



Neutral Citation Number: [2022] EWHC 3096 (KB)

Case No: QB-2019-003679

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/12/2022

Before :

MR JUSTICE FREEDMAN

Between :

- (1) **TIMOTHY PIERS HORLICK**
(in his personal capacity and in his capacity as
trustee of the SUZANNA GAYFORD HORLICK
GRANDCHILDREN'S TRUST)
- (2) **ROBERT MAURICE GAYFORD**
(in his capacity as trustee of the SUZANNA
GAYFORD HORLICK
GRANDCHILDREN'S TRUST)
- (3) **DEVELOPMENT CAPITAL LIMITED**

Claimants

- and -

- (1) **DIOGO JOSE HENRIQUES CAVACO**
- (2) **JV CONSULTORES INTERNACIONAIS**
LIMITADA
- (3) **COMPANHIA MINEIRA DO CHIBUTO S.A**
- (4) **PATHFINDER MOÇAMBIQUE SA**
- (5) **PATHFINDER MINERALS PLC**

Defendants

Robert Anderson KC and Andrew Thomas (instructed by The Khan Partnership LLP)
for the Claimants

Matthew Watson and Chinmayi Sharma (instructed by **Dentons UK & Middle East LLP**)
for the **Second and Fourth Defendants**

Hearing date: 18 November 2022

Approved Costs Judgment

**This judgment was handed down remotely at 12noon on Friday 2 December 2022 by
circulation to the parties or their representatives by e-mail and by release to the
National Archives**

.....

MR JUSTICE FREEDMAN :

I Introduction

1. Consequential upon the judgment handed down on 18 November 2022 neutral citation number [2022] EWHC 2935 (QB), I heard arguments about consequential orders. The parties are now agreed that no Part 36 consequences are to attach to the Trust claim. They are agreed about the amount of interest due on the Trust claim. It follows that the remaining issues are:
 - (i) what is the appropriate costs order in relation to the set aside application dated 1 April 2022 and video-link application dated 9 March 2022, which costs were reserved to the trial Judge;
 - (ii) should costs be awarded on the indemnity basis in respect of the expenses and the unjust enrichment claims;
 - (iii) what is the proper estimate of the Trust costs and what is the appropriate amount for a payment on account;
 - (iv) what is the proper estimate of the costs of the Fourth Defendant (“PMSA”) of the expenses claim, success fee claim and unjust enrichment claim and what is the appropriate amount for a payment on account?
2. There is also a contribution sought by the Second Defendant (“JVC”) against Mr Cavaco which will be considered at the end of this judgment.

II The set aside application

3. On 15 March 2022, Master Eastman made an order on paper authorising a hybrid trial and granting permission for the Defendants’ witnesses General Veloso and his daughter Ms Miriam Veloso to give evidence by video-link. The order authorising a hybrid trial and the permission for Ms Miriam Veloso to give evidence by video-link was subsequently set aside by Mr Justice Butcher on 1 April 2022. The order whereby General Veloso could give evidence by video-link was maintained and costs were reserved to the trial Judge. Those costs are solely the costs in respect of the 1 April 2022 application. Those are not the costs which were ordered by Master Eastman which remain in the case.
4. The Claimants submit that the application to give evidence by video-link was made very late. The application was defective in that they failed to obtain prior permission from the Mozambique authorities for the Defendants’ witnesses to give evidence by video-link from that country. They submit that they have been substantially successful in seeking to set aside the order before Butcher J. They submit that they should have all of their costs of the set aside application. In round terms, they submit that the total costs are £70,000 and that there should be a payment on account of 60% of those costs comprising about £42,000.

5. The Defendants submit that the costs should be ordered to be paid in the case. They are said to relate to case management and therefore an order for costs in the case is appropriate. It is said that it is disproportionate to try to carve up those costs in any other way. In any event, they submit that the Claimants were only partially successful in that the order in respect to General Veloso giving evidence by video-link stood and there was contested evidence about his ability to attend Court in London. The evidence was to the effect that it was not reasonable to expect General Veloso at his age and in his state of health to travel from Mozambique to London.
6. I have come to the following conclusions:
 - (i) this is not a usual pre-trial application but arises out of a discrete application to set aside an order of the Master made without a hearing;
 - (ii) Mr Justice Butcher had in mind the possibility of an order other than a case management costs in the case order;
 - (iii) Mr Justice Butcher must have contemplated that the trial Judge would be particularly well placed to assess how important or otherwise it was for the evidence to be heard remotely or in court;
 - (iv) having heard the trial, I confirm that it was an important order to have Ms Veloso attend, having regard to how central her evidence was to the case. (It was longer than the evidence of her father, albeit that General Veloso gave evidence of significance in relation to the defence to the Trust loan claim);
 - (v) in my judgment, the Claimants were the overall winners in relation to the application albeit that they did not succeed in relation to the issue of General Veloso;
 - (vi) I regard the decision of Mr Justice Butcher as an overall win for the Claimants rather than a ‘score draw’;
 - (vii) The fact that the Claimants did not succeed in respect of the issue relating to General Veloso is sufficiently substantial to merit a deduction from the overall costs despite the success of the Claimants in respect of the issues relating to Ms Veloso and the hybrid trial.
7. In view of the above, the Defendants should pay the Claimants’ costs of the application before Mr Justice Butcher, subject to consideration of a deduction. An appropriate deduction is in my judgment one third, which takes some account of the fact that costs in respect of the issue relating to General Veloso were incurred on both sides.
8. There is not adequate material before the court to make a summary assessment of those costs. Further, the costs which have been provided are by reference to both the hearings before Master Eastman and Mr Justice Butcher whereas I am only dealing with the costs before Mr Justice Butcher. The sums that are sought seem very high.

9. I shall make an order that JVC and PMSA jointly shall make a payment on account of those costs in the sum of £8,000. I have borne in mind that this is a net sum after deductions of one third to reflect my overall decision on this aspect and further that there would in the usual course be a deduction to take into account what might happen on a detailed assessment. Without subjecting this to any detailed mathematical conclusion, I regard the sum of £8,000 as an appropriate figure for a payment on account. I have not used the much higher costs advanced by the Claimants as a starting point because they seem at the moment to be so high as not to provide a starting point. This connects with the points made below by reference to the figures advanced by the Claimants in respect of the Trust's claim.

III PMSA's application for indemnity costs in respect of the costs of the expenses claim and unjust enrichment claim

10. PMSA seeks its costs of the expenses claim from DCL and unjust enrichment claim from Mr Horlick on the indemnity basis. They claim that the conduct of those claims was outside the norm for the following reasons, namely:
- (i) the absence of satisfactory evidence to support the contention that expenses had been incurred in connection with the Engagement Agreement despite this point being adverted to in the course of correspondence;
 - (ii) the like criticism in respect of the unjust enrichment claim;
 - (iii) the unreasonable rejection of the offers made to settle those claims in the sums of £30,000 in respect of the expenses claim and £135,000 in respect of the unjust enrichment claim;
 - (iv) the failure to have a mediation until 8 February 2022.
11. An award of indemnity costs is only warranted where a party's conduct or the circumstances of the case take it "*out of the norm*" that is "*something outside the ordinary and reasonable conduct proceedings*": see the notes at 44.3.8 of the White Book Volume 1 page 1505. In my judgment, none of the factors relied upon by PMSA justifies this conclusion. There was evidence adduced to support these claims but the Court found that the evidence was insufficient and PMSA, by the skilful advocacy of Mr Watson, was able to make significant inroads into the evidence of Mr Horlick in cross examination. This was particularly so in relation to the expenses claim, by reference to the question as to whether the expenses were due to the retainer under the Engagement Agreement or due to the retainer by Grandover Mining.
12. The claims were not speculative or weak as is evidenced by the fact that the offers made, in my judgment, were over and above a nuisance value payment. This is not a case where the Claimants can be criticised for not having accepted the offers in the context of claims for relatively large sums which were far greater than the offers made. The criticisms about the mediations are not well made because the mediations were cancelled for COVID reasons in 2021. In any event, a mediation in February 2022 was

unsuccessful. For all these reasons, the costs ought to be paid on the standard basis and not on the indemnity basis.

IV The proper estimate of the Trust's costs and appropriate amount for a payment on account

13. The Claimants say that they have incurred costs in the sum of £2,144,097.75 on the claims. They submit that 50% of those ought to be by reference to the Trust March 2012 loan claim and 50% in respect of the other claims. The Claimants seek that there should be a payment on account in respect of the Trust March 2012 loan claim of a sum of £708,787.21. This comprises the following:
 - (i) Solicitors' costs of £1,022,391.86 x 60% equals £613,435.12
 - (ii) Trust's disbursements of £162,675.15 x 60% equals £95,352.09.

14. JVC has suggested that a sum of £175,000 be paid on account of the Trust costs of the March 2012 agreement claim. The Claimants criticise that, saying that it represents 13.9% of the Trust's incurred costs. The Claimants submit that even if not awarded the full sums which they seek of over £700,000 they should still be entitled to a far higher sum than that suggested by the Defendants having regard to the following:
 - (i) The claim for the Trust March 2012 loan was not a straightforward debt collection claim, on the contrary, it had factual complexity which led to Master Eastman refusing the Claimants' application for summary judgment. The complexity was in large part by defences advanced by JVC comprising in particular misrepresentation made orally and secret commissions with the connotations of impropriety which that usually has;
 - (ii) The Defendants' lower costs are in part because they instructed a firm based in Milton Keynes classified as National Band 1, whereas the Claimants instructed a firm in the West End of London, specialising in heavy domestic and international Commercial litigation and classified as London 1. The Claimants' solicitors charged a 24% uplift to the London 1 guidance whereas in contrast the Defendants' solicitors charged a 34.5% uplift.

15. The Defendants submit that the Trust's claimed figure is grossly disproportionate and lacks any principled foundation. They particularly challenge the following, by way of example:
 - (i) they attack the figures of the Claimants' solicitors of £218,433.00 in respect of pre-action leading to a thirty four page pre-action letter and a handful of other (short) letters;
 - (ii) they attack also the claim of £416,952.90 for working on pleadings. They are also critical about the claim for £194,276.00 for the mediation;

- (iii) they challenge the apportionment of 50% to the March 2012 loan claim. They submit that the claims in which the Defendants were successful were substantially more valuable, involved considerably more documentary and witness evidence and took up the majority of time at the trial;
 - (iv) they submit that some of the costs would have been referable to other defendants and other claims that did not arise at the trial;
 - (v) they are critical of the hourly rate charged by Mr Khan. They submit that London 2 is the appropriate scale, bearing in mind that this is not heavy Commercial litigation;
 - (vi) they are critical about the late instruction of a senior silk to lead a very senior junior and that it would have sufficed if further assistance was required to have brought in a very junior counsel.
16. In circumstances where the Court is concerned about the possibility that the sums claimed might be totally unreasonable and completely out of proportion to the claim, the Court may not have a reference point for the payment on account of costs.
17. The starting point is that the costs are to be awarded on the standard basis. The burden is therefore on the Claimants to show that the costs are reasonable and proportionate. Costs incurred are proportionate if they bear a reasonable relationship to, among other things:
- (a) the amounts in issue in the proceedings;
 - (b) the complexity of the litigation: see CPR 44.3(5).
18. CPR44.2(8) provides that the court may order a party to pay a “reasonable sum on account of costs”. As for determining what is reasonable, the White Book states at para 44.2.12: *“A reasonable sum would often be one that was an estimate of the likely level of recovery subject, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.”*
19. In my judgment, the criticisms made by the Defendants to the extent that I have set them out above are valid for the purpose of challenging a payment on account of costs. As to whether those criticisms will be maintained on a detailed assessment of costs is entirely a matter for the Costs Judge, based on the materials and submissions before the Court on the detailed assessment. These misgivings may yield to a different analysis at that stage, but for the purpose of a payment on account, they have not been assuaged. In the event that the sums claimed were within a range or just over a range, that would usually be informative to the Court as a starting point for assessing a reasonable sum for the purpose on account of costs. From that sum, the court might decide that 60% of

those sums claimed would be reasonable to award at the stage of a payment on account of costs. There are no rules of thumb.

- (i) The overall sum in respect of the trust March 2012 loan claim of costs of over a £1 million bears no relationship to the claim itself of £225,000 plus contractual interest. I take into account the complexity of some of the defences and the particularly serious nature of the challenge based upon a secret commission. Nonetheless the disparity is such that a costs Judge will no doubt give very careful scrutiny to it, and, if appropriate, the Judge will be prepared radically to depart from it;
 - (ii) The examples given of pre-action costs, the pleadings costs and the mediation costs again appear out of all proportion to that which was involved in the totality of the claims. The Defendants have shown that these costs are a multiple of the costs incurred by the Defendants. The disparity between the respective parties' costs goes far beyond the differentials between a solicitor in Milton Keynes and a solicitor in the West End.
 - (iii) The costs of leading counsel being parachuted into this case only days before the trial, are a multiple of junior counsel's costs despite junior counsel being a senior junior specialising in commercial law. There is no criticism of the Claimants who wanted to instruct very experienced commercial silks, whose reputation goes before them. However it is an altogether different matter as to whether this was reasonable and proportionate for the purpose of reasonable and proportionate costs between the parties.
20. The Court is also concerned about the assumption that 50% of the overall costs will be by reference to the March 2012 loan claim. It is not sufficient simply to look at the judgment and see how many paragraphs of the judgment were by reference to the March 2012 loan claim. That is of course relevant, but it is far from the full story. On a detailed assessment it will be possible to have a much more complete view of the time spent in the course of the three years of the action in relation to the various claims. The apportionment is an important matter here because there is not a commonality of persons between the various claims. Instead, there are different claimants and different defendants for each of the claims.
21. In my judgment, the 50% assumption is too high for an apportionment for the purpose of a payment on account of costs. The claims other than the Trust claims were much higher in amounts and probably involved more time at trial and in preparation than the Trust's claim. On the basis of a bracket of 40-50% for the apportionment, an assumption for the purpose of a payment on account of costs at the lower part of the bracket would be appropriate, namely 40%. On the information currently before the Court, it would not be appropriate to go to the top of the bracket by a 50% assumption. I regard 40% as a safer proportion for the purpose of calculating a payment on account of costs.

22. The overall sums are so high that the Claimants have been unable to provide a reasonable starting point for the assessment of a payment on account. It would not be appropriate to make any order by reference to the figures provided: they are outside a reasonable framework for the calculation of a payment on account.
23. In the particular circumstances of this case, the Court ought to adopt a broad brush approach which will be conservative about the amount of costs that might be awarded to the Claimants on the March 2012 loan claim. The Defendants have adopted a realistic approach by advancing a sum of £175,000 not in the sense of this being necessarily the right sum, but by demonstrating that they were not negotiating with the Court by choosing an unrealistic figure. The amount which the Court will award by way of the payment on account of costs is a sum of £225,000. This is the equivalent of £562,500 (before an apportionment of 40% for the purpose of a payment on account of costs). Grossing up further to take into account the fact that the payment on account is based on 60% only of the estimated costs, this would give rise to overall costs of £937,500. I shall return to this figure of £225,000 after considering the figures provided by the Defendants.

V The proper estimate of PMSA's costs and appropriate amount for a payment on account

24. Regarding the amount of PMSA's costs of the expenses claim, the success fee claim and the unjust enrichment claim and the appropriate amount for a payment on account of such costs, PMSA seeks the following payment on account:
 - (i) £91,445.00 from the Third Claimant on account of the costs of the success fee and the expenses claim, and;
 - (ii) £116,510.00 from Mr Horlick on account of the costs of the unjust enrichment claim.
25. PMSA has provided a breakdown and explanation for those sums in correspondence. It claims that the total of all three claims is a total of £346,592.72. It has provided a schedule showing an apportionment of those costs between the three claims on a phase-by-phase basis with reasons for the apportionment. On that basis it says that PMSA's costs in respect of the claims brought by DCL were estimated at £152,408.78 and the costs of Mr Horlick's claim were estimated at £194,183.95. They submit that this is a reasonable pre-estimate of the costs that would be found on assessment.
26. The Claimants take issue in particular about the apportionment as between the claim of the Third Claimant and the claim of Mr Horlick. They submit that an appropriate apportionment would be 50/50 between those two. At this stage, I prefer the approach of the Claimants to apportion 50/50, given how the unjust enrichment claim which could have been the largest part of the case did not take as much time as the success fee and expenses claim at the trial. It may be that upon a detailed assessment, PMSA's apportionment will be vindicated.

27. The next question is whether the apportionment of the Defendants' costs is correct as between the Trust claim and the other claims? I am concerned about the apportionment that has been undertaken by the Defendants as regards the claims on which they have succeeded and the claim where they have lost in respect of the March 2012 loan claim. They have assessed the costs incurred by JVC in respect of the Trust's March 2012 loan claim as being in the sum of about £239,000. That indicates overall costs of about £586,000 (that is £239,000 plus £347,000, rounded up from £346,592.72) showing an approximate apportionment of only 41% of the overall costs to the Trust's March 2012 loan claim. Whilst that might be correct on a detailed assessment, a more conservative approach must be to take the opposite end of the range of 40% to 50% for the purpose of a payment on account of costs.
28. On this basis, there should be deducted 50% for the apportionment from the sum of £586,000. An award of 60% of the costs for the purpose of a payment on account is common, and so there should then be a deduction of a further 40%. This gives rise to a figure to be awarded of £175,800 which can be rounded down to £175,000. On the basis of an apportionment of equal sums to Mr Horlick and the Third Claimant, this would be £87,500 each.

VI Scrutiny of the correlation of the sums payable each way

29. There is a further scrutiny before fixing the figures. Having subjected the figures claimed by the Claimants to criticism, it is worth testing the sum for the Claimant trustees of £225,000 against the sum for PMSA of £175,000. There are the following matters to be taken into account, namely
- (i) Insofar as the costs of the Claimants are of West End London solicitors, they are as London Band 2 significantly greater than the National Band 1 costs of Milton Keynes solicitors. I have not based this on London Band 1 following the submission, which I accept, that this has not been "very heavy commercial work" by comparison with other cases before the courts;
 - (ii) The distinction between London Band 2 and National Band 1 might give rise to a greater gap than £225,000 to £175,000. However, the figures become closer because of the conclusion of the apportionment of a bracket of 40-50% for the Trust's claim where the Claimants succeeded and 50-60% for the other claims where the Defendants succeeded. On the basis of being at the lower end of the bracket, the Trust claim is for the purpose of a payment on account at 40% and the Defendants' costs on account are at 50%. This then reduces the payment on account for the Claimants more than it does for the Defendants;
 - (iii) It is not the case that the costs of one side necessarily mirror the other side's costs, albeit that it is sometimes a useful frame of reference to test the reasonableness and proportionality of what is being sought;
 - (iv) There is no mathematical precision, particularly caused by the absence of a satisfactory frame of reference from the Claimants. Nevertheless, I have

also had some regard to the contention that the Claimants may be liable to pay more for their legal services than the Defendants.

30. Taking all of this into consideration, I am satisfied that there is an appropriate correlation between the sums payable each way. Those sums are that JVC should make a payment on account of costs of £225,000 to the trustees. There should be a payment on account of the costs of PMSA in the sum of £175,000 of which £87,500 should be paid by Mr Horlick and £87,5000 should be paid by the Third Claimant.

VII Contribution claim of JVC against Mr Cavaco

31. There is to be included in the order a contribution order against Mr Cavaco pursuant to para.52 of the judgment handed down on 18 November 2022. JVC seeks its costs of the contribution claim in a sum of £10,007.50. A statement of costs has been provided substantiating that sum which I am asked summarily to assess. In the circumstances, I am satisfied that the costs of the contribution claim should be summarily assessed in that figure.

VIII Draft order

32. I should be grateful if the parties would agree a draft order to reflect this judgment. This will be a revision of the draft order or orders thus far provided.