

Neutral Citation Number: [2022] EWHC 846 (Comm)

Case No: CL-2018-000026

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 18 March 2022

Before :

Mr Justice Henshaw

Between :

Roman Pipia	<u>Claimant</u>
- and -	
BGEO Group Limited (formerly known as BGEO Group plc)	<u>Defendant</u>

Roman Pipia (instructed by **Giorgi Pipia**) for the **Claimant**
Sonia Tolaney QC and Alexander Polley (instructed by **Freshfields Bruckhaus Deringer
LLP**) for the **Defendant**

Hearing dates: **18th March 2022**

APPROVED JUDGMENT

Mr Justice Henshaw
(12:21 pm)

Friday, 18 March 2022

Judgment by **MR JUSTICE HENSHAW**

Introduction

1. The defendant, to whom I shall refer as “*BG*”, applies to vary a costs order made in its favour following the dismissal of the claim against it by the claimant, Mr Pipia, and for summary assessment of its costs of the proceedings.
2. The existing order provides for a detailed assessment of BG’s costs with a payment on account of £7,567,265. Nothing has been paid by Mr Pipia, over and above money which was already in court by the date of that order. BG’s evidence is to the effect that enforcement of any order against Mr Pipia based on an order for payment on account may be difficult in practice in Georgia.
3. BG therefore wishes, if possible, to avoid the time and expense of a protracted detailed assessment, which may be of limited practical value. BG understands that a final costs order is more likely to be enforced in Georgia than an interim order for a payment on account.
4. BG’s application was issued in November 2021, supported by a witness statement of Samantha Trevan, a partner in BG’s solicitors, Freshfields. She has had the conduct of the matter since at least February 2019, according to the monthly breakdown provided in BG’s updated schedule of costs.
5. The claimant, to whom I shall refer as “*Mr Pipia*”, responded to the application by a three-page letter dated 29 November 2021, indicating that he was by then unrepresented by legal counsel, although he had had assistance from lawyers. The letter said Mr Pipia had also been assisted by his son, Mr Roman Pipia, because Mr Pipia himself does not speak English.
6. At the present hearing, which took place remotely, I heard oral submissions from leading counsel for BG and Mr Roman Pipia has made submissions in person via an interpreter, for whose help I am most grateful.

Background

7. The background to the application in outline is this. Mr Pipia brought a claim against BG and initially seven other defendants in March 2018, claiming damages initially of around USD 1 billion for alleged Georgian law delicts arising out of the enforcement of a credit line agreement by the lender, Bank of Georgia, an indirect subsidiary of BG, against a company with which Mr Pipia was associated and which was one of the borrowers.
8. The trial of Mr Pipia's claim was listed for eight weeks commencing in April 2021 before Cockerill J. Both parties instructed teams of counsel for trial. BG instructed a QC and two juniors, while Mr Pipia instructed a QC and three juniors. Mr Pipia's solicitors at the time were Steptoe & Johnson. BG's solicitors were, as they have been throughout the litigation, Freshfields.
9. Security for costs had first been ordered by Moulder J in February 2019, after a contested hearing, and there were unsuccessful attempts by Mr Pipia to appeal her decision. Subsequently, tranches of security had been paid during the course of the litigation, in the ordinary way, by agreement. However, Mr Pipia sought to resist payment of the final tranche, which covered the trial preparation and trial periods, and so BG made an application in respect of that tranche at the pre-trial review on 26 March 2021.
10. Cockerill J granted the application and ordered Mr Pipia to pay a further £3.8 million by 16 April 2021, which was the working day before trial. No attempt was made by Mr Pipia to appeal or vary that order for further security for costs. Nonetheless, no further security was paid, and instead Mr Pipia's solicitors sought to come off the record on 16 April 2021.
11. On the first day of trial, 19 April 2021, BG sought an order that Mr Pipia's claim be struck out for non-compliance with the security for costs order. Mr Pipia, himself and through Steptoe & Johnson, sought to resist such an order. Cockerill J made an Unless Order, requiring compliance within 48 hours. Mr Pipia indicated on 20 April 2021 that he would not comply, and he did not do so.
12. Accordingly, the effect of Cockerill J's order of 20 April 2021 was that the claim was struck out at 4 pm on 21 April 2021.

13. Cockerill J made a consequential order, including in relation to costs, on 29 April 2021, though dated 22 April 2021, having received written submissions from both sides. BG now seeks to vary that consequential order in so far as it deals with costs.
14. Subsequently, Mr Pipia, through new solicitors and one member of his former counsel team, sought to appeal against Cockerill J's order striking out his claim. His application for permission to appeal was dismissed by Males LJ on the papers on 16 June 2021. Mr Pipia's new solicitors then ceased to act, with the result that Mr Pipia became a litigant in person and remains so.

The consequential order, costs schedule and updated costs schedule

15. When making the consequential order Cockerill J had before her a schedule of costs in support of BG's application for a payment on account, estimating (at high level) BG's total costs of defending the proceedings. The schedule estimated BG's costs at £16,816,146.
16. Ms Trevan has explained in her witness statement that that schedule, on further review, was found to contain some omissions and other errors, so that once the net effect of the adjustments are included, the true costs were slightly higher, standing at £17,028,242. Ms Trevan explains in her witness statement that an exercise has now been carried out by senior costs personnel to verify all the figures relied on, so that the court can be confident that they are correct. She says that since the vacation of the trial, Freshfields has completed an exercise of updating and reviewing the costs incurred in the proceedings. The exercise has been carried out by a senior costs lawyer, with over 29 years experience, at her firm, who has conducted a more detailed analysis of the costs position, including with the benefit of further invoices that were not produced until after the trial had been vacated.
17. As a result of that exercise, a more detailed costs schedule was produced for the purposes of the present application and is exhibited to Ms Trevan's witness statement. The updated schedule breaks the costs down on a monthly basis, providing detail as to the fees incurred by Freshfields and disbursements including counsel's fees.

18. There is a short narrative accompanying each monthly breakdown, which sets out the key areas of work undertaken during the relevant time period. The schedule sets out deductions to be applied where the costs of interim applications have already been assessed.
19. Ms Trevan has also explained the three areas of difference between the updated schedule and the original schedule, giving details of these. One of these, which was mentioned during argument today, arose from the mislabelling of a third-party invoice as an invoice of BG's expert, but this and other errors have been corrected in preparing the updated costs schedule. Ms Trevan apologises for these inadvertent errors, and reassures the court that a robust verification exercise has now been carried out by senior and experienced costs personnel at Freshfields to ensure that errors have been corrected and that no further errors exist.
20. Ms Trevan further explains that the costs have been updated to reflect actual amounts Freshfields invoiced to BG since 21 April 2021, and further disbursement invoices that had not been provided to Freshfields or to BG until after the trial had been vacated, but in both cases relating to work done before the trial was vacated. Those particular matters increase the costs originally claimed by approximately £1.175 million. Although Mr Pipia made the point that BG had not explained at the time of putting forward the original costs schedule that there may be more costs to follow, the explanation provided indicates that that was at least in part because there were costs that were not known at the time and, in any event, I am satisfied that the costs were in fact incurred. Indeed, Ms Trevan confirms expressly that all of the fees and disbursements set out in the updated costs schedule have been billed to BG. Ms Trevan points out that the bottom line figure in the updated costs schedule is only some £212,095 greater than the original bottom line figure, which in the overall context of costs of this level is not a highly significant one.
21. Ms Trevan adds that the figure of £17,028,242 that I have just mentioned does not take account either of interest on costs pursuant to the order made by Cockerill J, nor to post-judgment interest on the amount ordered to be paid in the consequential order.

22. Returning to the chronology. Cockerill J ordered Mr Pipia to pay BG's costs of the proceeding on the standard basis and ordered detailed assessment of those costs, as BG at that stage requested. Based on the estimated costs she had before her, the judge also made an order for a payment on account, which had been resisted by Mr Pipia. In her written reasons for the consequential order, the judge explained as follows:

"Payment on account: This is not an oppressive application. It is the normal course where a claim has failed and summary assessment of costs is not possible. As to amount, the usual range for payment on account is somewhere below the 60-70% range often used on ordering security for costs, because of the stage now reached, where a degree of caution in favour of the paying party comes more to the fore. In this case, the costs are very high indeed and indicate that recovery on assessment may very well fall below the usual range. In those circumstances, a payment on account of 45% seems to be appropriate."

23. Accordingly, Cockerill J ordered a payment on account of £7,567,265, but also ordered that sums already held by the court office in respect of security should be released in partial satisfaction of that order. That left a net sum of £4,410,232 outstanding, which under the order was due to be paid by 6 May 2021. As I have indicated, none of that amount has been paid.

BG's application.

24. BG seeks to vary the consequential order so to remove the existing direction for detailed assessment and an interim order for payment on account, and instead substitute the following orders:

(1) a summary assessment of BG's costs of the proceedings in the sum of £7,567,265, i.e. the amount ordered by way of payment on account;

(2) an order to treat the sum of £3,157,033 already released to BG from the court as partially satisfying that final costs order; and

(3) an order for Mr Pipia to pay the balance of £4,410,232.37 within 14 days.

25. BG accepts that in order to vary the order in this way, it must show a material change of circumstances. The circumstances in which such a principled exercise of discretion may arise are not prescriptively defined but have been said to require, "*something out of the ordinary ... especially*

in the absence of a change of circumstances in an interlocutory situation" (see *Tibbles v SIG* [2012] 1 WLR 2591 (Court of Appeal) at paragraph 39). It is apparent from that decision that a material change of circumstances may be a sufficient basis in order to justify the variation of an order where appropriate. It is in fact arguable (at least) that a material change in circumstances is not a *sine qua non*, in other words that the circumstances set out in *Tibbles* are non-exhaustive, but it is unnecessary to consider that point further on the present application.

26. Mr Pipia has suggested in his letter that there is in reality no material change in the circumstances.

27. BG accepts that there has been no change in the position in principle as regards enforcement, but submits that there have been three main relevant changes of circumstance.

28. The first is that Mr Pipia has failed to comply with the existing order for a payment on account.

29. The second is that since the consequential order was made, Mr Pipia has reinstructed lawyers and then become once again a litigant in person, and has shown no inclination to comply with the costs order made against him: despite legal advice presumably received during the four months when he was legally represented in that period, and despite the fact that he did actively participate in the proceedings by seeking permission to appeal the decision to strike out his claim.

30. The third point relied upon by BG is that the total amount of costs to which it contends it would be entitled on a detailed assessment has slightly increased, now that the calculations have been finalised and checked in a way that was not practicable at the time of the consequential order.

31. I do not regard that third point as a particularly significant one in this context. However, I do agree with BG that the key point is that, notwithstanding repeated chasers from Freshfields, Mr Pipia has not made any payment at all of the sum ordered to be paid on account by the consequential order, which was a very substantial sum of money due to BG. That strongly supports the view that to embark on a detailed assessment of the costs of the action would require BG to throw more good money after what may well be bad. That, in turn, significantly affects the balance of costs and benefits for the parties in having a detailed assessment, as well as the interests of court resources and

other court users in avoiding a long and potentially entirely futile costs assessment process. (It is pertinent to note here that in *National Crime Agency v Namli* [2013] EWCA Civ 1876, a failure to make a payment on account of costs in breach of an order to do so was regarded as a particularly significant change of circumstances, entitling the Court of Appeal to order security for the costs of an appeal.)

32. For completeness, the fact that Mr Pipia since the consequential order has at times instructed lawyers, but is now again a litigant in person, also tends somewhat to support the view that he cannot or will not pay the sums due at present; and, further, that he would in reality be unlikely to engage in a detailed assessment process. There is also some force in the view that the sequence of events summarised above tends to suggest that Mr Pipia is willing to pay legal costs when it suits his purposes.
33. Mr Pipia has apologised for non-payment of the amount ordered by Cockerill J and explained that that has arisen due to circumstances beyond his control and, in large part, he says, as a result of BG's own actions. It is, none the less, notable that Mr Pipia has not even paid the costs order made at the PTR itself, of the order (I believe) of £27,000; and nor has he made, I am told, any offer to satisfy the order against him for a payment on account of costs. I also note that in her previous judgment, Cockerill J stated that there was no evidence that the effect of the security order would be to stifle the claim; and she concluded that Mr Pipia was in fact a man with considerable wealth available to him.
34. The context of the present application includes what a detailed assessment would be likely to involve in the present case. Ms Trevan, in her witness statement, explains that her costs team estimates that, given the length and complexity of the proceedings, preparing a bill of costs would be likely to take at least six months and cost at least £400,000 (excluding VAT). Further, regardless of whether and to what extent Mr Pipia might participate in any detailed assessment proceedings and the duration of any hearing in detailed assessment proceedings, such proceedings would require

substantial time and resources, both for BG and for the Senior Courts costs office. Freshfields' costs team estimate that, in total, detailed assessment proceedings in this case – from the point of filing the bill of costs up to and including attendance at the hearing (which could potentially last for an estimated eight weeks) and the obtaining of the final costs certificate – would likely take a minimum of a further six months and cost in the region of an estimated further £800,000 (excluding VAT) to complete. That results in a total estimated cost of £1.2 million (excluding VAT). Ms Trevan says that Mr David Wallace, an independent costs lawyer at DW Legal Costs, with 38 years experience dealing with the assessment of costs in commercial matters, has confirmed that he agrees with these estimates.

35. That evidence, first of all, confirms the considerable extent to which good money would have to be thrown after likely bad money in pursuing a detailed assessment. It also indicates that detailed assessment would involve considerable further delay for BG. As the Court of Appeal said in *Blakemore v Cummings* [2010] 1 WLR 983 (in the context of ordering a payment on account), "*It is an important consideration that a party should not be kept out of the monies which should almost certainly be demonstrated to be due longer than is necessary.*"
36. Ms Trevan also explains that there is a potential enforcement advantage of a final order being made now. She states that BG is concerned that Mr Pipia's conduct over the past six months strongly suggests that he does not intend to, and will not, comply with existing or future orders of the court, so that BG will need to take steps to enforce its costs claim against Mr Pipia, including internationally. Without waiving privilege, it is, she says, BG's understanding that it is likely to require a final, rather than an interim, costs order from this court in order to have reasonable prospects of doing so in those foreign jurisdictions where Mr Pipia resides or may have assets. It seems to me entirely likely that that is the case.

37. So for the reasons I have given so far, I conclude that there has been a material change of circumstances that would justify a variation of the order. The question then becomes whether a summary assessment of the costs of the action is either feasible or appropriate.
38. An application for summary assessment to avoid the need for expensive and protracted costs proceedings was said by Master Rogers in the *Rotary Watches* case (17.12.04, unrptd.) to be "*clearly a pragmatic and sensible approach to adopt*" (paragraph 38).
39. It is certainly true that summary assessment is not the norm after a trial of substantial proceedings or for large costs bills. None the less, paragraph 9.1 of the Practice Direction provides that:

"Whenever a court makes an order about costs, which does not provide only for fixed costs to be paid the court should consider whether to make a summary assessment of costs."

Further, CPR 44.6(1) provides that:

"Where the court orders a party to pay costs to another party, other than fixed costs, it may either (a) make a summary assessment of the costs; or (b) order detailed assessment of the costs by a costs officer, unless any rule, practice direction or other enactment provides otherwise."

40. The court therefore does have the power to make a summary assessment in the present case.

Counsel for BG informs me that significant costs bills have been summarily assessed in this way, in the Commercial Court, previously where appropriate: see the order of Robin Knowles J dated 2 October 2019 in *Deutsche Bank v Unitech*, albeit there appears to be no reasoned judgment available there. Another example is the order I made in *Certain Underwriters at Lloyd's v Syrian Arab Republic* [2018] EWHC 385 (see paragraphs 87-91), albeit that was a case where only one party was represented.

41. Here, as I have already summarised, Ms Trevan's witness statement explains the process by which the updated schedule of costs before me, a document of some 25 pages, has been produced. I am satisfied that the process involved has been a robust one. One particular objection which was taken by Mr Pipia related to the additional sum of £1.175 million which represents one of the increases

between the original schedule and the final one, but as I have already explained, a sufficient basis has been shown for that change between the two schedules.

42. It seems to me in principle that it would be unfair, given the circumstances which have arisen, to permit Mr Pipia to put BG to the further delay and expense of a detailed assessment, when he has failed to make any payment or offer in respect of the sum already ordered to be paid on account. Although Mr Pipia claims that his financial circumstances have arisen as a result of the actions of BG, that is a matter which would go, essentially, to the orders which have already been made and against which no permission to appeal has been granted, rather than being a matter which arises on the present application. I note, though, that Cockerill J concluded that there was no evidence of any interference by BG such as to prejudice Mr Pipia and (as I have already said) that there was no evidence that the security order she made would stifle the claim.
43. I do not consider there was material delay in the present application being made. Following the refusal of permission to appeal on 16 June 2021, the present application was intimated in October 2021 and then issued in December 2021.
44. In my view, a final order for costs now would avoid substantial unfairness to BG and it would not cause material prejudice to Mr Pipia, provided that the amount of the costs orders is one which I can feel confident would be ordered at a minimum on a detailed assessment.

Quantum of costs

45. As to the amount of costs Cockerill J, as I have indicated, said that the costs claimed by BG were very high indeed and that the assessed costs may very well fall below the usual range. Views as to what is the usual range differ, but on a standard costs assessment, 60-70 per cent of claimed costs are commonly recovered.
46. In my view, the most notable features which arise from a review of the updated costs schedule are, first, that in some months quite large proportions of partner time were spent, for example frequently of the order of a third of the solicitor's costs for the month in question; and, secondly, the level of

the hourly rates claimed. For example, the rates claimed for work since about May 2020 range from £1,085 and £985 an hour for partners through £675 an hour for a senior associate, to £395 an hour for a more junior associate. By way of comparison, in the guideline rates issued in October 2021, the London 1 band applies, amongst other things, to very heavy commercial work by Central London firms. The rates in that band range from £512 an hour for solicitors of over 8 years experience, through £348 an hour for solicitors with more than four years experience, to £270 an hour for more junior qualified solicitors. Paragraph 29 of the guide to the summary assessment of costs says:

"In substantial and complex litigation an hourly rate in excess of the guideline figures may be appropriate for grade A, B and C fee earners where other factors, for example the value of the litigation, the level of the complexity, the urgency or importance of the matter, as well as any international element, would justify a significantly higher rate. It is important to note that these are only examples ... Further. London 1 is defined in Appendix 2 as 'very heavy commercial and corporate work by centrally based London firms.' Within that pool of work, there will be degrees of complexity and this paragraph will still be relevant."

47. The present case was at least to a degree exceptional, being originally a USD 1 billion claim ultimately reduced to a USD 246 million claim, with complex factual issues and issues of foreign law, listed for an eight-week trial. That was a trial for which, as I have said, BG had instructed three counsel and Mr Pipia four counsel. That is not to say that the case necessarily justified recovery between the parties of rates quite as high as those claimed, which in some cases are or approach double the guideline rates, but it would justify a significant uplift of some sort.
48. The costs order sought of £7,567,266 represents only 44.4 per cent of the now estimated costs of £17,028,242. The latter figure does not include any interest on costs incurred back to 2018, nor post-judgment interest on the outstanding balance of the order which Cockerill J made. Post-judgment interest at 8 per cent per annum on the £4.4 million, over and above the money in court, for the period of about 10.5 months since the order was made, would amount to something of the order of £300,000. Pre judgment interest on costs at the Bank of England base rate of 0.5 per cent

on costs of £7.5 million, for an average period of, say, 18 months, would be of the order of some £65,000, although it is not necessary to arrive at an exact figure. The essential point, simply, is that if sums of that order are added to the costs figure now claimed, the resulting figure increases further to something of the order of £17.4 million. The claimed sum of £7,567,266 is only about 43.5 per cent of that figure.

49. Mr Pipia suggests that BG is in fact now taking its present approach for fear that a detailed assessment will uncover excessive fees; and that in turn, he suggests, may even show that security ought never to have been ordered in the first place in the sums in which it was ordered. However, in my view, there are obvious good reasons for BG to be taking the present approach, particularly given Mr Pipia's complete failure to pay any of the costs ordered by Cockerill J some 11 months ago. I also consider that the reasonably detailed breakdown which BG has provided now gives a good sense of the rates and hours claimed, making it less likely that there is some area where excessive fees are somehow not visible. Clearly, the summary does not detail each hour spent in the way a detailed assessment or a detailed bill of costs would, but the monthly breakdown does give a short narrative explanation of the areas of work done each month by the solicitor and counsel team as a whole, as well as the individual hours spent by the solicitors and counsel's fees. I accept that it provides a sufficient basis for the court to form a view as to what figure could confidently be predicted as the minimum cost recovery on detailed assessment.
50. I mention in passing that I do not believe any assistance can be gained by way of comparison with the costs incurred on the claimant's side. Mr Roman Pipia told me during submissions that Mr Pipia's costs approached some £3 million. Counsel for BG told me on instructions that the costs on the claimant's side were believed to be of the order of £6 million. However, the simple fact is that there is no evidence before the court either way as to the actual level of the claimant's costs, so I do not consider that it is of any assistance here.

51. I have therefore had to form a view, based on the totality of the information that is before me, as to a fair level of costs to be payable under a final order, which does not run any material risk of amounting to an overpayment. In all the circumstances, I am confident that costs would be awarded on a detailed assessment in the sum of at least £7,250,000 and I consider it appropriate to assess the costs summarily in that amount.
52. I will hear submissions on the detailed form of the order and the question of time to pay.