Neutral Citation Number: [2024] EWHC 2046 (Comm)

Case No: LM-2023-000289

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

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

Date: 01/08/2024

Before :

MR ANDREW HOCHHAUSER KC
Sitting as a Deputy Judge of the High Court

- -

Between :

(1) BENJAMIN GILBERT **(2) BG PROJECTS LTD**	**Claimants**
- and -	
BROADOAK PRIVATE FINANCE LTD	**Defendant**

- -
- -

Approved Costs Judgment

This judgment was handed down remotely at 12:00noon on 01 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR ANDREW HOCHHAUSER

MR ANDREW HOCHHAUSER KC:

1. Following a hearing on 27 and 28 June 2024, I delivered judgment and made an Order on 28 June 2024, §10 of which provided that "*the question of the Claimants' application by a notice dated 4 March 2024, which were reserved to the Judge hearing the Set Aside Application, shall be adjourned to be determined by written submissions to be filed by the parties on 15 July 2024*."

2. Having received those submissions from Counsel for both parties, this is my judgment on those costs.

The Background

3. On 4 March 2024, the Claimants issued an application (the "**Directions Application**") seeking the following relief:

> "*An order;*
>
> *(1) Requiring the Defendant to file and serve its Defence by 15 March 2024;*
>
> *(2) Debarring the Defendant from filing or relying on any Defence after that date, including at the hearing of the Defendant's application to set aside default judgment listed for 1 May 2024;*
>
> *(3) Debarring the Defendant from filing any reply evidence to the Witness Statement of Marc Keidan dated 23 January 2024;*
>
> *(4) Granting permission for the Claimants to file and serve further evidence responsive to the matters raised in the Defence by no later than 5 April 2024; and*
>
> *(5) Requiring the Defendant to pay the Claimants' costs of this Application (for avoidance of doubt to include without limitation the pre-application correspondence) on the indemnity basis*."

4. Following the hearing of the Application on 25 April 2024, HHJ Pelling KC made the following Order (the "**24 April Order**"):

> *1) The Defendant has permission to file and serve further evidence in reply by no later than 4pm on 22 May 2024 (the "Deadline"). If the Defendant intends to rely on a draft Defence at the hearing of the Set Aside Application, such a Defence must be exhibited to or stand in place of the Defendant's evidence in reply as ordered in this paragraph and must be filed and served by no later than the Deadline.*
>
> *2) The Claimants have permission to file and serve further evidence in response to the Defendant's evidence in reply, by no later than 4pm on 7 June 2024.*
>
> *3) Save as ordered at paragraphs 1 and 2 above, neither Party is to file any further evidence (including for avoidance of doubt, a Defence or draft Defence) without leave of the Court.*

4) Following final judgment in the Set Aside Application, the Judge determining that application is to determine whether these proceedings are to be transferred to the Manchester Circuit Commercial Court.

5) Costs reserved to the Judge hearing the Set Aside Application."

5. Each party submitted that they were to be regarded as the victor of the Directions Application and as such, they should have their costs paid by the other party. Such an approach would reflect the general principle contained in CPR 44.2(a).

The Claimants' submissions as to which party succeeded on the Directions Application

6. The Claimants contend that they were the successful party. The only material difference between the order sought by the Claimants in the Directions Application and that made by HH Judge Pelling KC on 25 April 2024 (the "**April Order**") was the absence of a provision debarring the Defendant from defending the claim if it failed to file a Defence by the deadline ordered. But the Claimants had already made two Calderbank offers to impose a deadline, but without the debarring provision, on 28 February and 8 April 2024. In such circumstances, they were clearly the successful party, in that as a result of their application, they compelled the Defendant to serve a draft Defence well in advance of the hearing of the Set Aside Application and obtained permission to file evidence in response to the same.

7. Although the deadlines imposed by the April Order differed somewhat from those sought in Directions Application, the Defendant had not suggested any alternative deadline. At §14 of its skeleton for the hearing of the Directions Application, the Defendant maintained that the Court lacked jurisdiction to impose any deadline at all. Furthermore, the Defendant having indicated its intention to file a draft Defence, at §38 of his First Witness Statement dated 18 March 2024, Mr Daniel Adcock-Krish, a Senior Associate Solicitor employed by Kuits Steinart Levy LLP ("**Kuits**") solicitors instructed on behalf of the Defendant, contended that it was entitled to do so any time until two days before the hearing of the set-aside application (in disregard of CPR 59PD 9.1). The Court rightly rejected the Defendant's position.

The Defendant's submissions as to which party succeeded on the Directions Application

8. The Defendant submits that the Claimants were unsuccessful in the Directions Application. They did not obtain the relief sought. They did not obtain any of the debarring orders sought, including the provision of a draft Defence. Further, the Defendant was permitted the opportunity to respond to the First Witness Statement of Marc Samuel Keidan dated 24 January 2024 out of time. It is plain that both of these matters were central to the Claimants' application. As a result, the Defendant submitted that the Claimants were unsuccessful in the Application and that they should pay the Defendant's costs of the Directions Application in the usual way.

9. Insofar as the Claimants rely on the Calderbank correspondence, the terms of the draft Order attached to the Claimant's Calderbank letter dated 28 February 2024 was tantamount to a debarring order. In relation to the Calderbank offer made on 8 April 2024, limited criticism can be levelled against the Defendant for failing to agree a specific deadline in light of Mr Bleakley's prevailing personal circumstance at that time.

10. Alternatively, the Defendant avers that, despite the directions contained in the 24 April Order, the Directions Application was misconceived and unnecessary. The Claimants could have simply awaited any draft Defence and then they could have taken whatever issue they saw fit with the same ahead of or at the Set Aside Application. In those circumstances, the Defendant submitted that the Court should order that costs are in the case on the basis that HHJ Pelling KC simply made case management directions when the matter came before him.

11. In the further alternative, the Defendant submitted that an appropriate order may be no order as to costs on the basis that a potential view of the situation was that neither party should "benefit".

Discussion and conclusion in relation to the appropriate costs order on the Directions Application

12. In my view it is appropriate here to follow the principle in CPR 44.2(a). The successful party to the Directions Application should have their costs. In my judgment the Claimants are the successful party. It is clear that a draft Defence should have been served for the Claimants' consideration well before the hearing. The only way in which that was obtained was by making the Directions Application. As it was, a substantial part of draft Defence failed and one aspect on which the Defendant succeeded at the hearing, the claim in relation to the Bury Football Club Loan, was not even pleaded. The Calderbank offers were not tantamount to a debarring order and were no more draconian than §3 of 24 April Order. Whilst the 24 April Order gave the Defendant further time for service of the draft Defence than that offered in the Calderbank offers, the Defendant's position was that it could wait until two days before the hearing to serve it, which was clearly unreasonable.

13. The draft Orders in the Calderbank offers provided for the service of further evidence on matters set out in the draft Defence. The 24 April Order went further and permitted reply evidence generally, including the possibility of responding to the First Witness Statement of Mr Keidan out of time. The Court's permission to do that would have to have been sought in any event. I do not regard that as a point in the Defendant's favour.

14. It is common ground that the Claimants' costs should be assessed on the standard basis and that a summary assessment is appropriate.

The Quantum

15. The Claimants initially submitted a Schedule of Costs dated 24 April 2024 for £23, 886.60, exclusive of VAT and on 15 July 2024 submitted a further claim for £5,173.13, exclusive of VAT. The justification for the second Schedule was that there was a need for additional work by solicitors and further advice needed from two Counsel, and a hearing fee for Counsel of £875, even though there was in fact no hearing and the matter has been determined on paper.

16. The Defendant submit that the solicitors' rates are in excess of what is recoverable in accordance with the relevant guideline hourly rates; excessive time was taken in attendance on the Claimants and others; the work done on documents is excessive and claiming that Counsel's fee of £5,812.50, prior to the preparation of written submissions, for unspecified advice/conference/documents in addition to a brief fee of

£2,250 for the hearing, is unjustified. It has not had the opportunity to comment on the Second Schedule because it was served on the same day as the Defendant's skeleton.

17. I remind myself that this was an application listed for a 45 minute hearing. In my view the sums claimed by the Claimants for the costs of and occasioned by this straightforward application are excessive. The rates charged for Grade A and Grade C are too high, and should be £398 and 260 respectively, based on London 2 rates. The extent to which a partner has been involved in this matter is unnecessary. In particular, under "attendance on others", the amount of partner time (5.3 hours) spent on letters and emails is not justified, given that a further 10.2 hours was spent by a paralegal. I cannot see a sound basis for awarding anything for Counsel over the brief fee in relation to the original Schedule of Costs dated 24 April 2024. The additional costs in the Second Schedule of Costs are excessive, although I accept that there are some additional costs, but not the cost of two Counsel, particularly when the assessment was dealt with without a hearing.

18. Taking the above matters into account, I award the Claimants £21,000, inclusive of VAT, by way of their costs of and occasioned by the Directions Application to be paid by the Defendant by 22 August 2024.