



Neutral Citation Number: [2019] EWHC 215 (QB)

Case No: HQ18X03224

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
SITTING AT BRISTOL CIVIL JUSTICE CENTRE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2019

Before:

MR JUSTICE FREEDMAN

Between:

ARGUS MEDIA LIMITED
- and -
MR MOUNIR HALIM

Claimant

Defendant

JUDGMENT

**Gavin Mansfield QC and Nicholas Goodfellow (instructed by Locke Lord (UK) LLP for the
Claimant)
Mounir Halim appeared in person**

Hearing dates: 12-21 December 2018, 15, 29 January 2019

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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THE HONOURABLE MR JUSTICE FREEDMAN

Mr Justice Freedman:

Introduction

1. Judgment in this case was handed down on 15 January 2019 and was adjourned to 29 January 2019 when I heard consequential applications including for permission to appeal.
2. Although the Defendant (“Dr Halim”) was represented by solicitors and counsel up to 16 January 2019, namely Ms Naina Patel instructed by Pennington Manches LLP, from then onwards he appears in person. This was foreshadowed at various stages during the trial, when I was told by Ms Patel that his finances were about to run out and so after judgment, he would be appearing in person. At the hearing on 29 January 2019, the Claimant (“Argus”) appeared through Leading and Junior Counsel as above and Dr Halim appeared in person.
3. On 29 January 2019, Dr Halim applied for permission to appeal restricted to his contention that Clause 17.4 of his contract of employment was void for restraint of trade, contending that its scope was broader than was reasonably necessary. This comprised a part only of the matters which were determined by the Judgment. I rejected the application for permission to appeal and found that an appeal had no real prospect of success and that there was no other compelling reason for an appeal.
4. I reserved the other matters which were argued for a written judgment. They are as follows:
 - (1) The costs of the claim inclusive of the costs which were in the case following the hearing of 13 September 2019;
 - (2) The reserved costs of 20 and 28 November 2018 applications;
 - (3) Whether any costs ordered should be assessed on the standard basis or the indemnity basis;
 - (4) Whether there should be payment on account of costs pursuant to CPR 44.2(8), and if so, what that payment should be;
 - (5) What directions of all outstanding matters relating to quantum including any damages and equitable compensation and/or an account of profits should be ordered;
 - (6) Continuation and/or the scope of the undertaking of Mr Justice Andrew Baker dated 21 September 2018 or any order for preservation of evidence in place of that undertaking.

The costs of the claim

5. I am satisfied that the costs of the claim should be dealt with at this stage, since there only remains to be dealt with quantum.

6. Argus was substantially successful in its claims. It succeeded on the core issues relating to the enforceability of the restrictive covenants, and final injunctions were issued mirroring Clauses 17.2, 17.3 and 17.4 of Dr Halim's contract of employment.
7. Although Argus has succeeded on the vast majority of matters in issue, it has beaten the without prejudice save as to costs offer of Dr Halim comprising undertakings in terms of Clauses 17.2 and 17.3, nothing in respect of Clause 17.4, and seeking costs in his favour of £55,000 excluding VAT. Further, Argus has made an offer which restricted Clauses 17.2 and 17.3 to 13 April 2019 and Clause 17.4 to 3 months from the date of settlement, but with a confidentiality undertaking in the terms of the covenant and 50% of its costs. That offer was only available for acceptance over the course of two working days.
8. There were parts of the claim where Argus did not succeed. It did not obtain a final injunction in respect of confidentiality. However, it did succeed in establishing breaches of confidence and a legitimate interest to protect by reference to confidential information. The reasons why no further injunctions were granted for breach of confidence were in part because there was protection through the restrictive covenant and in part because the covenant about breach of confidence and the order sought went beyond the interests which could be protected following termination of employment: see the Judgment at [226]. It follows that the bulk of the issues concerning breach of confidence have been decided in favour of Argus, but there was no additional injunction in respect of breach of confidence.
9. There was a more substantial aspect in which Argus has not succeeded namely as regards springboard relief. Argus's position in this regard is set out at [232] of the judgment. For the reasons set out at [234], including that it was not established that any relief was required beyond the PTRs, the claim for springboard relief was not granted.
10. The starting point as regards costs is that Argus is the successful party. The general rule that costs should follow the event is the starting point, and save as regards the matters referred to above in paragraphs 8 and 9 above, there is no reason to depart from that: see CPR 44.2(2).
11. Dr Halim contends that Argus acted in too high handed a manner by its letter of Friday 31 August 2018 seeking a response over the weekend, and in proceeding immediately following his response of 3 September 2018 issuing proceedings and seeking injunctions. He says this particularly by reference to the fact that Argus was a global business and his role was small relatively to the whole and the damage that he could do was very small (£100,000 per annum of revenue). He also needed to have representation to prepare to meet the case against him, and he was given very little time. He says that in those circumstances, there was a "*preposterously short timescale*" and that Argus does not come to the Court with "*clean hands*".
12. I reject the foregoing for the following reasons:
 - (1) Dr Halim's information provided on 12/13 July and 3 September 2018 was for the reasons set out in the Judgment at paragraphs 50-63 not "a full or accurate account of his plans and/or such information as he did provide was misleading";

- (2) Thus, it does not lie to Dr Halim to say that he should have had longer to cooperate and answer the inquiries in circumstances where the answers provided had been unsatisfactory;
 - (3) On the contrary, Dr Halim was undeterred and was going to the Rwanda conference despite the concerns about the competing business;
 - (4) I have found that Afriqom was a competing business and that there had been breaches of Dr Halim's duty of fidelity and confidence, and that his participation in the business was to involve breaches of the PTRs;
 - (5) I reject the notion that since Dr Halim's business was on a small-scale relative to Argus's business that Argus should not have taken action. It was entitled to act quickly to preserve its business in the light of activities which I found to be unlawful in the Judgment.
13. I therefore do not make any reductions in the amount of the costs to take into account the conduct of Argus. Argus was entitled to act in the way in which it did to protect its interests, and having regard to his conduct, Dr Halim has nothing about which to complain.
14. However, I am satisfied that there should be a small deduction in respect of the issues at paragraphs 7 and 8. I am satisfied that they are significantly less than 10% of the time spent both during trial and in preparation for trial. I must have in mind not only the costs incurred by Argus where it did not succeed, but also the costs incurred by Dr Halim resisting those aspects CPR 44.2(6) and (7). It is undesirable to have a split issue by issue order in respect of these matters. I am likely to have a better feel of this issue as trial judge than a costs judge is likely to have. The proportion depends on my overall feel as to time spent, the significance of the issues and the overall justice of the order.
15. Before making a deduction, I take into account the fact that the offer made by Argus to where Dr Halim, in most respects, it was more favourable to Dr Halim than fighting the case. Despite giving some weight to this, I consider that it is still appropriate to make a deduction to the extent that Argus did not succeed. Argus's offer as regards the covenant about confidentiality required more than I ordered. On this basis, I apportion the costs so that Argus is deprived of 10% of its costs. I therefore make an order that Dr Halim pays 90% of the costs of Argus. This includes the costs of the application before Mr Justice Andrew Baker which follow the event of the claim.

The reserved costs

16. The majority of the costs of the applications before Mr Justice Pepperall comprised an application for specific disclosure. Argus substantially succeeded on the application. Moreover, as trial judge, I have been able to observe how important the application turned out to be both as regards the number of documents disclosed and their use during the trial. The documents comprised the documents in Bundle 24 relating to matters such as the Benadada emails (see Judgment paragraphs 35-43) and also documents relating to the creation of the Afriqom report. In the circumstances, the costs of the disclosure application should be paid by Dr Halim to Argus.

17. However, there were also applications to serve a Rejoinder and for Further Information. Dr Halim was successful in these applications. Costs should follow the event. In my judgment, the lion's share of the applications were those relating to disclosure. I do not have costs schedules about these costs, but it would be disproportionate to order that to take place. I can rely on an overall feel. Instead of a split order, I shall order that 60% of the costs of these applications should be payable by Dr Halim to Argus.

The basis of assessment of the costs

18. Argus applies for indemnity costs. The indemnity basis is not ordered unless there are circumstances taking the case 'out of the norm': see *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879 at paras 19 and 32 and see commentary of Supreme Court Practice 2018 at 44.3. It is important to state that it is not always necessary to show deliberate misconduct and that in some cases unreasonable conduct to a high degree suffices.
19. It is said that the factors which took the conduct of Dr Halim out of the norm were conduct of Dr Halim before the proceedings, aspects of the defence which were without merit and a wholly unreasonable approach to settlement, and unreasonably refusing a reasonable offer of settlement.
20. The skeleton argument on behalf of Argus at paragraph 14 points to seven (non-comprehensive) aspects in which it is alleged that Dr Halim's conduct was unreasonable. They include the matters relating to 12/13 July 2018 and 3 September 2018 referred to above, and concealing information relating to his intended business. Reference is also made to disclosure to which I have referred above and the remarks which I made about disclosure at paragraph 183 of the Judgment. I have had regard to each of these matters and to the Judgment as a whole. Although some aspects of Dr Halim's conduct were regrettable, in my judgment, this does not justify an order of indemnity costs. In the spectrum of conduct considered at this stage of an action, it is not conduct which is 'outside the norm'.
21. The second respect is that it is said that there were points taken which should not have been taken including whether the new business competed, the allegation of repudiatory breach and the point about acquiescence. The first two of those points were major in the context of the case. I take the view that they were arguments which were capable of being put and which were responsibly taken on the advice of Counsel who conducted herself well in the course of the case and, who, like all Counsel, was thanked for the high standard in which they conducted the case at the end of the Judgment. The acquiescence argument seems to have been a last-minute appendage, depending on the view which I took about the communications of 12/13 July and 3 September 2018, and which was not centre-stage in the case. In those circumstances, I reject the submission that the case was as a whole or in respect of a distinct and substantial parts outside the norm.
22. It is then said that the refusal to accept the settlement offer of Argus Media Limited took the case outside the norm. I do not accept that this was the case. Argus submits in its skeleton argument at paragraph 17 that "*the refusal to accept a reasonable offer of settlement is capable of justifying an award of indemnity costs, but the failure to accept the offer must be unreasonable.*" Reliance is placed on *F & C Alternative*

Investments (Holdings) Ltd v Berthelemy and another (No3) [2013] 1 WLR 548 at para. 70.

23. It is useful to set out the paragraph in its entirety. It reads as follows:

“70. There may be special cases where refusal to accept reasonable offers of settlement is capable of justifying an award of indemnity costs: see Epsom College v Pierson Contracting Southern Ltd [2011] EWCA Civ 1449. But, as Rix LJ there emphasised, the failure to accept such offers, or to accede to an approach for settlement, must be unreasonable: - see paragraphs 71 and 72 of his judgment. He referred to the judgment of Simon Brown LJ in the Kiam case. In the course of his judgment (with which Waller LJ and Sedley LJ agreed), Simon Brown LJ had said this:

“12. I for my part, understand the Court there to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under Rule 44 (unlike one made under Rule 36) does, I think, carry at least some stigma. It is of its nature penal rather than exhortatory. The indemnity costs order made on the principal appeal in McPhilemy was certainly of that character. We held that the appeal involved an abuse of process on the footing that:

“to have permitted the defendants to argue their case on perversity must inevitably have brought the administration of justice into disrepute among right-thinking people.”

13. It follows from all this that in my judgment it will be a rare case indeed where the refusal of a settlement offer will attract under Rule 44 not merely an adverse order for costs, but an order on an indemnity rather than standard basis. It is very important that Reid Minty should not be understood and applied for all the world as if under the CPR it is now generally appropriate to condemn in indemnity costs those who decline reasonable settlement offers.

Those observations are, as it seems to me, directly in point in the present case.”

24. The first sentence of paragraph 70 has been quoted by Argus. However, the remainder are qualifying words of explanation, beginning with the word “*But*”. The unreasonableness has to be “*to a high degree*”, not just “*wrong or misguided in hindsight*”. It is therefore a rare case where the refusal to accept a settlement offer will give rise not merely to an adverse order for costs, but to an order on an indemnity basis rather than a standard basis.
25. It is said that it was manifestly unreasonable for the offer not to have been accepted. I agree that the offer of Argus broadly appears to have been far more advantageous than the outcome (subject to whatever would have been the effect of the confidentiality

covenant if upheld by an injunction in the same terms). In the event, I am satisfied on the basis of the evidence as a whole that most of the points which Dr Halim put had to be rejected. It does not follow from that rejection of most of his points or from the relatively favourable nature of the offer against the outcome that indemnity costs are appropriate. The test is not one of hindsight, but one of unreasonableness to a high degree, I am satisfied that the refusal to accept the offer was not one which was unreasonable to a high degree or that this is one of those rare cases which merits indemnity costs. That would have been so even if, which was not the case, I had added an injunction in the terms of the covenant about confidentiality.

26. I have also considered whether the points taken together could bring the case ‘out of the norm’. Taken singly or collectively, the case is not ‘out of the norm’. Accordingly, the costs are not to be assessed on the indemnity basis, but on the standard basis.

Costs on account

27. Argus applies for an interim payment under CPR 44.2(8) which reads as follows:

“(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.”

28. Argus seeks an order that Dr Halim pays two thirds of the total of its revised costs budget of £666,156.09, comprising a sum of £444,104 with an appropriate time to pay of 14 days (the Claimants revised budget was updated on 28 January 2019 to a total sum of £688,109.26).

29. There was some discussion at the hearing about the impact of the means of Dr Halim. Mr Mansfield QC helpfully referred the Court to decisions which indicate that the ability or otherwise of a party to pay an interim payment might be a relevant factor. He says that in this case, although there has been talk of the impecuniosity of Dr Halim, there has been no evidence about it. There were opportunities for this to have been advanced at an earlier stage, and if it had been, then it might be necessary to make inquiries in respect of the material adduced. All of this is correct.

30. Reference was made to cases very different from the instant case. In particular, the recent case of *John Kent v William Paterson-Brown* [2018] EWHC 2830, Zacaroli J said at paragraph 35:

*“The principles to be applied are to be found in *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), per Christopher Clarke LJ at [23]-[28]. The task of the court is to identify a reasonable sum, having regard to all the circumstances, including the difficulty if any that may be faced in recovering the costs, the means of the parties, the imminence of any assessment and whether the paying party would have any difficulty in recovery in case of any overpayment. A reasonable sum will often be one that was an estimate of the likely level of recovery subject to an appropriate margin to allow for error in the estimation. It is appropriate to award an amount which is “not too much below” the likely level of recovery.”*

31. In *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), Christopher Clarke LJ said the following at paragraphs 23-24:

- “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.
24. In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment.”

32. In the former case, there was not evidence about the want of means, but the Judge stated that he would make an order for payment within 14 days on the basis that an application for more time could take place for an extension of time supported by evidence as to means.
33. In this case, there are some cautionary matters relating to an order at this stage for a payment on account of costs. They are as follows:
- (1) The case is not at an end. Directions are being given for the quantum stage. When I asked Mr Mansfield QC whether it was disproportionate to go to the next stage, he said, as he was entitled to do, that that was a matter Argus to appraise in due course. In the meantime, it was necessary to preserve all options. Dr Halim says that it is not justified to go on to quantum bearing in mind that the sums at stake will be “outlandishly” exceeded by the amount of costs. It might be necessary to revisit this aspect in due course, but for the moment, it seems to me that directions should be made to which I shall refer below. However, in the meantime, Dr Halim is having to defend himself in respect of the next stage, and if he faces an order for interim costs, he might be unable to defend himself due to an order which he is unable to meet, and due to the possibility of bankruptcy in the interim.
 - (2) He has a right to renew his application to seek permission to appeal to the Court of Appeal. Whilst I have rejected the application before me, he told me that he will consider whether to renew the application for permission to the Court of Appeal.
 - (3) There is no evidence about Dr Halim’s means by way of a witness statement or formally. He has told me that his sources of capital have

ended and that he has very limited income. His Counsel made the point that he would run out of funding by the conclusion of the trial. Although Mr Mansfield QC said that this issue could have been dealt with by his outgoing legal representatives, that seems to me to be a little theoretical, and I can understand how it did not occur.

34. It seems to me that there are some uncertainties at the moment about the future of the action as well as regards the means of Dr Halim including any means available to him from third parties. A concern is to prevent any stifling of any of the courses of action available to Dr Halim.
35. The Court has expressed concern about a respondent to an interim payment order having access to justice in respect of a continuing action, but in the context of an unless order. On the one hand, the Court asks what is the point of a payment on account of costs without sanction for breach, and on the other hand the Court concerns itself with Article 6 considerations. In the context of whether to make an unless order following breach of an order for a payment on account of costs, in *Crystal Decisions (UK) Ltd & Ors v Vedatech Corporation* [2008] EWCA Civ 848, Sir John Chadwick said (paragraph 18) “orders requiring payment of costs as a condition of proceeding with litigation are not made in circumstances where to enforce such an order would drive a party from access to justice.”
36. In this case, the consideration is not one of an unless order, but it seems to me that these considerations are engaged even before an unless order. In these circumstances, I have come to the conclusion that the application for an interim payment application should be adjourned with Argus to be at liberty to be able to restore it subject to the permission of the Court with directions then to be given for the hearing of the application. This will enable the matters set out above to be considered more fully and with the opportunity for some resolution of the current uncertainties.

Interest on costs

37. I direct that there be interest on costs at the rate of 1.5% above base rate from the date when such costs have been paid: see *Douglas v Hello! Ltd* (No 90) [2004] 2 Costs LR 304. The order that is sought is until the date when interest on costs is replaced by judgment interest. That in the absence of the order is the time when the order for costs is made. However, in the decision of *Involnert Management Inc -v- Aprilgrange Limited* [2015] EWHC 2834 (Comm), the power of the Court to make a different order was provided for. I therefore shall leave that question over for further determination as to when that appropriate date would be, albeit that if there is no agreement in respect of it, attempts should be made by the parties that it only comes back to the Court with other matters to be decided.

Directions for quantum

38. As regards the directions, the parties are substantially agreed as to what directions to make, if the Court considers that the case should go forward. There are the following observations:
 - (1) Disclosure should be in September 2019, as sought by Dr Halim, rather than in June 2019, as sought by Argus.

- (2) Expert evidence should not be ordered at this stage because it turns out to be neither necessary or proportionate.
- (3) Argus should be ordered to provide a Schedule of loss, after disclosure.
- (4) Directions should be made about witness statements and about the case going to trial.
- (5) However, there should be a case management hearing after disclosure and the provision of the Claimants Schedule of loss, and before witness statements with a view to considering matters of proportionality and the future directions of the trial going forward.

39. I ask that the parties seek to agree directions to trial.

Preservation undertaking

40. The terms of that undertaking are now agreed and should be included in an order. The terms of the undertaking given by the Defendant in paragraph 6 of the Order of Mr Justice Andrew Baker are now agreed to continue until the conclusion of the trial of all matters arising out of or relating to these proceedings, or further order, and this should be included in an order.

Form of order

41. It is hoped that this determines the matters in issue. However, in case it does not, I adjourn this application pending the making of an order, thus enabling the Court to have jurisdiction to complete the matter. Dr Halim should be clear that the permission to appeal in respect of the judgment handed down was dealt with on 29 January 2019, and that the time for any renewal application to the Court of Appeal starts from then. If Dr Halim wishes to apply for permission to appeal in respect of any matters arising out of this Judgment, I shall consider that on paper whilst approving the order.