



Case No: HT-2019-000137

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2019] EWHC 2504 (TCC)

The Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24/09/2019

Before:

MRS JUSTICE O'FARRELL

Between:

OHPEN OPERATIONS UK LIMITED	<u>Claimant</u>
- and -	
INVESCO FUND MANAGERS LIMITED	<u>Defendant</u>

Mr Matthew Parker (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Claimant**
Mr Fionn Pilbrow QC (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

SUMMARY ASSESSMENT
OF COSTS

Mrs Justice O'Farrell:

1. In the judgment handed down on 16 August 2019, the Court determined the defendant's application for the claim to be stayed pending compliance by the parties with the agreed dispute resolution procedure in favour of the defendant.
2. On 16 August 2019 the Court ordered that the incidence, basis and assessment of the costs of the application would be determined on paper following the exchange of short written submissions by the parties.
3. I am grateful to the parties for their clear and succinct written submissions.
4. There is no dispute as to the applicable principles. The Court has discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid: CPR 44.2(1). The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party: CPR 44.2(2). In deciding what (if any) order to make about costs, the Court will have regard to all the circumstances, including the conduct of the parties and any offers to settle: CPR 44.2(4)&(5).
5. The parties agree that the claimant should pay the defendant's costs of the application, such costs to be summarily assessed on the standard basis.
6. Where the amount of costs is to be assessed on the standard basis:
 - i) the Court will only allow costs which have been reasonably incurred and are reasonable in amount, resolving any doubt in favour of the paying party: CPR 44.3(1)&(2); and
 - ii) the Court will only allow costs which are proportionate to the matters in issue: CPR 44.3(2).
7. The claimant accepts that no issue of proportionality arises in this case.
8. In assessing the reasonableness of the incidence and amount of the costs incurred, the Court will have regard to all the circumstances, including the conduct of the parties, the value of the claim, the importance of the matter to the parties, the complexity of the issue, and the skill, time and effort spent on the application: CPR 44.4.
9. The defendant's statement of costs for the hearing is in the sum of £52,152.48. Mr Pilbrow QC, for the defendant, submits that the figures claimed are within the normal range of figures for a half-day interlocutory application in the Business and Property Court. The defendant's costs are very similar to the claimant's costs of £45,417.78; the slightly higher figure for the defendant's costs can be explained by the fact that it was the applicant. Any adjustment to the amount should be extremely modest, particularly having regard to the defendant's offer to settle the application on the terms of the order subsequently made by the Court. The Court should also take account of additional costs incurred by the defendant since the preparation of the statement of costs, such as reviewing the judgment, preparing the draft order and preparing the submissions on costs (thus avoiding a further hearing).
10. Mr Parker, for the claimant, submits correctly that the Court must carry out an assessment of the costs, albeit on a summary basis, and not simply alight upon a figure

that “looks about right”. The Court should not rely on a broad-brush comparison with the other party’s costs, although it may be a useful indicator of the nature and extent of necessary preparation for the hearing.

11. I endorse and adopt the views expressed by Leggatt J (as he then was) in *Kazakhstan Kagazy plc v Zhunus* [2015] EWHC 404 (Comm) at [13]:

“... it may be entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings. It does not follow, however, that such expense should be regarded as reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and proportionate in that context must be judged objectively. The touchstone (of reasonable and proportionate costs) is not the amount of costs which it was in a party’s best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances.”

12. As stated by Hildyard J in *Re RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch.D.), a case in which the costs exceeded £100 million, at [134]:

“... litigants are free to pay for a Rolls-Royce service but not to charge it all to the other side.”

13. The claimant submits that the defendant’s costs are unreasonably high and/or were unreasonably incurred in two respects:

- i) the hourly rates of the defendants’ solicitors are unreasonably high, particularly when compared against the Senior Courts Costs Office (“SCCO”) guideline rates; and
- ii) the time spent in relation to work done on documents is excessive.

14. As to the first point, the hourly rates of the defendant’s solicitors are much higher than the SCCO guideline rates. It is unsatisfactory that the guidelines are based on rates fixed in 2010 and reviewed in 2014, as they are not helpful in determining reasonable rates in 2019. The guideline rates are significantly lower than the current hourly rates in many London City solicitors, as used by both parties in this case. Further, updated guidelines would be very welcome.

15. The dispute in this case concerns claims and counterclaims arising out of the development and implementation of a digital online platform for buying and selling investment funds. Although the value of the case is not particularly high for this Court, the technical nature of the dispute justifies the engagement of solicitors with the appropriate skill and expertise to ensure proper and efficient conduct of the litigation. Solicitors providing such skill and expertise are entitled to charge the market hourly rate for their area of practice. The hourly rates charged cannot be considered in isolation when assessing the reasonableness of the costs incurred; it is but one factor that forms

part of the skill, time and effort allocated to the application. It may be reasonable for a party to pay higher hourly rates to secure the necessary level of legal expertise, if that ensures appropriate direction in a case, including settlement strategy, with the effect of avoiding wasted costs and providing overall value.

16. There may be cases where the hourly rates are disproportionate to the value or complexity of the case. However, in this case, proportionality is not an issue. The hourly rates claimed by the defendant must be considered together with the time spent on necessary work to assess overall reasonableness of the costs incurred.
17. The hourly rate of the grade A fee earner is high but very limited time has been charged; less than five hours reviewing documents, one letter/email and in attendance. That level of involvement and the overall cost is reasonable and does not require any adjustment. Likewise, the overall time and cost of the grade D fee earner is limited to 8.61 hours on document preparation and is reasonable.
18. As to the costs incurred in respect of the grade B and grade C fee earners, I accept Mr Parker's submission that the time spent in relation to work done on documents is excessive. Although the defendant was the applicant and, as such, will have had the additional burden of preparing the application and the bundle, that does not justify the defendant expending nearly twice as many hours as the claimant.
19. I have considered item 1 (preparing the application and draft order) and item 2 (preparing the witness statement and exhibit) together. I adjust the total hours for those preparation activities by deducting: (i) 4.22 hours spent by the grade C fee earner (£1,877.90) and (ii) 6 hours spent by the grade B earner (£3,930), a total of £5,807.90.
20. Those adjustments reduce the total solicitor fees from £27,842.90 to £22,035 and produce a total net of VAT of £37,695.
21. If the defendant is unable to recover any part of the VAT as input tax, the total VAT would be £7,488, giving a total sum of £45,183.
22. That total is increased to £46,000 to reflect the claimant's failure to accept the defendant's offer that would have avoided the contested hearing.
23. I summarily assess the costs payable by the claimant to the defendant in the sum of £46,000 (on the basis that the VAT is irrecoverable as input tax), such sum to be paid by 1 October 2019.