Neutral Citation Number: [2021] EWHC 3067 (Ch)

Case No: BL-2019-002365

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 16/11/2021

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

(1) CBPE CAPITAL FUND VIII A LP	**Claimants**
(2) CBPE CAPITAL FUND VIII B LP	
(3) CBPE NOMINEES LIMITED	
- and -	
(1) DR MOHAMED TARANISSI	**Defendants**
(2) ARGC TOPCO LIMITED	

- -
- -

Rosanna Foskett (instructed by **Macfarlanes LLP**) for the **Claimants**
Richard Fisher QC (instructed by **Carter Ruck Solicitors**) for the **Defendants**

Consequential matters dealt with on paper

- -

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.

.....

HHJ Paul Matthews :

Introduction

1. On 27 October 2021, I handed down a written judgment in this claim and counterclaim, adjourning consequential matters to be dealt with on paper. Thereafter I received and considered written submissions from both sides, and now give the following reasons for the orders which I make.

2. The claim was for various declarations as to the true construction of a letter agreement between the parties. If the claimants' view was correct, then a large sum of money, in excess of £10 million would be due from the defendants to the claimants. If the defendants' view was correct, then there would be a significant sum, in excess of £3 million, due the other way.

3. In my judgment I held that the true construction of that agreement was that put forward by the defendants, and accordingly the claim failed. The counterclaim was for rectification of the letter agreement in the event that the claimants' construction prevailed. In my judgment I held that, if the claimants' construction had been the right one, I would have rectified the letter agreement, on the basis of a unilateral mistake by the defendants coupled with "sharp practice" on the part of the representative of the claimants. But in the event it is not necessary to order rectification. Similarly, it was argued by the defendants that if, for some reason, there could be no rectification, there was an estoppel by convention preventing the claimants from relying on their construction of the letter agreement. In my judgment I also held that, if there had been no rectification, there would have been such an estoppel. But that too was not necessary.

Form of order

4. The defendants were anxious that the alternative holdings to which I have referred should be represented in the form of the order made, primarily (so far as I can see) in case an application was made for permission to appeal. As it happens, no such application has been made to me, and I therefore proceed on the basis that there will be no appeal from my decision. I can see no other reason why it should be necessary or desirable to refer further to the holdings in my judgment which do not result in an operative order.

5. But in any event it seems to me that, even if there were an appeal, the order against which the appeal would be made would be an order dismissing the claim, and not an order that, on the hypothesis that the first order were wrong, there would be an order that there be rectification, or again if that were wrong that there would be an estoppel by convention. The order must reflect the active result of the litigation. In the present case that is that the claim fails and it is accordingly unnecessary for any order to be made on the counterclaim. If there were a successful appeal against my order dismissing the claim, then what I would have done if I had dismissed the claim is shown by the remainder of my judgment. It has no place in the order.

Matters in dispute

6. I turn to the matters in dispute between the parties. Unsurprisingly, the claimants do not argue that there should not be an order that they pay at least some of the defendants' costs. The two issues that are in dispute between the parties are, first, whether any discount should be made in favour of the claimants, and, second, what should be the size of any payment on account of such costs? I will deal with the two issues in that order.

Costs

Law

7. The rules relating to costs are well known. Under the general law, costs are in the discretion of the court (CPR rule 44.2(1)), but if the court decides to make an order about costs, the general rule is that the unsuccessful party in the proceedings pays the costs of the successful party: CPR rule 44.2(2)(a). However, the court may make a different order: CPR rule 44.2(2)(b). In deciding whether to make an order and if so what, the court will have regard to all the circumstances, including conduct of all the parties and any admissible offer to settle the case (not under CPR part 36) which is drawn to the court's attention: CPR rule 44.2(4). In particular, the court may make an order that a party must pay a proportion of another party's costs: CPR rule 44.2(6)(a).

8. In my judgment I should make a costs order. This keenly fought trial concerned a real issue between the parties, involved considerable costs, and produced a clear result. The application of the general rule requires me to say who is the successful party. In *Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd* [2004] 2 Lloyd's Rep 119, Rix LJ (giving the judgment of the Court of Appeal) said (at [143]) that the words "successful party" mean "successful party in the litigation", not "successful party on any particular issue". And in In *Day v Day* [2006] EWCA Civ 415, [2006] CP Rep 35, Ward LJ said (at paragraph 17):

> " in a case like this, 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…."

These authorities govern the present case also. On that basis, the defendant is clearly the successful party.

Claimants' submissions

9. However, although the claimants accept that, they say that the court should order them to pay only a proportion of the defendants' costs, namely, 70%. They say this for three reasons. The first is that the defendants' counterclaim for rectification based on *common* mistake was dismissed. That based on unilateral mistake and sharp practice, which succeeded, was only introduced by amendment in February 2021, "by which time many of the costs had been incurred".

10. The second reason is that much of the trial bundle material and cross-examination by the defendants related to the later agreement of February 2014, concerning the "special dividend" for the defendant. The claimants say this was wasted effort, as the agreement of February 2014 was not relevant to the construction of the December 2013 letter agreement.

11. The third reason is that much disclosure and trial time is taken up with the contents of the accounts of the first defendant because they were raised in support of the defendants' claim to an estoppel by convention, although my decision on the estoppel point was not based on those contents, but instead on the conduct of Ms Hoffmann, that is, the same as in relation to the question of rectification.

Defendants' submissions

12. The defendants refer to passages in the judgment of Mann J in *Sycamore Bidco v Breslin* [2013] EWHC 583 (Ch), cited with approval by Miles J in *Terracorp Ltd v Mistry* [2020] Costs LR 1435, [790], [80]:

> "11. The principles on which I should determine this dispute were not themselves disputed. Many are set out in the judgment of Jackson J in *Multiplex v Cleveland Bridge* [2009] Costs LR 55:
>
> > '(i) In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.
> >
> > (ii) In considering how to exercise its discretion the court should take as its starting point the general rule that the successful party is entitled to an order for costs.
> >
> > (iii) The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.
> >
> > (iv) Where the circumstances of the case require an issue-based costs order, that is what the judge should make. However, the judge should hesitate before doing so, because of the practical difficulties which this causes and because of the steer given by Rule 44.3(7).
> >
> > (v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order.
> >
> > (vi) In considering the circumstances of the case the judge will have regard not only to any Part 36 offers made but also to each party's approach to negotiations (insofar as admissible) and general conduct of the litigation.
> >
> > …
> >
> > (viii) In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs.'

12. In addition:

(i) The fact that a party has not won on every issue is not, of itself, a reason for depriving that party of part of its costs.

> "There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially complex litigation such as the present case, any winning party is likely to fail on one or more issues in the case. As Simon Brown LJ said in *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125 at paragraph 35: 'the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues'." (Gloster J in *Kidsons v Lloyds Underwriters* [2007] EWHC 2699 (Comm)).

(ii) The reasonableness of taking a failed point can be taken into account (*Antonelli v Allen* The Times 8th December 2000 per Neuberger J).

(iii) The extra costs associated with the failed points should be considered (*Antonelli).*

(iv) One still has to stand back and look at the matter globally, and consider the extent, if any, to which it is just to deprive the successful party of costs. (*Antonelli*).

(v) The conduct of the parties, both before and during the proceedings, is capable of being relevant (CPR 44.3(5)).''

For what it may be worth, I respectfully agree with this summary of the relevant principles.

Discussion

13. In the present case, not only did the defendants succeed overall, but they were also successful on all four of the major issues, namely the authority of Ms Hoffmann, the construction of the December 2013 letter agreement, whether in the alternative there should be an order for rectification, and whether in the further alternative there was an estoppel by convention binding the claimants. The claimants however ingeniously attempt to cordon off various parts of the material before the court or various portions of the argument, or to carve sub-issues out from the major issues, and argue that these materials or arguments represent wasted costs or that the defendants did not win these sub-issues.

14. I do not think that this is the right approach to take. The quotation from Simon Brown LJ, referred to in paragraph 12 of *Sycamore Bidco v Breslin*, continued as follows:

> "and it should be less ready to reflect that sort of failure in the eventual costs order than the altogether more fundamental failure to make an offer sufficient to meet the winner's true entitlement."

So it is clear that he, Gloster J, Mann J and Miles J all took the view that a partial failure on the way to an overall success did not automatically mean that a different order should be made from that foreshadowed by the general rule. Nor do I think that the fact that some parts of the material put before the court are not ultimately found necessary for the court's decision should automatically be reflected in the costs order made by the court. It is a matter of discretion, and, as Mann J said,

> "the court should look at the matter globally, and consider the extent, if any, to which it is just to deprive the successful party of costs"

15. In any event, I reject the first criticism made by the claimants, concerned with the former rectification which the court would have granted if necessary. In my judgment it was reasonable in the circumstances for the defendants originally to proceed on the basis that there was a common intention between the parties which had not been properly recorded in the document, and then amend their case when materials came to light suggesting a unilateral mistake coupled with sharp practice.

16. As to the second criticism, so far as it refers to materials disclosed, this is misplaced. The test for disclosure at an early stage in the proceedings obviously cannot be whether it will be relied upon by the judge in reaching his or her conclusion after trial. So far as it relates to reliance at trial, in my judgment it is also misplaced. There clearly was some reliance on the February 2014 special dividend agreement, both in relation to the general course of conduct between the parties (and the striking similarity in Ms Hoffmann keeping *both* documents away from her partners' eyes) and also in relation to the question of authority. And I do not see how I could have produced a general narrative of what happened without the assistance of the materials and information concerned with the February 2014 agreement.

17. I turn to the third criticism, that the judgment does not refer to the first defendant's accounts in reaching a conclusion on estoppel, and that therefore the time spent on the accounts at trial was wasted. I reject this criticism too. It was reasonable for the defendants to make their points in relation to the accounts of, even though I did not need to rely on them to reach my conclusions. As I said in my judgment, a judge is not obliged to deal with every single point raised. Moreover, the accounts were referred to in argument as part of the materials on the question of what the parties thought they had agreed, and I recorded this in my narrative.

18. However that may be, and making a counterfactual assumption, I should say that, even if I had not rejected these criticisms, but had accepted that they had any force, I still doubt that I would have discounted the costs to be paid by the claimants to the defendants. All of these points are the kind of thing that arises commonly in modern litigation, and parties prepare for trial on the basis of having several arrows in their quiver. The fact that not all are shot, or that some that are shot miss their targets, does not mean that the successful party cannot have the cost of putting them there. In these circumstances, in the exercise of my discretion I will order the claimants to pay the defendants' costs of the litigation on the standard basis, without any discount.

Payment on account of costs

Law

19. The second issue between the parties is the amount of any payment on account of costs. CPR rule 44.2(8) provides that:

> "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".

20. In *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), Christopher Clarke LJ said:

> "22. It is clear that the question, at any rate now, is what is a 'reasonable sum on account of costs'…
>
> 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."

This case

21. The total budgeted costs of the defendants amounted to £558,000 plus VAT, as against £603,000 plus VAT for the claimants. However, disclosure and witness statements were not costs managed. The claimants have assumed a figure of £300,000 for these costs, but the defendants say this is on the low side. On the other hand, the costs budgeted for PTR, ADR and mediation were not fully used.

22. The defendants seek a payment on account of £350,000 plus VAT, whereas the claimants have offered £250,000 plus VAT. That offer is based on the claimant's argument that they should be entitled to a 30% discount from the defendant's total costs because of the criticisms which they made (but which I have rejected above). In other words, if the claim to a discount is rejected, then the claimants have no other argument put forward as to why the defendants should not receive a payment on account of £350,000 plus VAT. That amounts to slightly less than 70% of the budgeted costs. The defendants have confirmed in correspondence that their incurred costs exceeded the cost budget.

23. Even taking into account the fact that disclosure and witness statements were not costs managed, it seems to me highly unlikely that the defendants will not obtain at least £350,000 plus VAT on detailed assessment, and since that is the sum which the

defendants seek, and there is no sustainable argument of principle against it, that is the sum which I will award.