Neutral Citation Number: **[2024] EWHC 2778 (Comm)**

Case No: **(1) CL-2019-000603 (2) CL-2019-000727**

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

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

Date: **22 October 2024**

Before :

HHJ Pelling KC

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Between :

Mr Flavio de Carvalho Pinto Viegas & Ors	**Claimant**
- and -	
Mr José Luis Cutrale & Ors	**Defendant**

- -
- -

David Went and Juliet Wells (instructed by **PGMBM LAW LTD t/a Pogust Goodhead**) for the **Claimant**
Paul Luckhurst and Tom Watret (instructed by **Linklaters LLP**) for the **Defendant**

Hearing dates: **22nd October 2024**

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JUDGMENT

HHJ Pelling KC **Tuesday, 22 October 2024**
(**10:43** am)

HHJ PELLING KC:

1. This is the issue I now have to determine, concerns the costs of and occasioned by this disputed application for trial of preliminary issue. The successful defendants maintain that I should order the claimants to pay 40 per cent of the defendants costs of and occasioned by the preliminary issue application, which they quantify at £292,919.16, and direct an interim payment on account of 55 per cent of that sum. The claimants position is I should reserve those costs to be dealt with after determination of the preliminary issue, and in the alternative, that the costs should be directed to be costs in the application and, in any event, if I order that the claimant should pay the costs or some of the costs of and occasioned by the application, then the sums claimed are excessive in all the circumstances and the interim payment on account should be significantly less than the sum which is sought.

2. So far as the issue of principle is concerned, I accept the submissions made on behalf of the defendants that this was an application which was contested on a basis which meant that the hearing of the question whether or not there should be trial of a preliminary issue took far longer than would otherwise be the norm and involved a much higher level of legal and evidential activity that might normally be expected where the issue was whether or not a limitation issue should be dealt with ahead of the main liability issues. This was augmented by the fact it was necessary in order to dispose of the application to have some outline expert legal evidence because the issue is one which depends exclusively on Brazilian law. That is not an issue which can sensibly be determined by a court other than with the assistance of some expert evidence.

3. The opposition to the application was a root and branch one, with it being contended from by the claimants that the limitation issue should not be hived off and dealt with as a preliminary issue but must of necessity be dealt with as part of a trial of the liability issues which would have taken many weeks, in indeed months, in order to try.

4. In the circumstances, where an application for trial of a preliminary issue is made and it's dealt with relatively speedily in the context of a CMC, it will often be appropriate either to order that the costs of that application be costs in the preliminary issue, or alternatively to reserve the

issues able to be determined after the preliminary issue has been resolved. However, this is not one of those cases. This is a case where the time taken in order to resolve the issue, in the light of the way in which it is approached, means that very significant costs have been incurred in order to resist the application and in principle a costs order should be made. The test for deciding who should pay the costs of an interlocutory application of this sort is to ask who has been successful. Plainly, the defendants have been successful and the claimants haven't been. There are no conduct reasons for departing from the order that follows from this conclusion and in those circumstances, I accept that the defendants should be entitled to recover from the claimants the costs of and occasioned by their application for the trial of a preliminary issue on these the issues of limitation.

5. The next question which arises is what sum should be directed. So far as that is concerned, the point which is made by the claimants which is largely common ground, is that at least some of the costs that were incurred in making the application will be costs which will be in respect of work relevant or also relevant to determination of the limitation issue. I'm sure some focus in relation to that will be on the expert evidence which has been generated and also some of the documentation which has been produced as well. This leads to the defendants to submit that from the total costs of the application the costs order that should be made at this stage against the claimant should be limited to 40 per cent of the costs which the defendants have otherwise incurred in relation to that application. Again, in principle, I accept that as a correct approach and I don't understand that in principle that is objected to.

6. The real focus of attention by the claimants, in the event I came to the conclusion that a costs order was appropriate, was on the interim payment on account. The point which is made on behalf of the claimants is if you gross up from 40% to 100% the sums which are referred to in the assessment schedule, which has been produced by the defendants' solicitors, it looks as though over £1 million has been spent on the application for the trial of the preliminary issue. Even in hard fought commercial litigation of this sort, these are eye watering sums, and are sums which are likely to be the focus of very careful attention on a detailed assessment.

7. It is sensible, I think, at this stage, to remind all parties of what Leggatt J said now some years ago in Kazakhstan Kagazy Plc v Zhunus [2015] EWHC 404 (Comm) namely that in hard fought commercial litigation involving large sums of money and

in which the parties had spared no expense, "… *the touchstone (of reasonable and proportionate costs) is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances*" with expenditure over and above that level being for the receiving party's own account. It is plainly foreseeable that on an assessment there will be a very close focus on whether over £1 million was the lowest amount which the defendants could reasonably have been expected to spend in order to have its case conducted and presented proficiently in order to obtain the direction they had sought.

8. Where that leads me is to the question whether or not it is appropriate to adopt the approach contended for by the defendants, which is I should order 55 per cent of the 40 per cent of the costs which are claimed, which as I have said comes to £292,990-odd by way of a payment on account. The claimants submit that on assessment it is likely that the recoverable sums will be significantly reduced below that sum and therefore that rather more caution is required in assessing what is a reasonable sum for an interim payment on account.

9. I agree in principle with the claimants. Although it is submitted that the 55 per cent takes account of this factor I accept the submission that some additional caution is required where the sums claimed are as high as are claimed here, where the hourly rates claimed by the defendants' solicitors are as high as they are, where the number of solicitors involved are as numerous as they are and where counsel's fees are as high as they are. In those circumstances arriving at a payment on account is very largely a broad-brush and broad-axe exercise. In my judgment the reasonable sum for a payment on account in relation to the issues for which costs are properly recoverable is £225,000.