrison KC, at £243,000, but that is largely due to the difference in seniority.
29. I think it appropriate to cut the refreshers for trial on Mr Azima's side by £300,000 overall. That brings Mr Azima's estimated costs for trial down to £2,205,410.

Mr Buchanan's costs budget

30. By comparison to the figures in dispute on Mr Azima's costs budget, the two items that Mr Azima challenges on Mr Buchanan's costs budget are very small indeed. These are:
- (1) Further round of pleadings – Mr Buchanan estimates £97,000, whereas Mr Azima agrees £25,000;
 - (2) Trial – Mr Buchanan estimates solicitors' fees of £876,375, whereas Mr Azima says they should be no higher than £775,000.
31. I can be short with these items and I should say that I am disappointed that Mr Azima thinks it appropriate to object to these relatively trivial sums when he is claiming to be allowed to spend vast sums on this case.
32. On the further round of pleadings, Mr Plewman KC accepted that it is reasonable to assume that there will be further amendments and that this will include the removal of the reliance that had been placed by Mr Azima on the so-called Iniquity Documents. Mr Azima's estimated costs for this phase are £69,000 but he prefers to compare what the other Additional Defendants are estimating for this. In my view Mr White KC is right to say that Mr Buchanan's estimate is within the reasonable range and I will allow it.
33. As to the solicitors' fees for trial, Mr White KC makes the fair point that Mr Buchanan has a much smaller team of two counsel and that therefore there will be more for the solicitors on the team to do to assist counsel. That seems to me to be reasonable and Mr Buchanan's overall costs for trial are not out of line with the other parties. I therefore propose to allow Mr Buchanan's trial costs budget in full.

Conclusion

34. That, I hope, deals with all the disputed matters in relation to the parties' costs budgets. I would invite the parties to agree an order reflecting my findings as set out above.