IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY
COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Claim Nos.: BL-2018-000281,
CR-2018-003995

[2019] EWHC 2908 (Ch)

Rolls Building
7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Monday, 14 October 2019

Before:

THE HON. MR. JUSTICE FANCOURT

B E T W E E N:

UTB LLC — Claimant

- and -

SHEFFIELD UNITED LIMITED — Defendant

- and -

HRH PRINCE ABDULLAH BIN MOSAAD BIN ABDULAZIZ SAUD — Third Party

- and -

YUSUF GIANSIRACUSA — Fourth Party

A N D

IN THE MATTER OF **BLADES LEISURE LIMITED**
AND
IN THE MATTER OF **S.994 OF THE COMPANIES ACT 2006**

B E T W E E N:

SHEFFIELD UNITED LIMITED — Petitioner/Applicant

- and -

(1) UTB LLC
(2) UTB 2018 LLC
(3) HRH PRINCE ABDULLAH BIN MOSAAD BIN ABDULAZIZ SAUD
(4) YUSUF GIANSIRACUSA
(5) HRH PRINCE MUSA'AD BIN KHALID M BIN ABDULRAHMAN AL SAUD
(6) BLADES LEISURE LIMITED — Respondents

J U D G M E N T

A P P E A R A N C E S

Mr Andreas Gledhill QC and **Mr Tom Mountford** (instructed by **Jones Day**) appeared on behalf of the **Claimant, Third Party, Fourth Party and the First to Fourth Respondents**.

Mr Paul Downes QC and **Emily Saunderson** (instructed by **Shepherd and Wedderburn LLP**) appeared on behalf of the **Defendant/Petitioner**.

Hearing date: 14 October 2019

MR JUSTICE FANCOURT:

1 This is my judgment in relation to the costs of the trial which I heard in May and June 2019 and handed down judgment on 16 September 2019. I have had the benefit of detailed written submissions from each of the parties and oral presentations today from Mr Downes QC on behalf of Sheffield United Limited and from Mr Gledhill QC on behalf of the UTB defendants, all of which I am grateful for. Despite the length and detail of the submissions that I have heard, I hope it will be possible for me to express my views on costs relatively succinctly.

2 The proceedings that I heard comprised three different parts. First, the initial claim issued by UTB and a counterclaim to that claim raised by SUL. Those proceedings related to enforcement of the alleged contract of sale and purchase of shares in Blades and declaratory relief in relation to the effect of that contract and the Investment and Shareholders Agreement. The second part of the proceedings was an additional claim brought by Sheffield United Limited, claiming damages for lawful and unlawful means conspiracy, and also for breach of the Investment and Shareholders Agreement. Those proceedings were started in February and March 2018. The third part of the proceedings was an unfair prejudice petition brought under s.994 of the Companies Act 2006 by Sheffield United Limited in June 2018. All the matters were tried together before me.

3 The question of costs, of course, has to be dealt with in accordance with Part 44 of the Civil Procedure Rules. As is well-known, r.44.2 prescribes the approach that the court should take by specifying that there is a general rule that the unsuccessful party will be ordered to pay the costs of the successful party, but entitling the court to make a different order, and directing that, in deciding what order to make about costs, the court has to have regard to all the circumstances, including the conduct of the parties, any admissible offers to settle that have been made and the extent to which a party has succeeded on part of its case, even if not the whole of its case.

4 There is no real dispute that, at the end of the trial, the UTB parties were to be regarded as the successful parties in each of the three claims. In the original claim brought by UTB, UTB was successful in obtaining an order for specific performance of the contract of sale and purchase, but only on the basis of events that took place in April 2019. But for those events, or any concession on its part, it would not have succeeded in getting specific performance of the contract of sale and purchase, though it might well have recovered damages in lieu of an order for specific performance and would, itself, have been liable in damages to Sheffield United Limited. UTB was not successful in relation to the declaratory relief which it sought in those proceedings.

5 So far as the additional claim is concerned, the claim for damages for conspiracy or breach of contract failed, but, once again, but for the change of circumstances in April 2019, Sheffield United Limited would have recovered damages for breach of the Investment and Shareholder Agreement.

6 In relation to the petition, the position is more straightforward. The UTB parties succeeded on all the points that were raised in that petition.

7 From that brief summary, it is apparent that there is an important factor which I must take into account here, namely the change of circumstances on 29 April 2019. To explain that so far as necessary, until that point, UTB was claiming that it was entitled to specific

performance of the contract of sale and purchase but was not liable to trigger the property call options under the Investment and Shareholder Agreement. In about April 2019, UTB indicated that it would trigger the property call options in the event that Sheffield United Football Club was promoted at the end of last season, as, at that time, it appeared very likely that it would be. Following Sheffield United's promotion at the end of April 2019, UTB confirmed that it would now join in triggering the property call options.

8 As I have indicated, if that change of circumstances had not occurred then UTB would not have succeeded on a substantial part of its claim. However, its claim was not only defended by Sheffield United Limited on a narrow basis relating to the issue that I have just described. Sheffield United Limited defended on a much broader basis in its pleaded case and after the change of position of UTB in April 2019, Sheffield United Limited continued to oppose the relief sought by UTB in any event.

9 I am satisfied that that approach would have been the approach of Sheffield United at any time after about the summer of 2018, even if a much earlier concession by UTB in the first half of 2018 might have resolved the matter without the need for the lengthy trial which took place. By about the summer of 2018, by when the petition had been pleaded, I find that momentum had developed from that pleaded case such that, in any event, Sheffield United Limited would have sought to avoid the consequences of the contract of sale and purchase.

10 There is a second and related important point in relation to the incidence of costs, and that is that, initially, UTB was in the wrong in its conduct in refusing to trigger the property call options on the basis that I have found it should have accepted that it was liable to do so but, on the contrary, denied that obligation and sought to avoid having to perform it. That conduct was the immediate cause of the litigation that started in February 2018. There had been previous dealings between the parties, which, as I have investigated at length in my judgment, resulted in the breakdown of their relationship by no later than December 2017. But it was not that breakdown as such that caused the litigation to start; it was the stance that UTB wrongly took in relation to the effect of the call option notice and counternotice that were served.

11 That, however, does not, in my judgment, mean that all the costs of the claim up to and including April 2019 must be regarded as down to UTB. There were very substantial costs spent in preparing for a trial on other issues apart from the narrow cl.9.1.12 point, and on which, in the event, UTB were successful, and, as I have said, SUL defended (and from summer 2018 would have defended) on a much broader basis than merely disputing the narrow cl.9.1.12 point, thereby requiring substantial costs to be spent.

12 Dealing first with the costs of UTB's original claim, the counterclaim and the additional claim together, as the parties agree that I should do, in my judgment there needs to be a substantial adjustment to the amount of the costs of UTB can properly recover from Sheffield United Limited. In my judgment, based on its success in those proceedings, it is entitled to all of its costs after 29 April 2019, so that will include all the costs of the trial in relation to the issues in the original claim, the counterclaim and the additional claim.

13 So far as an appropriate reduction for the pre-29 April 2019 costs of those proceedings is concerned, bearing in mind the extent to which Sheffield United Limited can legitimately say that it has succeeded on some of the issues, including the very issue that gave rise to the proceedings in the first place, I consider that it is appropriate to award UTB only 60 per cent of its costs of those proceedings, and, in view of that substantial reduction, which takes account of the extent of Sheffield United Limited's success, I make no order in favour of Sheffield United Limited for its costs.

14 That deals with the costs of the original claim, the counterclaim and the additional claim. I turn then to deal separately with the costs of the petition.

15 As I have indicated, UTB succeeded fully in its defence of the petition, and it is not disputed that it must be entitled to its costs of the petition. The issue which is live between the parties is whether or not it should recover those costs on the indemnity basis rather than on the standard basis. The difference that that makes in practice is that the criterion of proportionality of costs in relation to the importance of the issues falls away and the onus of proof in relation to reasonableness falls on the paying party rather than on the receiving party. The commentary in the **White Book** at para.44.3.8 summarises succinctly the appropriate approach. It refers to the case of *Excelsior Commercial and Industrial Holdings Limited*, a decision of the Court of Appeal reviewing the jurisdiction. The note states:

> "In the *Excelsior Commercial* case, the Court declined to give detailed guidance as to the principles to be applied by judges intending to make orders for costs on the indemnity basis, taking the view they should not strive to replace the language of the rules with other phrases and that the matter should be left so far as possible to the discretion of judges at first instance. The Court held that the making of a costs order on the indemnity basis would be appropriate in circumstances where: (1) the conduct of the parties or (2) other particular circumstances of the case (or both) was such as to take the situation 'out of the norm' in a way which justifies an order for indemnity costs."

The expression "out of the norm" is taken as referring to the conduct of the litigation, or conduct before the litigation starts, which is not regarded as the ordinary and reasonable conduct of proceedings.

16 Notwithstanding the Court of Appeal's reluctance, Tomlinson J, in the *Three Rivers v Bank of England* case, identified a number of factors which should be regarded in appropriate cases as relevant to the judge's discretion whether or not to order costs on the indemnity basis. These include the following:

> "(4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations."
> (5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.
> (6) *A fortiori*, where the claim includes allegations of dishonesty, let along allegations of conduct meriting an award to the claimant of exemplary damages, and those allegations are pursued aggressively *inter alia* by hostile cross-examination.
> (7) Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that is a further ground."

17 In a case called *National Westminster Bank v Rabobank Nederland (No. 2)* [2007] EWHC 1742 (Comm), Sir Anthony Colman, sitting in the Commercial Court of the Queen's Bench Division, made the following observations. He said:

> "Where one is dealing with the losing party's conduct, the minimum nature of that conduct required to engage the court's discretion would seem, except in very rare cases, to be a significant level of unreasonableness or otherwise inappropriate conduct in its widest sense in relation to that party's pre-litigation dealings with the winning party or in relation to the commencement or conduct of the litigation itself. It is important to distinguish in Tomlinson J's formulation of relevant considerations between that of underlying concept and his identification of examples of more specific patterns of conduct capable of rendering a party's overall conduct relevantly unreasonable or inappropriate. Grounds (4) to (8) inclusive are specific examples of conduct which, taken alone, or in combination, may in all the surrounding circumstances often be capable of giving rise to a conclusion that the losing party's conduct has been so unreasonable or inappropriate overall as to justify an order which gives him a more effective costs indemnity than would be the case under the standard order. But in each case in which the costs of the whole litigation are under consideration, the conduct adversely criticised must be looked at in the context of the entire litigation and a view taken as to whether the level of unreasonableness or inappropriateness is in all the circumstances high enough to engage such an order."

18 Mr Gledhill QC points to a number of factors which he says amply justify an exercise of discretion in favour of indemnity costs. He points first to the serious allegations of bribery, with the potential, whether found to be justified at trial or merely alleged in the pleaded case, for very serious consequences for the person against whom the allegation was made. Second, he says that the material pleaded in support of the bribery allegation was slender, which is a hallmark of speculative or tactical claims. Third, he says that the case was supported or based on false evidence given by Mr Tutton on behalf of Sheffield United Limited. Fourth, he points out that bribery was also a major plank of an interim application for evidence preservation orders, again with Mr Tutton's evidence relied on. Fifth, he says that it became clear during the trial that the pleaded allegation did not stack up but, nevertheless, there was no attempt to withdraw it or make a proper amendment to the pleaded case. Sixth, the final manifestation of the improper conduct allegation only emerged with any clarity on day 18 of the trial. Seventh, that it was, in the circumstances, hypocritical of Sheffield United Limited to make an allegation against Prince Abdullah of abusing his position when the evidence was very clear that Sheffield United Limited was perfectly content for Prince Abdullah to do what he did. Eighth, he points out that, in addition, third parties, who had no other connection with the proceedings, were sucked in and forced to disclose documents and give evidence in order to deal with the allegations, and, finally, that the ensuing publicity about the funding that Sheffield United Limited obtained in Saudi Arabia has proved to be damaging to the club.

19 I accept that all those allegations and criticisms are appropriately made in this case. The consequence was that, on the basis of false evidence, an attempt was made to establish a link between Charwell, the lender, and Dr Rakan, who had had dealings with Prince Abdullah. There were also criticisms in relation to other factors, and I consider that the following criticisms are well made: first, that the allegation against Mr Giansiracusa, that he caused company money to be misapplied in paying Mr Bettis' wages, was unrealistic and improper

and a serious allegation to make; second, that an attempt to raise an issue of forgery during the course of the trial was an improper attempt to ramp up the pressure on Prince Abdullah. I refused to allow that application to go forward on the basis that the matters raised simply did not go to the issues that I had to decide.

20 Mr Downes QC, opposing the application, emphasises that I must, whatever I think of the bribery allegations, take a view of the content of the petition as a whole and he emphasises the passage that I have just read from the *NatWest v Rabobank* case. He says that, viewing the petition as a whole, these proceedings were not conducted in a way that was out of the norm. He identifies other specific content of the petition which were also, in their own right, important matters that had to be investigated, such as the allegation of quasi-partnership, advice that was given to Mr Bettis about the existence of a claim against the company, the appropriateness of the company having to pay Savannah's fees and indeed the "scheme" as I have called it in the judgment, that is to say the attempt by UTB to prevent the operation of cl.9.1.2 of the ISA. He also invites me to bear in mind criticisms that I made in the course of my judgment of the failings of the UTB defendants to give full evidence and full disclosure on certain matters.

21 It seems to me what I need to do is to assess the proportionate importance of the issues that I have found to be rightly criticised as regards conduct in the context of all the matters that were the subject of the petition and try, if I can, to form a view as to the extent to which the greater part of the costs were incurred in relation to the criticised matters. In performing that exercise, I make quite clear that if the criticised matters had been the only subject of the petition, then I would undoubtedly have exercised my discretion to order costs on the indemnity basis because, as I have said, the criticisms that were made in that regard are well-founded.

22 Despite the fact that there were a number of other important issues that were the subject matter of the petition and of which no equivalent criticism can be made of their pursuit, I do find that the allegation of bribery took a disproportionate amount of the time in the preparation for and the conduct of the trial, because it assumed such apparent importance as a basis on which Sheffield United Limited was seeking relief for unfairly prejudicial conduct. The other matters in issue, apart from the payment of Mr Bettis' wages, which I have also similarly criticised, were issues that properly had to be investigated and on which, as it happened, Sheffield United Limited failed. But, in terms of the potential weight of the bribery issue and the much reduced likelihood of success based on the other issues, the bribery allegations in my judgment were by far the most important issues in the petition. It is evident that Sheffield United Limited focused a great deal of time and energy in pursuing those issues.

23 In those circumstances, I consider that it is appropriate to make an order for the costs of the petition to be paid on an indemnity basis. The allegations, as I have said, were extremely serious. There was no proper foundation for bringing them in the first place before any disclosure of documents had been obtained that might cast some light on them, or other investigations were made, and, as the trial proceeded, both before the start of the trial and during the trial, it became very clear that the allegations of bribery as pleaded could not possibly succeed. In those circumstances, they should have been withdrawn, or some other more limited allegation of improper conduct substituted for them. They assumed such a prominent part in the proceedings that I heard and were such an important part of UTB's case on the petition that I consider that an order for indemnity costs is appropriate on the petition, even though there were other allegations that were not tainted with similar criticism.

24 That leaves to be dealt with the costs of certain applications that were made before and during the course of the trial. There were two applications before the trial, heard by the Chancellor, one for specific disclosure and one for an amendment of Sheffield United Limited's pleaded case. In relation to each of those, the Chancellor made an order of costs in the case. Nobody seeks to disturb the order in relation to the amendment, but Mr Downes invites me to substitute for the first order an order that there be no order as to costs. He does so on the basis that the Chancellor did not have before him, as I did at trial, a full picture of the extent of the shortcomings in the disclosure of the UTB parties, and that had the Chancellor had that material available to him, he could and would have made some different order. In other words, the application is effectively made under r.3.1(7) of the Civil Procedure Rules, on the basis of a misstatement of facts on which the decision was based.

25 However, from considering the quite lengthy judgment that the Chancellor gave on that occasion, it is apparent that the matter to which inadequate disclosure related was only a very small part of the material and only one out of several issues that the Chancellor had to consider. By far the largest part was the question of whether otherwise privileged material should be disclosed in these proceedings. The part of the application arguably infected by the lack of appropriate disclosure by UTB was really quite small and, in those circumstances, it does not seem to me to be appropriate to vary the Chancellor's order.

26 There were two applications made at trial. One was for relief against sanctions in relation to the calling of expert evidence on a forgery allegation; the second was an application for specific disclosure. The first application I rejected, as I have mentioned. The second application, in the event, was not pursued.

27 The application made is in relation to the fourth application, again, that there should be no order for costs in relation to the specific disclosure application. In my judgment, there is no proper reason why the costs of that application should not be treated as costs in the case. An application was made, a response to it was given on behalf of UTB and, in those circumstances, Sheffield United Limited decided not to pursue their application. I consider, in those circumstances, that those costs should be treated as part and parcel of the costs of the trial itself and similarly in relation to the application for relief against sanctions.

28 In those circumstances, I am invited to make a specific order that the costs of each of those applications be costs in the case, since neither of those applications was covered in the parties' costs budgets, and it seems appropriate to me to make that order and I will do so.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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