Neutral Citation Number: [2024] EWHC 668 (Comm)

Case No: CL-2019-000755

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT
KING'S BENCH DIVISION

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Friday, 2 February 2024

Before:

Mr Justice Henshaw

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Between:

(1) Anthony King (2) James King (3) Susan King

Claimants

v

(1) DWF LLP (2) Peter Morcos (3) Alexander Hall Taylor KC

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(Official Shorthand Writers to the Court)

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MR ANTHONY KING appeared in person

Mr M Pooles KC and Mr R Anderton (instructed by Clyde & Co) appeared on behalf of the First Defendant

Mr I Croxford KD and Mr J McCreath (instructed by Herbert Smith Freehills) appeared on behalf of the Second and Third Defendants

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JUDGMENT (Approved)

1. Mr Justice Henshaw: I am asked to deal with a number of matters arising in consequence of my substantive judgment in this matter.

2. The first matter relates to costs. It is not in dispute that costs should follow the event and that the claimants should pay the defendants' costs of the action. It is also not in dispute between the parties that the basis of assessment should be the indemnity basis. I am entirely satisfied that that is the appropriate basis here. The case was well outside the norm, as the claimants accept. The claimants made allegations of the utmost seriousness against the defendants which I found to have no cogent basis whatever. That was, in my view, particularly the case following disclosure and the service of witness statements, and yet the claimants pursued their allegations relentlessly and indeed added to them over time. This is a paradigm case for costs to be assessed on the indemnity basis.

3. The next question is whether there should be a summary assessment of the costs. The first defendant has provided a schedule of costs totalling £1,553,689. The second and third defendants' schedule of costs totals £2,745,573. It is suggested that there should be summary assessment, for the reasons I shall outline in a moment.

4. There is clearly a power to carry out a summary assessment even after trial, pursuant to CPR 44.6. Paragraph 9.1 of the Practice Direction PD44 indicates that the court should consider making a summary assessment whenever it makes a costs order other than one providing for fixed costs.

5. As the claimants point out, the Guide to the Summary Assessment of Costs indicates situations where the court generally should carry out a summary assessment. Those situations concern fast track cases and other hearings which have lasted for not more than one day. However, the Guide repeats the statement in the Practice Direction that the court should consider making a summary assessment:

> "... whenever it makes an order for costs which does not provide only for fixed costs"

and goes on to state as the "general rule" that the court should carry out a summary assessment in the situations I have just mentioned. It does not follow, of course, that a 4summary assessment is inappropriate in other situations. Examples of a summary assessment at the conclusion of a case are my previous decisions in **Certain Underwriters at Lloyds v Syrian Arab Republic [2018] EWHC 385 (Comm)**, which was an uncontested case regarding the import of a US judgment; and **Pipia v BGEO Group [2022] EWHC 846 (Comm)**, which was a contested

case. In **Pipia**, a claim had been struck out during trial for failure to pay security for costs that had been ordered. At the consequentials hearing, the judge ordered a payment on account of about £7.5 million against a costs schedule totalling £16.8 million, ie a payment on account of about 45 per cent, in circumstances where the court considered the claim of the costs to be very high for various reasons. Payment was ordered to be made by a certain date, but was not made. The receiving party then applied successfully for summary assessment in the amount of the payment on account.

6. The defendants say two main factors here favour summary assessment. First, a real concern that the claimants will be unable to satisfy any order for costs, including the costs of the detailed assessment process itself, so that incurring the additional substantial costs of a detailed assessment process would be throwing good money after bad. Mr Glassey, solicitor for the second and third defendants, says in his witness statement that the claimants have given numerous indications of inability to pay. Mr Preece, the solicitor for the first defendant, refers in particular to the claimants' unsuccessful application for an interim payment from the first defendant in these proceedings. Following that application, the costs were, as I understand it, agreed in the sum of £22,865 and Bryan J ordered payment within 14 days. Those costs have now remained unpaid for more than a year.

7. Secondly, the defendants say that the claimants' conduct of this litigation and of previous costs proceedings in other cases indicate that the claimants would make a detailed assessment process excessively expensive and prolonged. After the claimants' claim against Primekings ended in 2017, a costs order was made. The claimants applied for a stay, which Master Whalan refused in December 2019. He was strongly critical of the claimants' conduct of the matter, referring to 106 pages of skeleton arguments and 11 files of papers plus authorities, and said that many of the points raised by the claimants were of little or no relevance. Ultimately, a detailed assessment was carried out in November 2020 in that case, during the course of which the 5claimants alleged fraud in relation to costs. After issuing final costs certificates, the Master assessed the costs of the detailed assessment process on an indemnity basis, which no doubt was a clear indication of his view of the claimants' approach to that process.

8. In the present case, the claimants have, as set out in my judgment, fought to the bitter end wholly unmeritorious and groundless allegations, even after disclosure and

exchange of witness statements made it clear that they could not succeed. That was all the more extraordinary in circumstances where the claim as pursued was a 180 degree *volte face* from the claimants' original complaint, namely that they had been negligently advised to pursue a claim against Primekings that should never have been made. The inherent problems in the claim were also pointed out very clearly in the judgment of Bryan J on the claimants' failed application for interim payment against the first defendant, which I have already mentioned (see **[2022] EWHC 3324 (Comm)**, paragraphs 87 to 89).

9. In addition, Mr Glassey in his witness statement gives further examples of the manner in which these proceedings have been conducted on the claimants' side. These include requiring the defendants to make a frankly unnecessary application to extend time for witness statements, when they were the last substantive procedural step before trial, and the extension was sought until 15 April 2022, a date more than a year before the date fixed for trial. Mr Glassey explains that Mr King threatened criminal action against the defendants on several occasions in relation to the matters the subject of these proceedings. One particular such threat of a private prosecution against Mr Hall Taylor, the third defendant, was set out at length in Mr King's letter of 18 March 2022 which was sent to Mr Hall Taylor's present business address. Mr Glassey adds that the claimants have consistently made allegations of impropriety against him, his team and his team's counsel.

10. The claimants object to the proposed course of making a summary assessment. They say, first, that it is not usual to do so other than after a fast track trial or a hearing lasting no more than a day. This, by contrast, was a multitrack case leading to a five week trial. They draw support from the case of **Euroil v Cameroon [2014] EWHC 215** for the general position that statements in such complex and weighty claims should be 6the subject of a detailed assessment. The claimants point out that there has been no costs budgeting in the present case. They are now litigants in person and so they need time to take *pro bono* advice and prepare their case, after having seen bills of costs. In addition, the claimants make a number of complaints about the schedules of costs provided and suggest that a considerable amount of time may have been spent co-ordinating with other persons, such as the defendants to the underlying proceedings which were against Primekings, Mr Stiefel and others.

11. The claimants suggest that they may make a substantial recovery, which would enable them to pay costs in the present case, as a result of other proceedings currently pending in the Chancery Division. Those proceedings, as I understand them, involve an unfair prejudice claim brought by the claimants under section 994 of the Companies Act. I am told that there is a hearing fixed for 8 February 2024 in relation to those or related proceedings. Perhaps more materially, although the proceedings are currently stayed, there is a current timetable for submissions to be made for the lifting of that stay. Mr King tells me that the matter had been fixed for trial in March 2023 until a stay was imposed in November 2022.

12. It would be unusual to make a summary assessment of costs in such a large and complex case. The strongest argument would be if it were clear that requiring the claimants to undertake a detailed assessment process would be throwing good money after bad. The costs involved in detailed assessments here are likely to be very high, given that this was a complex case that went all the way to trial. There is also considerable force in the defendants' point that the claimants' track record in these and other proceedings suggests that they would approach the detailed assessment in a way that would make those proceedings even more difficult and costly than normal. The point which gives me greatest hesitation is that I am not convinced that I am in a position to form a complete view today on the competing arguments about whether detailed assessments would involve sending good money after bad. It certainly counts strongly against the claimants that they have failed to pay the costs order made by Bryan J, to which I have referred, for more than a year. The claimants, in effect, say that things may turn out differently in the near future as a result of recovery in the other proceedings to which I have alluded. That clearly depends on a number of matters 7including not only the prospect of those proceedings, as to which there is no evidence before me, but also on whether or not the stay is lifted in the near future.

13. It seems to me that the solution at this stage is as follows. I shall not summarily assess the costs today. I shall, as a provisional measure, order that there be detailed assessments with payments on account, the quantum of which I shall come to very shortly. I shall hear argument about how long should be given to pay those payments on account. I shall give the defendants liberty to apply to vary the order if the payments on account are not made or are not made in full. The matter can then return to me for a further hearing to decide, in the light of all the circumstances then

existing, whether to perform a summary assessment: in other words, an approach similar to that which I took in **Pipia**.

14. In the meantime, I shall postpone the running of time for the commencement of detailed assessment until a date 28 days after the deadline for making payments on account. That will give the defendants time to bring the matter back to me if the payments on account are not made. If the payments on account are made in full, then the order for detailed assessment will stand.

15. I therefore turn to the amount of the payments on account. The objective is to arrive at a reasonable sum, usually an estimate of likely ultimate recovery but building in a margin for error. In this case, I note the following considerations. I have been provided with detailed statements of costs running to 24 pages from the first defendant and 31 pages from the second and third defendants. This was a large scale litigation. As Mr Glassey says in his witness statement, over 15,000 documents were disclosed by the parties. There were six interlocutory hearings, all of which involved contested issues, often numerous. The defendants' general approach was to allow those to be costs in the case rather than seeking individual costs orders. The trial bundles contained over 2,500 documents.

16. The trial was conducted over 23 sitting days over a period of five weeks. Ten trial witness statements were filed and nine factual witnesses gave oral evidence. The opening written submissions of the parties ran to 50 pages each. The parties' written 8closing submissions each ran to approximately 100 pages. The claimants filed further reply submissions which ran to 131 pages.

17. In addition, the order will be for assessment on the indemnity basis which in practice usually tends to increase the overall percentage recovery as compared to the claimed costs.

18. The solicitors for the defendants have explained with care in their witness statements how the costs schedules have been compiled and how costs have been dealt with during the litigation. These include the point that the client, Bar Mutual Indemnity Fund habitually carefully controls costs. As part of that, discounted rates were agreed which are lower than the London 1 guideline rates. In the case of the second and third defendants, the agreed rate for the senior fee earner, Mr Glassey, was £404 compared to the guideline rate of £512 currently. The main fee earner on the first defendant's team, Mr Preece, was by the time of trial still charged out at only £210 an hour. There has been no real engagement on the claimants' part in the

hourly rates or hours spent, although I of course accept that they have not seen detailed bills setting out the manner in which the time was spent.

19. There is, in my view, no substance in the claimants' suggestion that any material costs have been incurred by the legal term in observing what occurred in the proceedings brought by the Kings against Primekings. I am satisfied from the explanations provided that, at most, a trivial amount of claimed costs were incurred in that exercise. It is, in any event, an exercise in which the defendants had a legitimate interest in observing, because the allegations made in the proceedings in question in part directly mirrored allegations made in the present proceedings. I refer in particular to the suggestion, which formed the claimants' primary case in these proceedings, that there had been a dishonest conspiracy between the present defendants on the one hand and counsel for Primekings.

20. Having borne all of those matters in mind, I have carefully considered where to pitch the appropriate payments on account. Bearing in mind that even where indemnity costs are ordered, there is rarely anything closely approaching 100 per cent recovery and bearing in mind also the need to build in a margin of error in any payment on account, I 9have concluded that the appropriate amounts are as follows. There should be a payment on account in favour of the first defendant of £1,085,000 and the payment on account in respect of the second and third defendants should be £1,750,000.

21. I now turn to the application by the defendants that I should declare that the claim was totally without merit. I have already made some general observations about this claim in the context of my decision that costs should be assessed on the indemnity basis. I said in paragraph 4 of my substantive judgment that I had:

> "… concluded that there is not the slightest merit in these claims. The extremely serious allegations made against each of the defendants are entirely without foundation."

It is indeed my view for all the reasons set out in that judgment that the claim against these defendants was totally without merit.

22. Against that, the claimants make a number of points. The first is that a totally without merit finding should not be made unless a claim was clearly hopeless from the outset. I do in fact have considerable reservations in this case about whether the claim was properly pleadable from the outset, but it is not necessary to form a view on that. It seems to me that a claim can be properly described as totally without

merit if the position following disclosure and exchange of witness statements is that there is no cogent basis on which it can properly be continued. In my view, that was certainly the situation in this case.

23. Mr King objects that that would be tantamount to suggesting that the merits of the claim had been prejudged before the trial even commenced. It seems to me that that simply does not follow. Once a matter reaches trial, unless there is an application made by one party or another, the function of the trial judge is to try the case as it stands and reach conclusions on the evidence as a whole. In any event, it seems to me that the fact that there may be factual disputes that would make an application for strike out difficult, for example, or for summary judgment, does not preclude a finding, once all the evidence has been heard, that the claim was totally without merit. Objectively, that is the position, in my view, once the full facts are known.

24. The claimants also refer to a number of events in other proceedings. In proceedings before HHJ Kelly, relating to a statutory demand, she recorded that the Bar Mutual Indemnity Fund accepted that the present proceedings satisfied the test under Rule 10.5(5)(a) of the Insolvency Rules, namely, that it must have a real prospect of success. That was no doubt a concession which it was reasonable to make in the context of those proceedings rather than seeking to engage in some form of satellite litigation about the merits of the present proceedings. Regardless of whether that concession was correct, it seems to me that it does not bind me. I am in a position, having heard the evidence as a whole, to form my own view on whether the proceedings were totally without merit. HHJ Kelly also took into account a point made by the Kings, ie the present claimants, that if the present case were not a genuine and substantial one, it was unlikely that the Kings would have been paid almost £2 million in 2018 in respect of this litigation. I regret to say I consider that point to be wholly unfounded. My understanding of the evidence in the present case is that the complaint being pursued at the time of that payment was that the proceedings against Primekings had no merit and that the Kings should have been advised not to pursue them. In other words, it preceded the *volte face* to which I have already referred; and therefore the fact that a payout was given in the context of that claim provides no support whatever to the proposition that the claim as ultimately brought was meritorious. Indeed, it might suggest the opposite.

25. Reference is also made to an observation by Jacobs J in the course of a wasted costs order application that the allegations made in the present case were:

> "... capable of being pleaded and indeed have been pleaded,"

in the present case. It does not seem to me that the fact, if it be the fact, that allegations were capable of being pleaded precludes a finding that the case is totally without merit once one sees the underlying evidence including disclosure and witness statements.

26. I have already made the point that I have reservations about whether the case was properly pleaded and, in any event, I do not consider that to be something which precludes a totally without merit finding at this stage. The same applies to the view formed by the DBA committee at Fieldfisher, to which the claimants refer in their 11skeleton argument. That is something about which I have no information and it seems to me that as the trial judge, I am better placed now to form a view on the merits or otherwise of the action.

27. Finally, reference has been made by both parties to the judgment of Bryan J on the interim payment application which I have already mentioned. At one point in his judgment, Bryan J said:

> "It may be that ultimately there is force in the Kings' case but at the present time, the net (if net there be) is not fully formed."

However, Bryan J went on in paragraphs 87 to 89 of his judgment to point out the serious, inherent improbabilities in the Kings' case and the fact that on the evidence produced so far, there was no basis from which it could be concluded that there was a claim of any substantial merit.

28. It therefore seems to me that none of those other matters has any real bearing on the decision I have to make, and that for the reasons I have already given, it is appropriate to certify or declare that the claim in the present case was totally without merit; and I shall do so.