



Neutral Citation Number: [2024] EWCA Civ 242

Case No: CA-2022-002442

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**BUSINESS & PROPERTY COURTS IN MANCHESTER**  
**INSOLVENCY AND COMPANIES LIST (Ch D)**  
**HIS HONOUR JUDGE STEPHEN DAVIES**  
**[2022] EWHC 2498 (Ch)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14/03/2024

**Before :**

**LORD JUSTICE LEWISON**  
and  
**LORD JUSTICE MALES**

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**Between :**

**DALE HEATHCOTE & ANOTHER**  
- and -  
**ASERTIS LIMITED**

**Appellants**

**Respondent**

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**Erica Bedford and Chelsea Carter (instructed by BBS Law) for the Appellants**  
**Alfred Weiss (instructed by Primas Law) for the Respondent**

Hearing date: 07/03/2024  
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## **Approved Judgment**

This judgment was handed down remotely at 11.00am on 14/03/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## **Lord Justice Lewison:**

### **The issue**

1. The issue on this appeal is whether HHJ Stephen Davies, sitting as a judge of the High Court, exceeded the permissible bounds of his discretion in making the costs order that he did, following his judgment after a three day trial in the Business and Property Courts.

### **The proceedings and the substantive judgment**

2. The underlying action was brought by Asertis Ltd, a litigation funder, as assignee of Servico Build Tec Ltd (“Build Tec”). As permitted by CPR rule 7.3 the single claim form was used to start two claims which could conveniently be disposed of in the same proceedings.
3. Both claims arose out of the affairs of Build Tec of which Mr Heathcote was the sole active director.
4. The first claim (“the rewards claim”) was brought against Mr Heathcote alone. The allegation was that sums paid under an employee benefit trust tax avoidance scheme (“the EBT”) benefitted Mr Heathcote. It was alleged that those sums (a) were not justifiable as remuneration to him and were made in breach of his duties to Build Tec as its director and/or (b) represented transactions at an undervalue defrauding creditors and/or (c) were made in breach of his duties to creditors. The sums claimed amounted to £520,000.
5. The pleaded claim attacked the EBT as a whole. It did not descend into detailed analysis of individual payments and reimbursements.
6. The judge described how the rewards were provided at [76]:

“(a) [Build Tec] contracted for (but did not pay for) gold to be provided by a third party gold dealer known as Asset Hound Limited, to Mr Heathcote; (b) Mr Heathcote undertook a liability to the trust equal to the value of the gold; (c) Mr Heathcote took title to and then arranged for Asset Hound to sell the gold on his behalf; (d) with the agreement of [Build Tec], Mr Heathcote agreed to Asset Hound paying itself what it was owed by [Build Tec] from the proceeds, so to discharge the liability of [Build Tec], before paying the balance to Mr Heathcote; (e) [Build Tec] reimbursed Mr Heathcote the amount of the liability for the gold that he had settled on [Build Tec’s] behalf; (f) at the conclusion of these steps, Mr Heathcote remained as a creditor of the trust to the value of the remuneration received plus interest, but in reality it was well understood that the trustee, Qubic Trustee Limited, would not seek payment from him. The reality was that Mr Heathcote was better off to the value of the reward.”

7. The second claim (“the payment claim”) was brought against both Mr Heathcote and Servico Contract Upholstery Ltd (“Upholstery”), a company connected with Build Tec. It concerned a payment of £65,000 made by Build Tec to Upholstery which was alleged to have been a preference, and hence liable to be set aside under section 239 of the Insolvency Act 1986. The claim was that both Mr Heathcote and Upholstery were liable to restore that payment to the claimant; Upholstery as recipient of the payment and Mr Heathcote for breach of his duty as a director of Build Tec in causing that payment to be made.
8. The judge considered each of the ways in which the claimant put the rewards claim. He held that the payments into the EBT were lawful remuneration (albeit not taxable remuneration): para [106] and [107]. Those payments were not at an undervalue and in any event were not entered into for the purpose of putting assets beyond the reach of creditors. The claim under section 423 therefore failed. The judge went on to hold that at the time when the payments were made, it had not been shown that Build Tec was insolvent, and so the duty to creditors was not engaged. In short, the judge decided that all three routes advanced to justify the rewards claim against Mr Heathcote failed.
9. There was, however, a wrinkle in relation to the rewards claim. Mr Tesciuba, the expert accountant retained by the Defendants, discovered on examining Build Tec’s accounting records, that in reimbursing Mr Heathcote (at step (e) in the judge’s description of the scheme) Build Tec had failed to deduct a commission payment which had been made to the gold dealer. This resulted in Build Tec having overpaid Mr Heathcote to the extent of £7,800. When this came to the attention of Mr Heathcote and his advisers, that amount was paid some two weeks before trial. The judge did not, therefore, need to adjudicate on that payment. Hence the rewards claim failed.
10. On the other hand, the judge found that the payment claim advanced against both Mr Heathcote and Upholstery succeeded.
11. As the judge said at [6]:

“In short, my decision is that the rewards claims fail but the payment claim succeeds.”

### **The costs judgment**

12. Having handed down his judgment on the two claims, the judge held a further hearing to decide (among other things) the form of order and the question of costs. So far as the form of order on the rewards claim was concerned, he held that Asertis was entitled to judgment against Mr Heathcote on that claim for the sum of £7,800 which had already been paid and interest on that sum (although credit would be given for that sum). He rejected the submission made on behalf of Mr Heathcote that that sum was not within the pleaded claim.
13. He then turned to the question of costs. He decided that his first task was to decide who had won. He said that the claimant was the winner. It successfully sued and obtained £65,000 in relation to the payment claim. It also succeeded on the rewards claim to the extent of the £7,800 for which he had entered judgment. Even if the

£7,800 were to be ignored, that was a real, substantial and not illusory recovery. He went on to say that the claimant had succeeded on two of the claims it advanced, and lost on the rewards claim. He added that:

“For present purposes, it is clear that what I am looking at are the claims, not the various different ways in which the claims were put at trial.”

14. He did not consider that the claimant’s pursuit of the rewards claim was unreasonable; and it was not exaggerated. It was not, therefore, a case in which the claimant’s conduct could be criticised. He recorded and accepted the submission for the claimant that its loss on the rewards claim turned on a detailed analysis of the law and the evidence. He continued:

“That is important because, in my judgment, that shows that in this case it could never be appropriate to award the Defendant its costs of the rewards claim, and the most that I ought to consider doing is to deprive the Claimant of the costs of the rewards claim.”

15. He then considered a number of different factors: (a) the time taken to deal with the rewards claim and the payment claim; (b) the absence of any Part 36 or equivalent offer by “the Defendant” and (c) the refusal by “the Defendant” to mediate. He concluded:

“What are the consequences then of all these considerations? It seems to me that there should be a movement away from any 50% reduction but I do agree that it would be wrong not to make any reduction at all. Overall it seems to me that the proper reduction is one of 25%, so that the Claimant should have 75% of its costs of the claim.”

16. He thus ordered that:

“The Defendants shall pay 75% of the Claimant’s costs on the standard basis to be assessed if not agreed.”

### **The appeal**

17. As Ms Bedford points out, the judge’s overall costs order has the consequence that Upholstery is liable to pay 75% of the claimant’s costs of the rewards claim, despite the fact that it was never a claim advanced against Upholstery. It was a claim brought solely against Mr Heathcote. She also submits that in relation to the rewards claim which is a separate claim (not merely a different legal basis for the payment claim) Mr Heathcote is liable to pay 75% of the claimant’s costs of that claim, even though it failed entirely on the pleaded basis. She accepts, however, that both Mr Heathcote and Upholstery are liable for the costs of the payment claim, which succeeded.
18. In his substantive judgment the judge expressly recognised in paragraph [1] that he was dealing with “two separate claims”. But in his costs judgment, having again said that he was considering “the claims”, the judge wrongly rolled them into a single

claim (in relation to which he also referred to the Defendant (singular) without acknowledging that there were two Defendants (plural)).

19. Mr Weiss, on the other hand, argued that the judge was right for the reasons that he gave. He correctly identified Asertis as the successful party, because it won the payment claim and recovered judgment on the rewards claim to the extent of £7,800.
20. He also argued that the Defendants did not invite the judge to distinguish between the rewards claim and the payment claim for the purpose of a costs order. They invited the judge to deal with the proceedings as a whole, contending that they should be regarded as the successful party. The conduct of the proceedings had been wholly based on treating them as one unified package (with, for example, a single costs budget covering both claims). The judge can hardly be criticised for not having exercised his wide discretion in a way which he was never asked to do.

### **The nature of the appeal**

21. In *Allen v Bloomsbury Publishing Ltd* [2011] EWCA Civ 943 (a case about security for costs) Lloyd LJ said at [17] :

“In our adversarial system of litigation, in a case where each party was professionally represented with plenty of opportunity to formulate and put to the court all points considered to be relevant on a particular point, it seems to me questionable for a judge to be criticised for having failed to take into account a factor which, if relevant, was known or available to all parties and which no party invited him to consider as part of the process of exercising his discretion. It would be one thing if, through inadvertence, the judge overlooked a point of law which should affect his reasoning ... but otherwise what is said here is that there was a relevant consideration which the judge failed to take into account. It does not seem to me to be fair either to the judge or to the opposing party or parties for an unsuccessful litigant to be able to challenge the exercise of the court's discretion for failure to take account of a factor which was not in any way hidden and which, if it really is relevant, the exercise of reasonable professional diligence could have brought to light but which was not suggested to the judge as being relevant. This strikes me as being wrong in principle.”

22. To similar effect, in *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 423 (a case about service out of the jurisdiction) Males LJ said at para 5:

“Further, it is important to say that the function of this court is to review the decision of the court below. The question is whether the judge has made a significant error having regard to the evidence adduced and the submissions advanced in the lower court. Just as the trial of an action is not a dress rehearsal for an appeal..., neither is an application to set aside an order for service out of the jurisdiction. In general an appellant will not be permitted to rely on material which the judge was not

invited to consider or to advance an entirely new basis for saying that the judge's evaluation on the issue of appropriate forum was wrong. A judge can hardly be criticised for not taking something into account if he was never asked to do so. Although no doubt this principle will be applied with some flexibility, bearing in mind that the ultimate *Spiliada* question is concerned with 'the interests of all the parties and ... the ends of justice', good reason will be required for taking a different approach."

23. Both these passages were approved by this court in *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661, [2022] 1 WLR 3847 (a case about costs).

### **Costs under the CPR**

24. CPR rule 44.2 relevantly provides:

“(1) The court has discretion as to—

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs—

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

...

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes—

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction—Pre-Action Conduct or any relevant pre-action protocol;

- (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
- (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.”

25. The first question for the court to decide is whether to make a costs order at all. Normally, that is a question that poses no difficulty. Once it has decided that a costs order should be made, the court must identify who is the unsuccessful party and who is the successful party.

### **The global approach to costs**

26. It is common to approach the question of costs on a global basis. Thus, where a claimant brings a claim against a defendant, whether based on one cause of action or more than one cause of action, the court will often identify the successful party as the party who has succeeded overall. Where the claim is a purely monetary claim, then as Ward LJ said in *Day v Day* [2006] EWCA Civ 415, [2006] CP Rep 35 at [17]:

“... the question of who is the unsuccessful party can easily be determined by deciding who has to write the cheque at the end of the case...”

27. But the position may be different in cases in which there are multiple claimants or multiple defendants, advancing or responding to distinct claims.
28. Although it is only an example, the recent decision of this court in *Flitcraft Ltd v Price* [2024] EWCA Civ 136 illustrates what I mean. In that case the first claimant, Mr Price, made claims for (i) patent infringement on the basis of his claim to be the proprietor of the patents in issue and (ii) copyright infringement based on his claim to be the owner of copyright in certain works. These claims failed because he failed to establish that he had the requisite title. The second claimant, Supawall made a claim for patent infringement on the basis of its claim to be the exclusive licensee of the patents. It succeeded in this claim as regards some of the defendants’ products, but not others. The claimants together made a passing off claim, which failed. Although he was invited to look at costs in the round, the deputy judge declined to do so. He said at [10]:

“An approach in the round has considerable attractions in terms of simplicity and in reducing the issues for a costs judge carrying out a costs assessment. However, given the findings summarised in paragraph 6 above, I do not think that it is possible to say that either the Claimants collectively or the Defendants collectively have succeeded. It is true that the Claimants collectively brought the passing off action on which they failed. However, the other claims were not brought collectively. Whilst Mr Price’s patent claim had elements that were common to Supawall’s patent claim, the two claims were

separate claims and Mr Price's claim failed whereas Supawall's succeeded. The copyright claims were brought by Mr Price alone and failed.”

29. This court upheld his decision. The claimants submitted on appeal that the claimants had won on three issues and only lost on one. They had brought the claim jointly and had defeated Flitcraft's defence. The claimants, taken together, should therefore be regarded as the successful party. That submission was rejected. Nugee LJ said:

“[64] I do not accept this submission. It treats Mr Price's claim and Supawall's claim as if they were a single claim on which Mr Price and Supawall had overall been successful. But they were not. They were two separate and distinct claims. Mr Price brought his claim as proprietor of the patents. Supawall brought its claim as exclusive licensee. These are separate causes of action vested in separate claimants, and if successful would have resulted in separate judgments in favour of Mr Price and Supawall respectively.

[65] This is not just a technical point. In many claims brought by more than one claimant the claimants are associated parties (members of the same corporate group, an individual and his company, members of the same family and their trusts, and the like), and even if the causes of action vested in each of them are technically distinct, economically their interests are aligned. In such a case it may, depending on the circumstances, make sense to regard substantive success by any claimant as success for the claimant interest overall. But the present case was not like that. Supawall had originally been Mr Price's company, but we were told by Mr Maynard-Connor that he had been replaced by Mr Middleton as majority shareholder (and sole director) in 2012/13, and Mr Knox did not suggest that was wrong. So Mr Price and Supawall had their own separate interests in their claims, and the fact that for convenience they joined forces to bring their claims in a single set of proceedings did not change that. I think the judge was right to regard their claims as separate and distinct.”

30. Similarly, in *Sirketi v Kupeli* [2018] EWCA Civ 1264, [2018] 1 WLR 1235 multiple claimants brought proceedings against Cyprus Turkish Airlines seeking compensation for cancelled flights. The claims were joined and managed together. 14 claims were allowed, 32 were transferred to the County Court for determination and 792 were dismissed. The trial judge held that the claimants were the successful party because they would receive a cheque from the defendant. This court reversed her decision. Hickinbotham LJ said at [60]:

“... in a group claim such as this, whilst the defendant may be unitary, the claimants are not. In his submissions, Mr Bradley referred to this group claim as a “unitary claim”; but that is to misdescribe it. In this case, there were 838 individual claims,



albeit joined and managed together because, without that mutual support, clearly none would be viable.”

31. Although those observations were directed to joint claimants, I consider that they apply equally to co-defendants against whom separate claims are advanced.
32. If the judge had considered the two claims separately, he might well have concluded that Mr Heathcote (and Upholstery) had succeeded on the rewards claim; and Asertis had succeeded on the payment claim. He might well then have made an order requiring Asertis to pay the costs of the rewards claim; and an order requiring the two defendants to pay the costs of the payment claim. But is that what he was asked to do?

### **What was the judge asked to do?**

33. It is well established that in exercising his discretionary power to make an order for costs, a judge has very wide discretion. But Ms Bedford argued that the identification of the successful party was an anterior step. It was only once the successful party has been identified that the court can exercise its discretion. To put it another way, a court that does not first identify the successful party carries out the discretionary exercise from the wrong starting point.
34. She went on to submit that that was, indeed, the way that the case was put before the judge. Whereas Asertis had gone straight to the question of costs overall, the defendants had asked the judge to identify the successful party before considering how to exercise his discretion over costs.
35. The skeleton argument before the judge at the consequential hearing pointed out in paragraph 4 that Asertis had brought two claims: the rewards claim against Mr Heathcote and the payment claim against both Mr Heathcote and Upholstery. The judge was then asked in paragraph 11 to order Asertis to pay all the defendants’ costs on the standard basis. Paragraph 16 pointed out that the claimant succeeded on the payment claim but that the defendants had succeeded in defeating the rewards claim. Paragraph 17 referred to *Islam v Ali* [2003] EWCA Civ 612 where the claimant had recovered around 10 per cent of what he claimed. It was on that basis that the judge was asked to treat the defendants as the successful party. I cannot read into this the proposition that the judge was invited to consider each claim separately. It is directed at persuading the judge to treat the defendants as the overall winners. It does not, for example, acknowledge that the defendants were both liable for the costs of the payment claim or make any reference to the separate position of Upholstery.
36. The defendants’ skeleton argument then canvassed the possibility of a percentage costs order (once again by reference to the overall costs of the case). At paragraph 26 it was argued that the claimant had “only recovered 11.12% of the value of its entire claim”, thus reinforcing the point that the judge was being asked to consider costs globally. Paragraph 28 looked at the possibility of an issue based order but went on in the next paragraph to say that the defendants “do not believe that an issue-based costs order is practical or appropriate”. That argument is inconsistent with any suggestion that the judge was asked to treat the two claims separately.

37. Nor was it suggested that it was ever pointed out to the judge that the effect of his order was to make Upholstery liable for 75 per cent of the costs of a claim that was never made against it.
38. Valiantly though Ms Bedford tried to argue that the judge had erred in principle, I do not consider that he was ever asked to approach the question of costs in the way for which Ms Bedford argued. Both sides, represented by counsel, asked him to consider the question of costs globally, and that is what he did.

### **Result**

39. Whether we would have made the same order as the judge is not the question on this appeal. Nor is the question whether, like the deputy judge in *Flitcraft*, the judge would have been entitled to treat the two claims separately despite all parties' invitation to consider them globally.
40. The narrow question is whether, having regard to the way that the case was argued before him, the judge erred in exercising his discretion as he did. I consider that the answer to that question must be "no".
41. That makes it unnecessary to go into the other interesting issues canvassed at the hearing of the appeal.
42. I would dismiss the appeal.

### **Lord Justice Males:**

43. I agree.