

Case No: CL-2019-000068

Neutral Citation Number: [2022] EWHC 2035 (Comm)

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**COMMERCIAL COURT (QBD)**

7 Rolls Building  
Fetter Lane  
London EC4A 1NL

Monday 4 July 2022

BEFORE:

**MRS JUSTICE MOULDER**

BETWEEN:

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**THE ECU GROUP PLC**

Claimant

- and -

**(1) HSBC BANK PLC**  
**(2) HSBC UK BANK PLC**  
**(3) HSBC BANK USA, NA**

Defendants/Applicants

- and -

**THERIUM LITIGATION FINANCE ATLAS AFP IC**

Respondent

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**MR J CROW** (instructed by Cleary Gottlieb Steen & Hamilton LLP) appeared on behalf of the Defendants/Applicants

**MR S INNES** (instructed by Harcus Parker Limited) appeared on behalf of the Respondent

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**JUDGMENT**  
(Approved)

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1. MRS JUSTICE MOULDER: This is the consequential hearing following the handdown of the judgment on 24 June 2022 in respect of the Defendants' application (the "Application") for a non-party costs order against Therium Litigation Finance Atlas AFP IC ("Therium"), a litigation funder.
2. I will rule now on the question of the costs of the Application in principle.
3. Therium's primary position is that the costs of the Application should be reserved until the conclusion of the detailed assessment of the Defendants' costs of the proceedings.
4. Therium made an open offer on 12 April 2022. It was expressed in the alternative and the alternative on which Therium now rely is that it would pay £700,000 in satisfaction of its liability to the Defendants, which would include the costs of the Application. It was submitted for Therium that it will not be possible to know whether or not that offer has been beaten until the conclusion of the detailed assessment of the Defendants' costs. Therium therefore submitted that, although it was not a Part 36 offer, the court has a wide discretion and it should take into account the existence of this offer and the fact that, until the position is known, the court should reserve the matter to after detailed assessment.
5. It was submitted for the Defendants ("HSBC") that there is no reason for the costs to be delayed. As regards the offer of £700,000, HSBC has beaten the figure as Therium has been ordered to pay in excess of \$1 million as part of the interim payment. The offer of £700,000 was an offer in respect of the final quantum of Therium's costs liabilities, although it was accepted that, had the offer been accepted, it would have had the collateral effect of rendering the application unnecessary.
6. HSBC referred me to the case of *McKeown v Langer* [2021] EWCA Civ 1792. In that case, the issue was the treatment of Part 36 offers and a *Calderbank v Calderbank* [1975] All ER 333 offer and whether or not they should be treated in the same way.
7. Therium submitted that it accepted that its offer was not a Part 36 offer and that its case was rather that some support could be gained from the fact that the offer had been made rather than relying on the Part 36 framework.

8. HSBC referred to the reasoning of the Court of Appeal in *McKeown* and submitted that, although in that case the amount of the offer was not known, nevertheless the principle stated by the Court of Appeal was that the court has a broad discretion under CPR 44.2, that there were policy considerations as to why the offers would be treated differently and that, had Therium wished to make a Part 36 offer, it could have done so, in which case the Part 36 regime would have applied with the effect that the matter would have been reserved until the end of the proceedings.

9. The relevant law is set out in CPR 44.2:

*“(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"*

10. It is clear that the court has a broad discretion as to the costs order which it makes and that, in deciding what order to make, the court will have regard to all the circumstances.
11. In my view, this Application was about the principle of how the costs should be borne and was unrelated to the general litigation. In my view, although the facts before the Court of Appeal in *McKeown* were different, one can take guidance from the statements of the Court of Appeal that there is an issue of policy here: Therium having challenged the extent of its liabilities for costs and having been successful on this matter, HSBC is entitled to the costs of its Application and should be entitled to receive those costs without waiting for the outcome of the detailed assessment process.
12. Whilst one cannot be completely certain that the costs found to be payable will exceed £700,000, the interim payment which the court ordered took into account the relevant considerations and was after allowing for a discount in the usual way. Having arrived at an appropriate figure for the interim payment, it seems to me that there is no reason why the court should revisit the reasoning that underpinned that interim payment and therefore, in my view, it is unlikely that the figure of £700,000 would be relevant.
13. Even if I were wrong on that, I do not accept that, in the circumstances of an application of this nature, the Defendants should be made to wait until the end of the detailed assessment process. Part 36, as was accepted by Therium, is a self-contained code. If Therium wanted to have the protection of the Part 36 regime, it could have made a Part 36 offer.
14. As to the amount of costs, Therium submitted that a percentage reduction should be made to reflect the fact that Therium was partly successful. Therium submitted that a significant amount of time was spent on the issue of causation, both at the hearing and in the submissions, and that it was successful on the issue of whether or not it should be liable for the entire period for the costs incurred such that an issue-based order would be appropriate.

15. The initial submission for Therium is that an order should be made that HSBC should pay a percentage of Therium's costs with Therium to pay a percentage of HSBC's costs and, as a fallback, which I understood to be the position pursued in oral submissions, that Therium should pay 75 per cent of HSBC's costs.
16. For HSBC, it was submitted that the only point on which Therium has partially succeeded is as regards the costs incurred prior to 30 November 2018, which constitute less than 10 per cent of HSBC's costs. It was submitted that that was not Therium's primary position on the Application and it failed on its submission that it should be liable only from the date of the LFA. It was submitted for HSBC that, taking a broad brush approach, HSBC had succeeded on the Application and should recover its costs in the ordinary way.
17. CPR 44.2 (2) provides that the general rule is that the unsuccessful party should bear the costs of the successful party but, in deciding what order to make, the court will have regard to all the circumstances.
18. As set out in the judgment on the Application at [26], the issues before the court were as follows:
  - (1) whether Therium should only be liable for costs incurred by the defendants after the date of the LFA.
  - (2) whether of those costs, Therium should only be liable for a percentage corresponding to its percentage contribution to the total funding after that date.
  - (3) whether factors relating to the level of HSBC's costs should be taken into account.
  - (4) whether credit should be given to Therium for the £5 million proceeds of ATE insurance and the £2.5 million retention account already received by HSBC.

(5) whether Therium should be required to contribute to the payment on account.

19. Of those five issues, the only issue on which Therium had some success was that the court held that Therium was not liable for all of HSBC's costs but only from and including 30 November 2018. The amount of the costs for which Therium was thus liable was 90.8 per cent of HSBC's total costs. Issue 3 was held by the court not to be a matter relevant to the Application. Therium was unsuccessful on issues 2, 4 and 5.
20. In those circumstances, in my view, a very small proportionate adjustment should be made to reflect the overall success of HSBC and the order I make is that Therium should pay 95 per cent of HSBC's costs of the Application.
21. It now falls to the court to carry out the summary assessment of the costs in line with paragraph 13.2 of the Commercial Court Guide.
22. The Defendants' costs of the Application which are sought are some £93,000, equivalent to approximately \$114,000.
23. Therium submitted that these costs are not reasonable and proportionate, that the solicitors' hourly rates are excessive because of the unjustified increase from the guideline hourly rates, that an unreasonable and disproportionate amount of work was done by partners and that the level of attendance on the costs defendant was unreasonable and disproportionate. Further objections are taken as set out in the skeleton on the work done on documents.
24. For HSBC, it was submitted that there was an increase in the costs between the original application and the hearing today that was due in part to the costs of agreeing the order, in relation to which there was a dispute. It was submitted that the main proceedings were obviously complex litigation and that a party could not be expected to change its legal advisors from the main proceedings when dealing with the ancillary costs proceedings. The amount which has been incurred by Therium, which was involved for a short period, was some £60,000, which in Therium's case was attributable as to more than 50 per cent to counsels' fees.

25. The court has considered carefully the observations of Males LJ in *Samsung Electronics Co Ltd & Ors v LG Display Co Ltd & Anor* [2022] EWCA Civ 466 and his statement that "*a clear and compelling justification must be provided*" for rates to be charged in excess of the guideline rates.
26. I entirely accept the submission that it cannot be the case that HSBC should be criticised or penalised for using the same legal advisors in relation to the costs issues that it used to defend the main litigation and I stress that my observations on the rates which apply on this Application have no bearing to the question of whether the rates which were charged on the main litigation should be upheld.
27. It does seem to me that the rates which are sought are well in excess of the guideline rates and, given the nature of this application, some reduction does need to be made.
28. I have considered the other matters raised by Therium. The amount of partner work does not seem to me to be suggestive of an unreasonable lack of delegation on the part of the solicitors. I note the level of attendance, but I also note the hard-fought nature of the dealings between HSBC and Therium, which is inevitably reflected in the costs incurred by HSBC and it is only fair and reasonable that Therium should bear the result of their actions. In my view, notwithstanding the fact that this was ancillary to the main litigation, it nevertheless raised issues which were complex. Specialist leading costs counsel were instructed and this, too, has to be borne in mind in deciding whether the overall sum is reasonable and proportionate.
29. In all the circumstances, the amount which I allow as the overall figure for both the solicitors and counsel and the associated fees referred to in the statement is the sum of £71,000.



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**This transcript has been approved by the Judge**