Neutral Citation Number: **[2022] EWHC 2969 (Comm)**

Case No: **CL-2018-000297, CL-2018-000404, CL-2018-000590, CL-2019-000487 & CL-2020-000369**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Date: **21 November 2022**

Before :

Mr Justice Foxton

- -

Between :

SKATTEFORVALTNINGEN (THE DANISH CUSTOMS AND TAX ADMINISTRATION) ("SKAT")	**Claimant**
- and -	
SOLO CAPITAL PARTNERS LLP (IN SPECIAL ADMINISTRATION) & OTHERS	**Respondents**

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- -

James Goldsmith KC, Abra Bompas, Theo Barclay, James Russell and Matthew Hoyle (instructed by **Pinsent Masons LLP**) for the **Claimant**
David Head KC and Tom De Vecchi and Sophia Dzwig (instructed by **DWF Law LLP**) for **the DWF Defendants**

Hearing dates: **21st November 2022**

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RULING 3

Mr Justice Foxton Monday, 21 November 2022
(**15:44** pm)

Ruling by **MR JUSTICE FOXTON**

1. An application has been made by the DWF defendants, and so far as I am concerned today only by the DWF defendants, for a costs order in their favour to be subject to either immediate assessment or at least a payment on account relating to the costs of what has been called the beneficial ownership case. That case was originally advanced by SKAT in circumstances which I will explain, but was then abandoned, as recorded in the order made at the May 2022 CMC.

2. The argument on this application for the costs has occupied the court for the best part of half a day, which at least enables me to understand why the trial estimates for the resolution of this case are what they are.

3. By way of a summary of the relevant principles, which essentially were not in dispute, the court has a discretion when a party ceases to pursue part of its case that it was previously pursuing, but without any determination by the court as to the merits of the abandoned case, as to whether to make any costs order at that point, and if so, what order to make. Mr Justice Pepperall in *RG Carter Projects Limited v CUA Property Limited* [2020] EWHC 3417 (TCC) at [10]-[11] addressed the position of a party who abandoned a cause of action as follows:

> "10. In many instances, an order for the costs of and caused by (or, as we used to say, occasioned by) an amendment or (as PD 17 puts it) the costs of and arising from the amendment, will meet the justice of the case. There will, however, be cases where the amendment abandons a particular cause of action that the defendant has spent a significant sum defending. Even in such cases, sometimes the amended statement of case will still pursue other causes of action arising out of the same facts, or the amendment will essentially just put a new label on previously pleaded facts such that the earlier costs have not been entirely wasted ...
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> 11 Yet in other cases, the cause of action is simply abandoned, and substantial costs will have been wasted. An award of costs on the conventional basis would, in such cases, cover the defendant's costs of amending his defence to delete the now redundant answer to the abandoned plea, but would not recompense such defendant for the costs of investigating the original case or of pleading the first defence. On such facts, the usual order would not be just and the appropriate order will often be to award the defendant not just the costs of and caused by the amendment, but also the costs in respect of the abandoned cause of action."

4. It has also been said by Mr Justice Marcus Smith in *Genius Sports Technologies Limited v Soft Construct (Malta) Ltd* [2022] Cost LR 825 at [14] that orders for assessment and payment of costs along the way when an issue which has been raised is abandoned will be rare.

5. The reality is that each case is going to turn on its own particular facts and I think it can fairly be said that the circumstances of this litigation are so singular that the benefit to be gained from general statements of principle is rather less than might otherwise be the case.

6. One point which Mr Justice Marcus Smith did make when explaining why such orders are rare was because "the process of identifying in the course of proceedings what costs relate to which deletions will be time consuming, cumbersome and generally speaking unjust" ([14(c)]). However, the extent to which that is the case will depend both upon the nature of the issue abandoned and also on the nature of the costs order which the court decides to make.

7. It has also been said that a trial judges will often be best placed to determine the incidents of costs following an abandoned issue and I was referred in SKAT's skeleton argument to the decision in *AB v Goldsmith Williams* [2015] EWHC 1559 (Ch) [21]-[22] which contains an observation to that effect. Once again, the force with which that observation applies will vary from case to case. I should note that judges hearing interim applications very often think the trial judge is best placed to decide a whole range of points. Trial judges who then come to those points many years on, when they are at best a footnote in the ancient history of the case, are not always persuaded of the wisdom of the earlier choice. A trial judge dealing with consequential issues in a case such as this is going to have a vast amount to do, it is important to bear in mind the very lengthy period of the time which will elapse in this case before any consequential costs issues will be determined in costs. That period will be measured in years: quite how many years will be the subject of a further hearing before Mr Justice Andrew Baker next week.

8. I will now explain the background to the issue which is no longer pursued. In its original Particulars of Claim, SKAT alleged that the defendants had made a representation, and advanced four grounds for saying that the representation was false. Part of one ground was that a representation had been made as to the defendants' beneficial ownership of certain companies (as that term is understood in the context of international taxation treaties) which was false and fraudulent. That issue generated a number of pages of pleading by SKAT and the DWF Defendants and raised a distinct area of enquiry in relation to the ambit of the concept of "beneficial ownership" as a matter of international tax law. That ground of falsity has been abandoned.

9. There was some debate (it is fair to say initiated by me), as to whether an attempt to introduce such an allegation, had it not been pleaded before, would have involved the addition of a new cause of action for limitation purposes. I was referred, thanks to some lunchtime diligence, to the decision of the Court of Appeal in *Savings & Investment Bank Ltd v Fincken* [2001] EWCA Civ 1639, [35], which at least on one reading might support the view that a fresh particular of falsity of the same misrepresentation will never involve the addition of a new cause of action.

10. For my part, I think that it is important to look at how significant and discrete the new particular or allegation of falsity before it is possible to determine whether it involves a new cause of action or not. Indeed, in that case the Court of Appeal were keen to stress that it was the essential facts which it was important to have regard to in answering this question. In that case, h the essential facts were an alleged failure to disclose assets. One can well see that, materially, the identification of a further asset in the form of a shotgun called "the Boss" would not be regarded as sufficiently discrete or substantial to involve adding a new cause of action. I am far from persuaded that it can never be the case that an addition of a new ground of particular falsity will involve asserting a new cause of action if that ground is sufficiently discrete, substantial and distinct from what is already there. In *Steamship Mutual Underwriting Ltd v Trollope & Colls Ltd* (1986) 6 Con LR 11, page 36, May LJ stressed that the answer to the issue of whether a new cause of action has been introduced can be "a matter of degree".

11. But I do not need today to decide whether or not abandoning this aspect of the misrepresentation case involved abandoning a cause of action. It was common ground that this factor was one which would have weight as part of the overall assessment, rather than an all or nothing effect. I am satisfied that the beneficial ownership issue was sufficiently discrete in many of its aspects and, in particular, the issues of international taxation law to which it gave rise, to come quite close to the abandonment of a cause of action for the purposes of determining what approach to adopt to the costs of the abandoned case.

12. I accept, however, on the basis of the passages in the pleadings that Mr Goldsmith has taken me to, that the underlying factual investigation of what was going on in the interaction of the defendants with these various companies remains, or very substantially remains, a significant part of this trial when looking at allegations made of whether there was actual, rather than beneficial, ownership and whether particular transactions were shams or genuine.

13. For that reason, I accept that I need to approach any request for a costs order at this stage in relation to that issue with circumspection, and that I must try and find a way of dealing with the issue which does not award the costs of that factual enquiry, or require difficult judgments to be made now of how to allocate overlapping costs.

14. Before considering where that approach should take me, I should deal with some of the grounds of objection taken in principle by SKAT to any costs order being made at this stage.

15. First, it is said that the allegation of beneficial ownership was made at an early stage when SKAT had limited visibility of the underlying issues, that the point was reasonably advanced and is now not pursued for sensible reasons, namely SKAT's overwhelming confidence in its prospects of success on the matters that remain. It is very difficult for a court to grapple with arguments as to why a party, for its own privileged reasons, has decided not to pursue a particular point it had previously raised. In any event, it is often falsely simplistic to suggest that a decision not to pursue a point has a single reason rather than being the outcome of a multifactorial analysis. I do not accept that it is necessary for me to find that the decision to advance the case in the first place was unreasonable before it would be possible to make a costs order following its abandonment, given that I am satisfied that this was a discrete and significant issue.

16. It is also said that if the case had been pursued to trial, then the court might well have refused to make a costs order in the DWF defendants' favour had the allegation failed, but SKAT’s case generally succeeded. It is necessary to approach with caution the suggestion that costs orders at the interim stage must mirror the position had matters proceeded to trial and there had been partial success and partial failure at that stage. In fairness, Mr Goldsmith did not seek to push the analogy too far, but said it was a matter of weight. I accept that. The issue is how much weight it has in this case. A factor which might be said to weigh in the contrary direction is the increasing desire in this court, in particular, to encourage parties to focus on the essential issues in a case, and to seek to visit the consequences of adverse decisions or abandoned cases at an earlier stage in the trial rather than at the end of the process.

17. Further, one point that bears particularly heavily on me in this case is quite how long it will be before issues of costs will come home to roost in the wider sense. That is a unique feature of

this case and one which in my view makes it appropriate for the court to grapple rather more readily than it otherwise would with a request for a costs order now when a significant part of SKAT's case has been abandoned.

18. SKAT also says that beneficial ownership issues remain in the case. As I have said, so far as the underlying factual allegations are concerned, I am persuaded that is likely to be right, but so far as the legal expert issues raised as to the scope of the concept of beneficial ownership within relevant double taxation treaties, I am not, at least so far as the DWF defendants are concerned.

19. It does appear to be the case that the Godson and Jain defendants continue to advance a positive case that the withholding tax applicants were the beneficial owners of shares or dividends and that has itself driven reference to that question in the expert issues. But the expert issues are prefaced in the relevant respects with the words "if relevant and admissible" and it became apparent from a straw poll conducted in court today that certainly neither SKAT nor the DWF defendants believe that either of those criteria are met. I was also taken to a reference in the Danish taxation report produced for the DWF defendants, which contains a glancing reference to the concept of beneficial ownership in the double taxation treaty, but (as I read that passage) only for the purposes of interpreting the document rather than any consideration of what the true scope of beneficial ownership is, as a matter of international tax law.

20. Standing back, I am satisfied that it is appropriate to make some form of immediate costs order in favour of the DWF defendants here, but one of rather lesser scope than that for which they seek, in part because of the need to avoid awarding costs of investigating underlying facts that remain in issue and in part, because it seem to me appropriate to meet the concern Mr Justice Marcus Smith raised by having a very focused enquiry at the costs stage.

21. The order that I am satisfied is appropriate is one that will be limited to the expert costs in relation to the beneficial ownership allegation that have now fallen away as a result of the abandonment of that allegation and of costs directly concerned with that expert exercise. The fees of experts directed to the beneficial ownership issue, the costs of instructing those experts and reviewing their reports and attendance with them are all potentially capable of falling within the costs order I propose, but not underlying factual investigations conducted for the purpose of briefing the experts and so forth.

22. I should also state that when it comes to quantifying the order made at this stage, any doubt as whether costs fall within the ambit of my order is going to be exercised in favour of limiting the payment on account at this stage. It may well end up being nothing more than the US pension experts' costs that have been identified as a particular cost, although it may go wider than that. The proof of the pudding will be when I see some submissions put forward as to what costs are said to fall within the ruling I have given.

23. In order to move matters forward, I am going to ask the DWF defendants, within a period to be discussed, to serve a further submission identifying which costs they say are either expert costs or directly related to the expert costs of the legal technical issues of beneficial ownership raised and abandoned, then give SKAT a set period of time to respond to those, a short period for reply and then resolve the dispute on paper. I am also satisfied that the appropriate way of proceeding is by way of payment on account rather than a separate assessment at this stage.

24. There is one further matter I should mention. The sheer scale and length of these proceedings undoubtedly has very significant cash flow implications for defendants having to fund their legal costs along the way. That is not to suggest that an order should be made adverse to SKAT simply because it is litigating with much greater resources than other defendants. But it does make it proportionate in a case such as this to award the payment on account at this comparatively early stage comparatively when it might not be in many other cases.