Neutral Citation Number: [2018] EWHC 3142 (Ch) Case No: HC-2015-000268

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

Rolls Building
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 14 November 2018

Before:

The Honourable Mr Justice Marcus Smith

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Between:

Britned Development Limited Claimant

- and -

(1) ABB AB
(2) ABB Ltd Defendants

- -

Robert O'Donoghue, QC and **Hugo Leith** (instructed by **Squire Patton Boggs (UK) LLP**) for the **Claimant**
Sarah Ford, QC and **Jennifer MacLeod** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Defendant**

Hearing date: 14 November 2018

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Approved Ruling

MR JUSTICE MARCUS SMITH

1. Having handed down Judgment in this matter and having dealt with certain consequential matters in a Supplemental Judgment, I have before me today the question of the costs in this dispute. I take the Judgment and Supplemental Judgment as read.

2. The rules regarding costs are set out in CPR 44. They are helpfully distilled in paragraph 3 of BritNed's written submissions. Essentially these principles are uncontentious as between the parties:

   (1) It is accepted that the court has a broad discretion on costs, subject to any contrary provision in the CPR. That discretion extends to whether costs are payable at all, how much those costs are, and when they should be paid.

   (2) The starting point, however, is that it is the unsuccessful party who will be ordered to pay the successful party's costs. But that is only the starting point and the court may make a different order.

   (3) In considering what costs order to make, the court has a general and broad discretion. The court must have regard to all the circumstances without limitation. However, these circumstances include: the parties' conduct; whether a party succeeded in part in its case, even if not in whole; and any admissible offer to settle, where the offer falls outside CPR 36. It is important to make that qualification because CPR 36 is a self-contained procedural code regarding offers to settle that are compliant with CPR 36. That is why they are known as "Part 36" offers. The consequences of an offer complying with CPR36 is that there is a higher degree of certainty about what occurs where a Part 36 offer is either accepted or not accepted and not beaten after trial. The discretion of the court in such cases is curtailed (but not excluded) when compared with non-CPR 36 cases.

   (4) The parties' conduct, which as I have said is one of the relevant factors that needs to be taken into account, includes, but is not limited to, conduct before and during proceedings, whether it was reasonable to advance certain allegations or issues, the manner in which a case was brought or defended and whether a party who was successful exaggerated its claim.

   (5) Finally, the court has the broad menu of orders that it can make under CPR 44. By that I mean that although there is a broad discretion and although the starting point is that the successful party should recover its costs, different costs orders can be made in the appropriate case. For instance, an issues-based costs order can be made where the court identifies discrete issues and makes specific costs orders in relation to those specific issues. Or the court may allocate a proportion of its costs to the successful party, in such a case determining that the successful party can recover only a proportion of its costs, not all of them.

3. Turning then to this case, who is the successful party? Success, BritNed contends, is not a difficult concept. It is the party who writes the cheque at the end of the day who is the unsuccessful party, and the party who receives that cheque who is the successful party. On this basis, as the recipient of several million Euros from ABB, BritNed is the successful party, as it contended.

4. I confess that I am not sure that the definition of success is so easy a concept, at least in this case. In this case, there was, from the outset, a binding finding against ABB. I refer to the Commission's Decision, which found the existence of the Cartel, which found that ABB was party to that Cartel, and which found that the BritNed Interconnector was a cartelised project pursuant to that Cartel. In a very real sense, therefore, quantum was substantially the only issue before the court.

5. Absent one of the two factors that I list below, it was, one might well say, inevitable that ABB would be writing a cheque to BritNed. It does not, therefore, axiomatically follow that simply because a payment was ordered in this case, that ABB was the loser.

6. The inevitability that ABB would have to pay damages was qualified by two factors:

    (1) First, it was open to the court, because this was ABB's primary contention, to find that there was actually no overcharge and no loss to BritNed at all. Although, as I have said, ABB advanced this case, the contention failed. It is fair to say, however, that the outcome of the litigation in purely monetary terms was far closer to ABB's case than BritNed's.

    (2) Secondly, a Part 36 offer exceeding any award of damages might have been made. It is possible – and I will come back to this question – that a non-Part 36 offer or a withdrawn Part 36 offer would also amount to a factor affecting who is the successful party.

7. In this case a Part 36 offer was made by ABB. This offer was withdrawn after trial, but before judgment. It follows that the automatic costs consequences of CPR 36 do not pertain in this case, as ABB accepts. Moreover, had the Part 36 offer remained on the table, and not been withdrawn, it is also the case that BritNed would not have been able to accept the offer without the court's permission. That is the effect of CPR 36.11(3).

8. In these circumstances, given that the Part 36 offer was withdrawn by ABB, the existence of the offer is no more than a factor that must be taken into account in my assessment of costs. It cannot, because it was withdrawn, <u>automatically</u> have the consequences laid down in CPR 36. There is no automatic read-across into non-CPR 36 cases of the consequences of CPR 36 in relation to a CPR 36 compliant offer. It is simply that offers made, including withdrawn Part 36 offers, become a relevant factor in the assessment of costs under CPR 44. Of course, the fact that such an offer was made may be very significant; or it may not be. That depends on the individual case.

9. There were essentially four issues before the court. Using the terminology of the Judgment, these were:

(1) The Overcharge Claim.

(2) The Lost Profit Claim.

(3) The Regulatory Cap Issue.

(4) The Compound Interest Claim.

10. It is not possible to sub-divide these issues further. No party contended that I should seek to do so.

11. What is more, these issues are (as my Supplementary Judgment makes clear) substantially intertwined. Indeed, it may be said that the adjudication of the Overcharge Claim was the central issue, with the remaining issues simply satellites orbiting it. I do not consider that it would be just, or indeed possible, to allocate costs issue-by-issue. To be fair, neither party contended for such an approach.

12. In terms of who writes the cheque, it is clear – as I noted earlier – that BritNed is the winner. Against this, however, a number of points must be noted:

(1) In terms of expectation, BritNed was substantially the loser in this case, when measured by reference to its own Part 36 offer of €135 million. BritNed recovered under 10% of this amount (not including interest, which brought BritNed's recovery to just over 10% of this amount).

(2) What is more, ABB made an offer, which remained open throughout the trial, that BritNed failed to beat.

(3) The case on overcharge advanced by BritNed substantially failed. As is noted in my Judgment, I did not feel able to place reliance on Dr Jenkins' model.

That said, the interchange between the experts and the battle between their different approaches, I found (as I hope the Judgment makes clear) incredibly useful. I do not consider that I would have been able to reach so clear a conclusion regarding Mr Biro's approach had I not had the benefit of understanding why Dr Jenkins' approach was flawed. The manner in which the experts' views were tested in the crucible of cross-examination was very helpful indeed.

(4) It was as a consequence of the failure, in relative terms, of BritNed's Overcharge Claim that the Lost Profit Claim failed. So far as the Regulatory Cap Issue is concerned, it might have to be said that that was something of a score draw for the parties. On the fourth issue, BritNed lost on the Compound Interest Claim, but in terms of the time spent this was a relatively minor issue.

13. ABB's case on costs turns on two points:

(1) BritNed's failure in this litigation, and in particular its failure to recover anything like the amounts it sought, as evidence by the Part 36 offer it made.

(2) The fact that ABB made a Part 36 offer (albeit withdrawn before Judgment) that BritNed failed to beat.

For these reasons, ABB contended that it should have its costs, and interest on them, from the latest time that its Part 36 offer could have been accepted (without the permission of the court) by BritNed.

14. BritNed's contention was that these factors were not enough to displace the starting point, which was that BritNed, as the successful party, as the recipient of the cheque, should have its costs.

15. BritNed made one further point as regards its non-acceptance of the Part 36 offer made by ABB. It placed great reliance on the informational imbalance that existed between the parties. It is true that, in cartel cases, the cartelist generally knows far more about the operation and consequences and impact of the cartel than the innocent claimant seeking recompense against such harm as it has suffered. Up to a point I accept that, and I do agree that quantification can be difficult. But that is a regrettable fact of quantification in all cases, not just competition cases.

16. It seems to me that the informational imbalance between BritNed and ABB in this case might well be relevant if this were a case of the late acceptance or the attempted late acceptance by BritNed of ABB's Part 36 offer. The information imbalance might, in such a case, be deployed to explain the late acceptance of a stale offer. The issue of information imbalance, however, does not seem to me to be of particular relevance where there was no acceptance at all of ABB's Part 36 offer. Indeed, not only was that offer not accepted, a much higher counter-Part 36 offer was made 18 months after ABB's offer, in what proved to be the excessive amount of €135 million.

17. That implies not an inability to quantify due to a lack of information, but simply an excessive appreciation by BritNed of what its case was worth.

18. I proceed to my conclusion on this question of costs.

19. I have given my reasons for rejecting an issues-based costs order. This was, perhaps, something of a novel case given the complexity of the quantification exercise. Properly predicting the outcome, at least in the earlier stages of the case, would have been a tall order, given the divergence between the experts' approaches. In these circumstances, I do not consider that BritNed can be criticised as behaving entirely unreasonably in wanting its quantum established through trial, given the level of ABB's Part 36 offer. I certainly do not want to label BritNed's claim or its Part 36 offer as "exaggerated", save in the sense that (in the light of the Judgment) BritNed got far less than it thought it should.

20. Absent the withdrawn Part 36 offer made by ABB, it is clear to me that BritNed was the winner. The fact that it recovered far less than its own Part 36 offer might be said to be a measure of failure but not, I think, a relevant one for the purpose of the incidence of costs. I reject, as irrelevant to this question of incidence, ABB's point summarised at paragraph 13(1) above.

21. Of course, that relative failure would be relevant in an issue-based costs approach. If the costs relating to the Overcharge Claim could properly be isolated, then costs orders going different ways in respect of different issues could be made. I cannot make such an order, for the reasons I have given. As it is, however, were I to hold that BritNed should have its costs, that would be on the basis of a substantial discount of the order of 40% to reflect BritNed's relative failure on the overcharge claim. In short, whilst I do not consider ABB's point (as summarised in paragraph 13(1) above) to be relevant to the incidence of costs, it is relevant to amount of costs BritNed can recover.

22. I appreciate that, in many cases, the fact that the winner loses on some points, but nevertheless wins in the round, may make no difference to the successful party's entitlement to costs. Very often the general rule – that costs follow the event – will be the right outcome. This, I stress, is not such a case. The Overcharge Claim was central and, as I have noted, BritNed's analysis was not accepted, whereas ABB's analysis substantially was.

23. I should make clear that my substantial discount of 40% would have been higher but for the fact that, as I have noted, I found Dr Jenkins' evidence helpful in reaching the conclusions that I did in relation to Mr Biro's analysis.

24. So that is my conclusion, leaving out of account ABB's Part 36 offer. Obviously, that offer is a factor that I must take into account. The question is, to what extent? Is this withdrawn Part 36 offer enough to turn the tables, and cause the incidence of costs to shift? Settlements out of court are to be encouraged, and ABB put in an offer that backed its expert's judgment regarding the level of the overcharge, and which proved to be more than BritNed recovered. It would be entirely wrong to leave this offer out of account.

25. But I also have to have regard to the fact that CPR 36 is a self-contained procedural code, and that had ABB wanted to ensure a costs outcome in its favour, it should not have withdrawn the offer. By withdrawing the offer it made, ABB, as it accepts, put itself (or, rather, put its offer) outside the CPR 36 regime.

26. I conclude that, in this case, the existence of the ABB Part 36 offer is not enough, where quantification was so difficult, to reverse the incidence of costs. Had ABB wanted a guarantee of this outcome, then its course was clear.

27. So I do not consider that ABB should have a costs order in its favour. But I do consider that the making of a commercial offer early on that was not beaten by BritNed does mean that it would be unjust for ABB to pay any of BritNed's costs.

28. Looking, then, at the overall justice of this case, as I must, the order that I make is that there be no order as to costs. The costs will lie where they fall, including the costs of today.