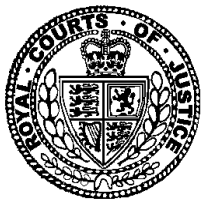

Neutral Citation Number: [2024] EWHC 2213 (Comm)

Case No: CL-2022-000139

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
COMMERCIAL COURT

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 19 July 2024

Before:

HIS HONOUR JUDGE PELLING KC

- -

Between:

AHMAD	**Claimant**
- and -	
OUAJJOU & ANOR	**Defendants**

- -
- -

MR LAURENCE PAGE appeared for the **Claimant**
MR PHILLIP GALE appeared for the **Defendants**

- -

Approved Judgment

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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HIS HONOUR JUDGE PELLING KC:

1. This is an application by the claimant for an order that unless the defendants pay some costs which were summarily assessed as long ago as 29 April 2024 within 14 days of the date of any order I make, then the defence of the defendants to this claim should be struck out, the counterclaim should be struck out and there should be a disposal hearing leading inevitably to a judgment in favour of the claimants.

2. The circumstances which lead to this application start for present purposes with a contempt hearing which took place before Dame Clare Moulder in April of this year. She committed each of the defendants to prison for nine months for breaches of a freezing order and made a costs order with a summary assessment of those costs in the sum of £113,000.

3. At the outset of the hearing, submissions were made on behalf of the defendants by leading counsel for the defendants which included a submission by Mr Pickering KC who appeared then on behalf of the defendants recorded in the transcript in these terms:

> "My Lady, we do not resist an order for costs, nor do we resist costs on the indemnity basis".

There was then a submission to the general effect that there should be a detailed rather than a summary assessment of those costs which ultimately failed, with Dame Clare carrying out the relevant assessment. The assessed costs of £113,000 have not been paid and it is that which leads to the present application.

4. The applicable principles which apply to an application of this sort are set out in the now well known case of Michael Wilson & Partners Ltd v Sinclair [2017] EWHC 2424 (Comm), [2017] 5 Costs LR 877, a decision of Sir Richard Field sitting as a Deputy Judge of the High Court. In the course of his judgment, which culminated with a comprehensive statement of the principles which apply in this area, he noted the comments of Patten J, as he then was, remarking as to the default position that might apply in relation to situations where costs orders were made and not complied with before turning to the applicable principles which he derived from the authorities which he summarised in the earlier paragraphs of his judgment. The principles which apply were summarised by Sir Richard are in these terms:

> "(1) The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion…
>
> (2) The court should keep carefully in mind the policy behind the imposition of costs orders made payable within a specified period of time before the end of the litigation, namely, that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.
>
> (3) Consideration must be given to all the relevant circumstances including: (a) the potential applicability of Article 6 ECHR; (b) the availability of alternative means of enforcing the costs order through the different mechanisms of

> execution; (c) whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings in question; and where no such submission was made whether it ought to have been made or there is no good reason for it not having been made.
>
> (4) A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice and/or in breach of Article 6 of [the Convention] should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.
>
> (5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.
>
> (6) If the court decides that a debarring order should be made, the order ought to be an unless order except where there are strong reasons for imposing an immediate order."

5. The circumstances of this case are these. Until the day before the hearing was due to take place, the position was that the application had gone essentially unresponded to. However, on 18 July 2024 a fourth witness statement of Mr Howard Colman, solicitor who acts on behalf of the defendants, was filed and served. A preliminary point arises in relation to this material. It was served significantly outside the time provided for the service of evidence in answer to an application of this sort as set out in CPR Part 58, the Part 58 practice direction, which apply to proceedings in the Commercial Court, which require evidence to be filed within 14 days after service of the relevant application.

6. No application for relief from sanction has been made notwithstanding that the evidence filed outside those time limits would be inadmissible other than with the permission of the court and no satisfactory explanation has been offered for why it is that this material was served late other than what is set out in paragraph 3 of Mr Colman's witness statement which is in these terms:

> "I would like to apologise for the fact that this statement has been produced very late but unfortunately it had been my clients' intention to make payment of the costs prior to the hearing of this matter and for the reasons set out below this has not been possible and the situation only became apparent very recently."

7. That explanation has to be read in the light of the point which has been emphasised on behalf of the claimant by Mr Page, particularly in his reply submissions, which is that it is nowhere suggested that these defendants are impecunious because as was accepted by Mr Gale appearing on behalf of the defendants in the course of his submissions. There are other assets capable of being realised or perhaps transferred *in specie* to the claimants which are available to satisfy this relatively modest costs order. In those circumstances, the explanation offered is an unsatisfactory one, at any rate, unless it could be shown that there was correspondence making precisely those points at a much earlier stage in these proceedings. There is none.

8. Notwithstanding all of that and notwithstanding the fact there is no formal application for permission to rely upon this material even though it was served out of time, I judge it would be unfair given the nature of the relief being sought against the defendants to exclude this material in its entirety but what has to be borne in mind as an overarching point when considering this material is that the claimants have had no realistic opportunity to consider any of the points which are made within it and, furthermore, given the time that has elapsed since the application was served, if and to the extent the evidence fails to satisfy the high level of particularity identified by Sir Richard Field in Michael Wilson & Partners, then that is all the more unacceptable having regard to the time that has passed.

9. The relevant part of the evidence focuses on the sale of a property formerly owned by the parties jointly in Madrid which was first transferred by the first to the second defendant and then sold by the second defendant. It was this activity which resulted in the contempt application which was found proved on the admission of the defendants that the transfer and sale of the property was in plain breach of the worldwide freezing order that had been made. The witness statement filed by Mr Colman in answer to this application then goes on to refer to the fact that there was left after the sale of the property by the time of the committal proceedings about €346,000 odd.

10. This issue of what was left and what has happened to the money was dealt with by way of statements of account exhibited to the second defendant's eighth witness statement. It is unnecessary for me to set out the detail beyond saying this: that there are two schedules of account which have been produced, one which runs from the sale of the property until 14 November 2023 and the second one which deals with expenditure thereafter. The first of these accounts records that the property was sold for €3.99 million. There was a deferred payment of €1.19 million resulting in a balance received at completion of €2.8 million.

11. There were then various costs in connection with the sale and the discharge of mortgage sums judged by way of mortgage against the property which left a net sum on completion of €1.605 million odd. There was then a costs and interest payment made pursuant to a court order which then left a balance which was then expended, according to the first of these schedules, with legal fees of £677,000 odd, various additional debt repayment of €134,000 odd, various taxes and the like and then living expenses.

12. That left a balance of €419,109 odd which has been expended since 14 November 2023, according to the second of the schedules that have been produced, on legal fees of €189,500 odd and on living expenses for 21 weeks from 14 November 2023 which

total a further €78,000 odd. The expenditure on legal expenses for the 21 week period following 14 November is significant for reasons which I come to in a moment.

13. I now return to the witness statement of Mr Colman who explains at paragraph 9 that:

> "My clients wanted to preserve the balance which they held as this was their only means of paying for their living expenses and legal fees other than any support they were able to obtain from friends or family from time to time."

This suggests that the aim of the exercise was to preserve the fund and expend it on those two principal heads of expenditure. At paragraph 11 Mr Colman says:

> "I am instructed it was always my clients' intention that in the event they could not obtain help from family and friends they would make the payment from the balance of the proceeds of sale which they were holding…"

14. What is then relied upon is the production of an administrative decree, a copy of which is exhibited to Mr Colman's statement. The document is dated in late 2023 but the defendants' case advanced by Mr Colman on instructions is:

> "This was received by the second defendant on 16 February 2024…"

It is common ground that the decree which purports to be one issued by the Spanish tax authorities precluded dealings with the property and was issued at a time after the property had been sold.

15. Mr Colman then continues by accepting at paragraph 13 that at the time the notice was received the property had already been sold, which is self-evidently correct but then goes on to say as the basis for relying on this document at all:

> "It was only recently that the second defendant learnt from someone who had faced a similar embargo that this may also attach to the proceeds of sale. I am further informed by Daniel Jimenez (?), a Spanish lawyer advising my clients, that whilst he is not a tax lawyer he believes that this advice may be correct under the provisions of Article 83 of the Regulations which are referred to in the embargo."

Those Regulations are not produced by way of evidence.

16. This is not evidence that can sensibly be relied upon to support the proposition that the effect of the administrative decree to which I have referred precludes the expenditure of the proceeds of sale in the way I have described. The expenditure of the proceeds of sale is self-evidently what the defendants have been doing because the living expenses referred to in the second statement identified a moment ago include expenditure which has been incurred after the date in February when the administrative decree was received by the second defendant on the evidence as it currently stands. Therefore, the only basis upon which it could be said that this was a realistic problem in the circumstances of this case is the assertion that:

> "Only recently… the second defendant learnt from someone who had faced a similar embargo that this may attach to the proceeds of sale."

17. This evidence is wholly unsatisfactory because it does not identify when this information came to the knowledge of the second defendant, it does not identify who it came from, nor does it identify in any sensible detail the circumstances or context in which this information was supposedly supplied. Furthermore, an informal expression of an opinion made orally by a Spanish lawyer not specialising in tax law does not take matters any further, particularly when the relevant articles of the Regulations have not been produced whether in translation or otherwise and unsurprisingly, therefore, Mr Gale placed really very little reliance upon this point.

18. The other point that emerges from this evidence is that which appears at paragraph 15 where Mr Colman says this:

> "At present the embargo [I interpolate the embargo being the embargo imposed by the administrative decree I referred to a moment ago] … expires on 14 August 2024 and so my clients wish to see whether or not the embargo is extended. If not, they will be able to make the payment to the claimant. However, if the embargo is extended my clients do not have any means to pay the claimant immediately. I understand that in those circumstances they will consent to the tax authorities, they will seek the consent of the tax authorities but it is likely there will be some delay in even getting a response during August because almost everyone in Spain goes on holiday and very little is done."

19. In relation to payment from other sources, all that is said in relation to that is that it was intended to seek help from friends and/or relatives as a means of paying the outstanding costs but it only relatively recently came to their attention that this would not work. The only evidence in relation to that is at paragraph 10 of the statement of Mr Colman's in which he says this:

> "They sought assistance from their family and friends to enable them to pay the costs due to the claimant. They fully expected to be in a position to make payment of the costs prior to the hearing of the application. However, very recently it became apparent that whilst their friends and family had been able to help them in respect of relatively small sums, they were not able or willing to do so in respect of such a large sum in respect of the costs of £113,000."

20. That is not evidence which comes anywhere near satisfying the requirement identified by Sir Richard Field in his summary of the relevant legal principles concerning the need for evidence which deals fully and frankly with the absence of a means to pay. The evidence is not detailed, it is not cogent and it does not give full and frank disclosure of either of the defendants' financial position, nor does it deal with the prospects of raising necessary funds where cash resources are said to be insufficient in the sort of detailed way that evidence of this sort requires.

21. The requirement for detailed, cogent and proper evidence dealing with this issue has been emphasised in the authorities time and time again and, in particular, up to Supreme Court level in relation to applications for security for costs where the point has been made that all the relevant information is in the hands of the party claiming to be unable to pay which is why that material must be dealt with in the way described in the authorities, including by Sir Richard in Michael Wilson & Partners.

22. Further, and in any event, it is said that this is not a case of impecuniosity because there are other assets not identified in this particular statement but identified in other documents which have been filed in the past in these proceedings which could be sold in order to generate the necessary funds. There is, however, not the slightest evidence of any attempt having been made to liquidate any of these assets, or to transfer them, or to offer to transfer them in specie to the claimant and that is so notwithstanding that Mr Colman's statement maintains that there is now no prospect of raising the money from third parties, the defendants do not have the cash resources to pay immediately and they claim to be unable to safely use the remaining proceeds of the Madrid property following the service of the Spanish administrative decree.

23. In those circumstances, what one would have expected is some evidence of an immediate attempt to raise the cash by attempting to realise assets, or seeking permission to realise assets if and to the extent they are subject to the freezing order, in order to make the payments concerned but there is no such evidence. In those circumstances, the question which arises is what should be done?

24. The first point which is made is that there is an outstanding appeal in relation to the orders which Dame Clare made both in relation to costs and in relation to the prison sentences imposed. So far as that is concerned, the appeal has been before Males LJ on two separate occasions. On the first occasion by an order sealed on 29 May 2024, he rejected an application for a stay of any of the orders made by Dame Clare. There was then an application made on behalf of the defendants for a reconsideration of those issues and that was dealt with by an order made by Males LJ on 5 June 2024. His decision was that the application for reconsideration of the refusal of a stay be itself refused and in relation to that, paragraph 1 dealt with the application for a stay in relation to the terms of imprisonment that had been imposed and I need say no more about that because it is not centrally relevant to the issues that arise but in relation to the costs appeal he said this:

> "As to the request for reconsideration of the refusal of a stay of the costs order, the appellants admitted the breaches of the freezing order and accepted they should pay the costs of the committal application on the indemnity basis. The proposed appeal is only against the quantum of the costs summarily assessed by the judge. I am not persuaded that the appellants even have a right of appeal in those circumstances when they have not obtained permission to appeal on costs as distinct from challenging the order committing them to prison for which permission is not required. In any event, I can see no good reason for ordering a stay."

25. The submission which was made on behalf of the defendants in relation to the appeal is that at the appeal it is proposed to suggest that because of the form of cost funding

which has been used by the claimants in these proceedings, the indemnity principle which applies to the recovery of costs has not been satisfied and therefore the costs order that was made should not have been made or the costs which were claimed should have been either postponed to be assessed at the end, or perhaps even not assessed at all.

26. So far as that is concerned, it seems to me that it would be wrong in principle for me to take that into account. First of all, I have not been treated to any detailed submissions as to the force of that point beyond being told by Mr Page that this is an argument which has previously failed, presumably at first instance. Secondly, and perhaps more pertinently for present purposes, the default position which applies in relation to any court order is that the court orders that are made must be complied with unless and until they are either reversed on appeal or a stay is granted. As I have explained, there is no stay in place here and the application for a stay has failed at Court of Appeal level.. In those circumstances it seems to me that in principle the claimant is entitled to the order sought.

27. The next point which arises, therefore, is whether I should make an order in the terms which is sought which was for an order that unless the relevant costs were to be paid by 4pm on the date which is 14 days from the date of the order, then the strike out consequences should follow. 14 days from today is before the administrative decree issued by the Spanish tax authorities is expressed to come to an end. In addition, and in any event, it seems to me a little time would be necessary in order to realise other assets if that is what is intended. There is no evidence as to how long that would take, there is no evidence as to what the assets are and, therefore, it is impossible for me to arrive at any sensible conclusion as to how long the process would take other than it is unlikely to be instantaneous.

28. In those circumstances, as it seems to me, the appropriate course is to consider an order which takes effect a few days after the apparent expiry of the administrative decree. The difficulty about the administrative decree, I should emphasise, is that not merely the difficulties I have already highlighted but also the fact that the administrative decree was not relied upon at any stage either before Dame Clare Moulder as a ground for staying the enforcement of the costs order, nor as far as I can see, was it relied upon in the submissions that were made and determined by Males LJ.

29. This all further undermines my confidence that the points being made in relation to the decree are anywhere as strong as are suggested and, in any event, as I have said, take no account of the other assets which are available and the fact that it is not suggested that this case is one where the defendants are so impecunious that they cannot meet the costs bill from other sources, albeit that those would involve the realisation of assets.

30. In those circumstances, in principle I conclude that the appropriate order to make is one which requires the defendants to pay the £113,000 worth of costs by 28 August 2024. This is significantly longer than the period sought by the claimants but it gives a period of about 14 days from the apparent expiry of the decree in which a further application can be made to the court in relation to a further extension of time to comply with the payment obligation, if the circumstances change from what they are now.

31. The only other point I would make in relation to the draft order is that there is a reference in paragraph 1 of the draft order to words in parenthesis "together with all statutory interest due thereon". That is an order which is difficult to make as part of an unless order since it does not specify precisely what is required and it seems to me that the appropriate course, unless that can be identified with clarity as to which I will hear some brief further submissions in due course, is that the order should be confined to one which requires the payment of the £113,000.

32. I should make clear for the avoidance of doubt that in arriving at the conclusions I have arrived at, I have taken no account either of the findings of dishonesty or recklessness that have been made by Dame Clare in relation to the committal proceedings. Those findings are not material to the issues that I have had to resolve today and, secondly, I take no account of the index breaches of the freezing order which were relied upon to a degree by Mr Page but which, as it seems to me again, are essentially immaterial to the issues that have arisen.

33. The short point which arises in this case is that which was identified by Sir Richard Field in his summary of the relevant principles. The defaulting party, in this case the defendants, have no or insufficient assets in the jurisdiction. Therefore, there are no other steps that can sensibly be taken, or easily or cost effectively taken by the claimants to recover the costs which are due. There is no proper and sufficient evidence of impecuniosity. On the contrary, impecuniosity appears not to be suggested and, therefore, the very strong default position is that the court should generally require the payment of the costs order as the price of being allowed to continue to contest the proceedings since otherwise there will have been a failure to give effect to the policy which lies behind the imposition of pay as you go costs orders being that identified by Sir Richard in paragraph 2 of his summary of the applicable legal principles.

34. There is no Article 6 issue because impecuniosity is not alleged. The availability of alternative means of enforcing the costs order does not arise because there are no assets in England and Wales against which enforcement could be levied and so far as the question of whether the court making the costs order did so notwithstanding a submission it was inappropriate to make a costs order, to the contrary; it was conceded that a costs order could be made and that those costs should be directed to be assessed on the indemnity basis as part of the mitigation offered on behalf of the defendants in relation to the contempt proceedings.

35. The further question which Sir Richard directed attention to was if no such admission was made, whether it ought to have been made or there is no good reason for it not having been made. As to that, there is really no satisfactory evidence which enables me to reach any sensible conclusions. The administrative decree was available at the time of the hearing before Dame Clare took place, no reliance was placed on it at the time and it was not suggested that costs could not be raised, costs could not be paid from other assets and the point which is now made concerning the availability of a non-application of the indemnity principle goes against, as it seems to me, the concession – the open offer made by leading counsel at the outset of his submissions to Dame Clare to pay the costs of the application on an indemnity basis.

36. In all those circumstances, therefore, subject to the alteration to the date which I mentioned a moment ago, I am satisfied it is appropriate to make the order sought,

subject to the statutory interest point which I will invite some short submissions on now.

(Hearing continues)

37. The issue I now have to determine concerns an application by the paying party for an order that the costs of the current application should be the subject of a detailed assessment. The reason why that submission is made is because the claimant is funding the costs of this litigation by what is referred to in the CPR as a damages-based agreement which is dealt with in CPR Part 44 at CPR rule 44.18 and following.

38. The submission which is made on behalf of the paying party is that I should not make an order which involves the summary assessment of the costs because there is a serious concern as to whether or not the indemnity principle can possibly be satisfied which can only be answered with sight of the relevant funding agreement. It is therefore said that it would be wrong to determine the issue by reference to the signature of a solicitor on a summary assessment costs schedule because the correct way to approach signatures is to confine them as being relevant only where there is a traditional retainer. There is no authority that suggests that the principle I last mentioned would apply in relation to damages-based agreements and the only authority which is relied upon is in relation to conditional fee agreements where the issue which arises is different or potentially so.

39. The relevant rules in relation to damages-based agreements make it clear that the approach to costs applications should be identical to those which apply in a conventional situation. The relevant rules are in these terms:

> "(1) The fact that a party has entered into a damages-based agreement will not affect the making of any order for costs which otherwise would be made in favour of that party.
>
> (2) Where costs are to be assessed in favour of a party who has entered into a damages-based agreement –
>
> (a) the party's recoverable costs will be assessed in accordance with rule 44.3; and
>
> (b) the party may not recover by way of costs more than the total amount payable by that party under the damages-based agreement for legal services provided under that agreement."

40. It follows, first of all, that applying subparagraph (1) of the rule, in principle costs orders can be made and therefore the costs order I made is an appropriate one in the circumstances. (2) so far as assessment is concerned, that is to take place in accordance with rule 44.3, that is to say in the way that it would apply if someone was funding litigation on the conventional basis and, therefore, the only focus of attention is on whether a party would recover by way of costs more than the total amount payable by that party under the damages-based agreement for legal services.

41. The point which is made on behalf of the paying party is that unless and until the relevant agreement has been produced, I cannot be satisfied that that is so. Equally, I

would have a very real concern that requiring the production of such an agreement might create problems concerning litigation and/or solicitor/client privilege.

42. The point which is made on behalf of the receiving party is that the costs – is that the statement signed by the partner representing the claimant is:

> "That the costs stated above do not exceed the costs which the claimant is liable to pay in respect of the work to which this statement covers. Counsel's fees and other expenses have been incurred in the amount stated above and will be paid to the persons stated."

That ought to satisfy me, so it is submitted, that the claimant is not seeking to recover by way of costs more than the total amount payable by that party under the damages-based agreement to which he is a party. That does not assist because the terms of the standard declaration in a summary assessment bill of costs does not address the issue that arises under CPR rule 44.18(2)(b), they are different points. It seems to me, however, that it can properly be addressed by a witness statement which certifies that the costs claimed are, if allowed in full, would not mean that – would not involve the claimant recovering by way of costs more than the total amount payable by that party under the damages-based agreement.

43. What I propose to do is to direct that the costs be assessed on a summary basis, that that assessment take place as an exercise on paper, therefore that the claimant will file and serve a witness statement dealing with the issue that I have mentioned and I make clear I do not require the agreement to be exhibited, I merely require the solicitor to say what is required, or to say that the relevant subparagraph I have referred to has been satisfied.

44. There will then be evidence in answer from the defendants which address that issue to the extent necessary and also set out any submissions as to the sums which are claimed by way of assessment, having regard to the directions I have given as to the bases of assessment of the costs that arise. There will then be some evidence in reply and then I will deal with the questions which arise on those submissions and the submissions in favour of the assessment in answer and reply will be delivered at seven day intervals starting with today. I hope that satisfies everybody.

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(This judgment has been approved by the Judge.)

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