



Neutral Citation Number: [2019] EWHC 3219 (Ch)

Case No: HC-2014-000954

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

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

Date: 25/11/2019

Before :

THE HONOURABLE MR. JUSTICE FANCOURT

Between :

BTI 2014 LLC

Claimant/Respondent

- and -

(1) PRICEWATERHOUSECOOPERS LLP

First Defendant/Applicant

(2) WINDWARD PROSPECTS LIMITED

Second Defendant

Approved Judgment

JUDGMENT ON CONSEQUENTIAL MATTERS

ARISING FROM JUDGMENT DATED 15.11.19

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MR JUSTICE FANCOURT:

1. I handed down judgment on 15 November 2019 giving my reasons for dismissing PWC's application dated 26 March 2019 to strike out the claim against it, alternatively for summary judgment to be entered in its favour ("the Application").
2. I have received detailed written submissions in relation to the following matters:
 - a. the appropriate disposal of a similar application to strike out and for summary judgment dated 27 July 2015 ("the 2015 Application");
 - b. the costs of the 2015 Application;
 - c. the costs of the Application;
 - d. interest on costs;
 - e. the amount of any interim payment on account of costs; and
 - f. permission to appeal and a stay of the requirement to file a defence.

I shall deal with each of them in turn.

Disposal of the 2015 Application

3. The 2015 Application was made on somewhat different grounds from the grounds of the Application. This was because different allegations in certain respects were made in the original particulars of claim and because it pre-dated the judgment in the Sequana trial. The particulars of claim were amended following that judgment. In the light of that judgment and the later decision of the Court of Appeal, PWC issued the Application in different terms.
4. On 15 October 2015, BTI offered to allow PWC to withdraw the 2015 Application on the basis of no order as to costs, on terms that no further application to strike out should be made. PWC declined but offered instead to adjourn the application and stay the claim until after the Sequana trial. This was agreed by BTI. The claim was further stayed until after the decision of the Court of Appeal was known.
5. The 2015 Application was formally restored before me, so that the costs of that application could be addressed, but no argument was directed to its grounds because these had been superseded by the outcome of the Sequana litigation, by the amendments made to the particulars of claim and by the terms of the Application.
6. PWC has not pursued and will not pursue the 2015 Application and it should formally be dismissed rather than left undetermined.

Costs of the 2015 Application

7. BTI seeks its costs of the 2015 Application as part of an order for payment of its costs in connection with PWC's unsuccessful attempts to strike out the claim against it. PWC submits that, although BTI has succeeded in overall terms, a number of the grounds of the 2015 Application fell away as a result of amendments made to the particulars of claim.

8. Only one of the 4 grounds pursued by PWC at the hearing was substantially the same as a ground of the 2015 Application: the “no loss” argument. The more substantial grounds based on abuse of process; no additional evidence; no legal causation (reliance), and the scope of the duty of care (the SAAMCO point) either arose from the Sequana judgment or were different in any event from the grounds in the 2015 Application.
9. In the circumstances, I consider that it would be unfair and wrong to treat all the costs of the 2015 Application as effectively costs of the Application. Since the 2015 Application was not heard, BTI cannot say that it was the successful party in that regard even though it succeeded in overall terms in preserving its claim. Given that the grounds in the 2015 application have not been argued, I cannot assess which would have succeeded and which would have failed, other than the “no loss” argument. It is however accepted by BTI that at least in 3 cases (and PWC says more) the ground on which PWC relied was taken away by the amendments to the particulars of claim.
10. Finally, no substantial costs will have been incurred in connection with the 2015 Application after BTI’s 15 October 2015 letter.
11. In the circumstances, I consider that the costs of the 2015 Application should be costs in the case.

The costs of the Application

12. BTI seeks its costs of the Application. PWC submits that the right order would be BTI’s costs in the case. It argues, in effect, that despite the outcome of the Application, PWC might be proved right at trial: in particular that there is nothing more in BTI’s case against it than there was in BTI’s case against Sequana and the Directors, and that once the facts are found it might succeed on its argument about the scope of the duty of care.
13. In my judgment, while acknowledging that PWC might well succeed in one or other of these ways, or for some other reason, that is not a good reason to refuse BTI its costs of a substantial interlocutory application on which it has wholly succeeded. PWC must pay BTI’s costs of the Application, to be assessed on the standard basis if not agreed.

Interest on costs

14. Since I have not awarded BTI its costs of the 2015 Application, all the costs that PWC must pay were incurred in or from March 2019, when the Application was issued. The significant majority of these were only incurred in or about October and November 2019
15. In my judgment, there is therefore no sufficient reason to require PWC to pay interest on costs before the judgment date. BTI will only have been out-of-pocket for a matter of a few months at most, and for the most part less than that, at a time when interest rates remain very low. There is no need for an express order entitling BTI to interest on costs from the judgment date.

Interim payment of costs

16. PWC does not dispute that there should be an interim payment on account of the costs of the Application.
17. BTI's costs of the Application are in the eye-watering sum of £1,015,722.79. That amount is in addition to costs of £319,435.77 said to have been incurred on the 2015 Application. BTI sought an interim payment of £700,000, but this was in relation to the costs of the 2015 Application and the Application together.
18. PWC criticises, in particular, the apparently substantial duplication in the number of fee earners working on the case at BTI's solicitors; the inordinate length of the evidence adduced on the Application by BTI; the unnecessary use of two Silks on the hearing and, in general terms, the disproportionate amount of fees in comparison with the issues raised by the Application. PWC's total costs, in comparison, were £276,385.
19. Although the Application raised complex matters of fact and law, I am satisfied that – even in the context of litigation about very large sums of money – some of the costs incurred will be held to be disproportionate and/or unreasonable in amount or unreasonably incurred. It is impossible, with a short summary of the costs incurred, to make an accurate assessment of these matters, but I propose to take a conservative approach in the absence of any evidence or detailed explanation of why such large sums were incurred (in contradistinction to mere assertion that this was major commercial litigation with large sums at stake and a substantial matter).
20. I will therefore order PWC to pay £350,000 on account of costs within 14 days.

Permission to appeal

21. I grant permission to appeal on grounds 1 and 2 in PWC's Grounds of Appeal document dated 22 November 2019.
22. I refuse permission to appeal ground 3. For the reasons given in my judgment, the Application raised a novel argument in a notoriously difficult area of law, which appeared doubtful in any event, but it requires to be assessed in the context of the full facts about PWC's audit work and the interaction between its employees and the Directors at the relevant times.
23. On the basis that permission to appeal has been granted in relation to the abuse of process argument, PWC submits that there should be a stay (in effect) of the order of Mann J made on 3 July 2015 requiring a defence to be pleaded within 2 months of the determination of the 2015 Application. Pleading to the very long amended particulars of claim will be a substantial exercise and involve considerable costs. If the appeal were to succeed, it would be wasted effort and money. On the other hand, the subject matter of this claim is somewhat stale – events in October 2008 and May 2009 – and further delay is undesirable. BTI submits that it would be good for the additional costs, in the event that the appeal succeeded, and PWC does not suggest otherwise.
24. On balance, I consider that the requirement to serve a defence should be stayed. If, as PWC assert the claim is abusive, it should not be required to engage with it. The grant of a stay would in any event only save the time required after the dismissal of the appeal to close the statements of case, since it cannot realistically be expected that,

with an appeal pending, the parties should embark on the preparation for costs management and disclosure review documents and hold a case management conference.

25. I will therefore extend the time for service of PWC's defence to 2 months after judgment is handed down by the Court of Appeal (or after withdrawal of dismissal of the appeal, if sooner).