Neutral Citation Number: [2025] EWHC 503 (KB)

Case No: KB-2022-004778

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 March 2025

Before :

MR JUSTICE CONSTABLE

- -

Between :

Assensus Limited

Claimant

- and -

Wirsol Energy Limited

Defendant

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- -

Arfan Khan (instructed by iLaw Solicitors Ltd) for the Claimant
Joanne Box (instructed by Cripps LLP) for the Defendant

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Friday 7TH of March 2025.

Mr Justice Constable:

1. This judgment deals with consequential matters arising out of the Judgment handed down on 26 February 2025. In that judgment, I determined that each of the claims brought by the Claimant, Assensus Limited ('Assensus') against the Defendant, Wirsol Energy Limited ('Wirsol') had failed. The matters for determination are (1) costs; (2) interest on costs; (3) interim payment of costs; (4) the Claimant's application for permission to appeal; (5) stay of execution pending appeal. The parties agreed that these matters could be determined by me following written submissions, which I duly received.

Costs

2. The Claimant accepts that it has been the unsuccessful party and that costs follow the event. It argues, however, that the Defendant ought to receive only 70% of its costs, to be assessed if not agreed. The first ground is the Defendant's rejection of mediation.

3. In Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 3 Costs L.R. 393, relied upon by Mr Khan for the Claimant, the Court of Appeal held that in deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. The burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR. In doing so, it rejected submissions that there ought to be a presumption in favour of mediation. Factors which may be relevant to the question of whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success.

4. In Gore v Naheed [2017] EWCA 369; [2017] 3 Costs L.R. 509, the Court of Appeal, in a passage referred to in the White Book and relied upon by Ms Box, for Wirsol, identified '*some difficulty*' in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated. The Court was considering reliance upon the judgment in PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288; [2013] 6 Costs L.R. 973 in which the Court had upheld the trial judge's decision to regard silence in the face of an invitation to mediate as unreasonable and to impose some, albeit limited, cost sanction. In Gore, Patten LJ pointed out that, as made clear in PGF, a failure to engage, even if unreasonable, does not automatically result in a costs penalty. It is simply a factor to be taken into account by the judge when exercising his costs discretion.

5. In his Reply Submissions, Mr Khan relied upon the case of OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195 at [39] where Vos LJ observed "*The parties are obliged to conduct litigation collaboratively and to engage constructively in a*

settlement process" and at [41] that a "*blank refusal to engage in any negotiating or mediation process ... to seek to frustrate a claimant's attempts to reach a compromise solution should be marked by the use of the court's powers to discourage such conduct*." Whilst Mr Khan submitted, without more, that that is *a fortori* in the present case, OMV was in fact all about the rate of enhanced interest on the judgment sum, and involved, '*a very bad case of the defendant simply ignoring a proper offer and running up the costs thereafter*' and '*and the use of a vast asset base to seek to frustrate a claimant's attempts to reach a compromise solution*'. This description is a very, very long way from the present case.

6. Turning to the factors to be considered, the case was not, in itself, unduly complex and the parties' positions were polarised: Assensus' central claim alleged an entitlement to a bonus of c£2.5m, and Wirsol argued there was no contractual or other entitlement to such a bonus. Its position was wholly vindicated. The Defendant's amendment at trial was ultimately irrelevant to that success (see paragraph 94 of the Judgment), and this fact does not bear on the merits of the claim. It is correct that the primary pleaded position of Wirsol – that no contractual arrangement at all existed as a result of the August 2014 - was unsurprisingly not pursued in opening, but this again was not a concession that changed the shape of the case materially. When considering the merits of the case, it is also impossible not to lose sight of the unreliability of at least parts of Mr McCarthy's evidence, which was rejected as implausible in certain important respects.

7. Although the Claimant focuses on the various invitations to mediate which were not taken up by the Defendant, this is not a case where Wirsol made no attempts at settlement. Mediation was proposed by Assensus on a number of occasions prior to the issue of proceedings. Although Wirsol did not accept these invitations, it made a Part 36 Offer of £100,000 in November 2022. This is a meaningful sum, in light of Assensus' entitlement as it has been found to be. Assensus also made a Part 36 Offer in October 2022 of £1,041,589 (excluding costs). The question is not, as Mr Khan put it at one point, whether the Assensus' rejection of Wirsol's offer was reasonable; it is whether the conduct of Wirsol was *un*reasonable. There was a large gulf between the parties. Making, and then standing by, a reasonable offer was patently not unreasonable conduct in light of the ultimate Judgment. There were some lawyer to lawyer discussions in September 2023, which may have been brief, but these resulted in Assensus making a verbal offer to accept £725,000, again representing a significant gap in expectations. Whilst I do not consider that the costs of ADR would have been disproportionate or cause prejudicial delays, in light of the offers on the table, I consider it very unlikely indeed that ADR would have been successful. Indeed, Mr Khan's initial submissions accepted that '*Mr McCarthy's rejection of £257,000 £157,500 suggests that the mediation may have failed…*'. I agree (save that, of course, there was no 'rejection' of £157,000, as though it was an offer to reject. This was the conclusion of Wirsol's expert as to the potential market value of a bonus, on the assumption that an entitlement existed, which it did not). As made clear in the Judgment, Mr McCarthy had already refused a discretionary bonus of £257,000. The offer of Part 36 Offer of £100,000, whilst ultimately still generous in light of Assensus' contractual entitlement, plainly significantly below a sum previously rejected, and the gulf between the parties therefore remained very significant.

8. It is improbable that Wirsol would have increased its offer (a position which would ultimately be vindicated) and it is plain that Mr McCarthy would not have accepted it given the size of Assensus' Part 36, which was not reduced at any time. In circumstances where the prospect of mediation or other ADR seeking was vanishingly small, the decision not to incur costs (some of which would be irrecoverable) in mediating was not unreasonable. Therefore, the absence of a mediation in this case does not justify any reduction in Wirsol's costs.

9. The other two matters raised are (a) the Defendant's application to amend its Defence and (b) the Respondent's successful application to amend its Reply. These issues should not be dealt with by way of any percentage deduction from costs otherwise recoverable: the costs involved would have been negligible in relative terms. However, it is appropriate that the Defendant pays its costs of the amendment in any event. As to the Amended Reply, these should be in the case. As set out in the Judgment (paragraphs 98-102), I rejected the contention by the Claimant that these were, in substance, responsive to the Amended Defence. They were not: the Amended Defence was a vehicle by which a new legal analysis which was always available to the Claimant was advanced. On one view, the costs would be the Defendant's in any event. For the avoidance of doubt, therefore, producing the Amended Reply was not, in substance, a cost occasioned by the Amended Defence.

10. There is no basis to depart from the ordinary rule that costs follow the event, subject to the two supplementary costs orders identified immediately above. These have been sought on a standard basis, and I so order.

Interest on Costs

11. Wirsol seeks an order for interest on costs at the following rates and for the following periods:

    a. 2% above the Bank of England base rate for the period from the date of payment of the costs by Wirsol up to the date one month after delivery of a detailed bill of costs by Wirsol to Assensus; and

    b. the Judgments Act 1838 rate of 8% thereafter.

12. In addition to CPR r.36.17(3), Ms Box points out that the Court has the power to order interest on costs prior to judgment pursuant to CPR r.44.2(6)(g). This power is "*routinely exercised when an order for costs is made following a trial to award interest at a commercial rate from the dates when the costs were incurred until the date when the interest becomes payable under the Judgments Act*" (Involnert Management Inc v Aprilgrange Ltd and others [2015] EWHC 2834 (Comm) at [7] per Leggatt J, as he then was). As to the application of interest to pre-trial costs, I consider that there is no reason not to make the routine order in this case, especially given Wirsol's Part 36 offer. This is so whether or not the rejection of the offer was 'reasonable' as submitted by Mr Khan. Ultimately, the rejection was not justified given the outcome of the litigation. As to the rate, I accept that 2% above base rate is payable as a "*rule of thumb*" for ordinary commercial concerns: see Friston on Costs (4th Ed) at paragraphs 56.74 and 56.78.

13. I am not persuaded, however, that in this case it would be appropriate for the Judgments Act 1838 rate of 8% to apply until two months after delivery of the detailed bill. This is because a relatively large proportion of the costs fell outside the approved costs budget and I consider it appropriate for a reasonable opportunity be granted to interrogate the detailed bill.

Interim Application for Costs

14. CPR r. 44.2(8) provides that: "*where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so*".

15. Wirsol's total costs up to and including the final day of trial amount to £613,981.82 (excl. VAT), as adjusted in the most recent schedule provided by Wirsol's solicitors. Costs incurred up to and including the CCMC on 14th November 2023 were £107,521.33. Costs incurred for which there had been an approved budget amount to £361,408.66 (against a budget of £348,590). The total for incurred but not-budgeted costs (which included disclosure, which had not been agreed or approved) is £145,051.83. Wirsol seeks an interim payment of £459,393.80, alternatively £430,908.31.

16. Both counsel rely upon the guidance from Coulson J (as he was then) in MacInnes v Gross [2017] 4 WLR 49, in which he regarded the approved costs budget as the appropriate starting point for the calculation of any interim payment on account of costs. A deduction of 10% was then allowed as the maximum deduction that was appropriate, given the pre-existing budgeting exercise. Mr Khan argued that, notwithstanding, the deduction from the budgeted costs incurred should be 20% rather than 10%. Most of the reasons advanced for this approach are not sufficient to depart from the suggested approach in MacInnes; many of them are repetitive of the points made above, which I have dealt with. Moreover, whilst Mr Khan makes the valid point that, in relation to the budgeted 'Expert Reports' phase, the total sum of £132,179.17 claimed as incurred by the Defendant is at least arguably unreasonable and/or disproportionate, both of the calculations advanced by Ms Box are already based upon allowing either 100% or 90% of the budgeted phases for those phases in which actual costs incurred exceeded the phases (together with 90% of incurred costs when they were below the budgeted amount). This is a realistic and appropriate approach. In this context, the criticisms of actual costs insofar as they relate to phases in which the budget was exceeded are irrelevant. I regard it as appropriate to allow (a) 90% of incurred costs (where less than budgeted) and (b) 90% of budget (where incurred costs exceeded budget) in respect of all phases which were budgeted. This amounts to £256,369.39.

17. As made clear in Cleveland Bridge UK Ltd v Sarens UK Ltd [2018] EWHC 827 (TCC), a different approach is taken to costs incurred which were not part of an approved budget. The incurred, non-budgeted costs are £252,573.16. In Cleveland Bridge, a deduction of 30% was made, as Mr Khan accepted at paragraph 3.2 of his final written submissions on costs. Applying this, the relevant amount would be £176,801.21. Mr Khan then seeks, at paragraph 4 of his submissions, a further reduction of this sum '*by applying the principles in Cleveland Bridge*' to 30% of £176,801.21. This is an effective overall reduction to the incurred costs by 79% (or a reduction to 21% of the incurred costs). Notwithstanding the criticisms made by Mr Khan of the amounts incurred, there

is no reasonable basis to conclude that a 79% deduction is anything like the appropriate percentage deduction to make for the purposes of an interim payment. However, I do accept that the costs in respect of some phases on their face seem high – disclosure in particular. Without in any way prejudging the merits in the context of a detailed assessment, I consider the appropriate deduction, in light of the points made at paragraph 3.2.1-3.2.3 and 3.3 of Mr Khan's final note, to be 40% the incurred, non-budgeted costs claimed. This amounts to £151,543.90.

18. The total amount to be paid by way of interim payment is therefore £407,913.39.

Permission to Appeal

19. Assensus advances four grounds of appeal.

The judge was wrong to hold that the Claimant was not entitled to a reasonable bonus on the basis of the claim in quantum meruit.

20. Mr Khan submits that the Court failed to address the existence of a term implied by law.

21. No appeal is (rightly) advanced in respect of the absence of any express entitlement to a bonus. The only fully implied term pleaded was introduced in the Amended Reply, after closing submissions. The Court dealt expressly with the pleaded claim alleging a term implied by fact (i.e. business efficacy/obviousness). The rejection of this claim is also not appealed. A term implied by law was not pleaded. It is also noted that when the Claimant raised by way of substantive comments on the draft judgment (in addition to the agreed identification of various typographical errors), Mr Khan at that time submitted that the new paragraphs within the Amended Reply included the plea as to the existence of a term implied by law. This submission is dealt with at paragraph [109] of the Judgment. The suggestion now is that the plea that there existed a term implied by law is found in the words '*such other amount as the Court may determine*' in paragraph 27 of the Particulars of Claim; this had not previously been submitted. In any event, that paragraph was not 'overlooked' as suggested, but expressly dealt with in paragraph [89] and following of the Judgment, and the basis for the claim advanced in that paragraph relates back to the specific plea at paragraph 12(6) of the Particulars of Claim, which was also expressly referred to and considered in the same passage in the Judgment. Paragraph 12(6) pleaded the legal basis for the entitlement as being an express term entitling Assensus to a bonus, with the implication being limited to the 'reasonableness' of the amount. This plea was considered in detail in paragraph [90] and following of the Judgment, and rejected as inconsistent with the various agreements that were made by the parties as found by the Court (and not the subject of appeal).

22. The words now relied upon formed part of paragraph 27 of the Particulars of Claim as follows:

> "Assensus will say that a bonus so calculated would come to £2,445,100 plus VAT, i.e. £2,934,120 (on the basis that the Cleve Hill Project was in any event equivalent to a greenfield development to which "Option 2" applied), alternatively *such other amount as the Court may determine*."

23. They are the usual words pleaded which allows the Court to conclude (when quantifying any such legal entitlement as had been shown to exist) a number other than that specific

sum identified as the Claimant's primary case (i.e. to £2,445,100 plus VAT). The words were plainly not pleading the legal basis of a claim which needed to be considered in its own right. This is no doubt why they had not previously been referred to by the Claimant as the pleaded basis upon which the Court should consider the existence of an implied term (whether by fact or law).

24. The pleading point alone means the ground of appeal has no reasonable prospects of success. However, the Judgment in any event considered the substance of the claim, albeit briefly, at paragraph [109], irrespective of the pleading point. It is not reasonably arguable, contrary to the conclusion expressed at paragraph [109], that there was any evidential or other sound basis upon which the Court could conclude that an entitlement to a bonus in addition to a base salary is a necessary ingredient of a contract for services between a development company and a project manager, simply by reason of its falling into particular category of relationships, so as to imply a term by law (and the skeleton argument for permission to appeal does not identify one or engage with the substance of this conclusion).

The judge was wrong to hold that the Claimant was not entitled to a reasonable bonus based on the claim in unjust enrichment.

25. In circumstances where there was a contract for services between Assensus and Wirsol, which provided for remuneration in respect of those services, including work on the Cleve Hill project, but which contract contained no express or implied term that there existed an additional entitlement to a bonus, the argument that nevertheless there is a space in which the concept of unjust enrichment may operate stands no reasonable prospect of success. It is plainly not unjust that Assensus was paid in accordance with the contract, as it was found to be. The skeleton argument does not begin to engage with how this analysis is wrong, particularly in light of the Supreme Court authority relied upon by the Court at paragraph [123] of the Judgment. This ground of appeal stands no reasonable prospect of success.

The judge was wrong in that he committed a fundamental error of fact in respect of Invoice 176.

26. Invoice 176 relates to Assensus' claim for statutory interest in the sum of c£21k, on sums said to have been due in relation to Project Encore. The factual background to Project Encore is dealt with at paragraphs [37] to [45], and the claim itself is considered at paragraphs [151] to [155] of the Judgment. Invoice 176 is dealt with at paragraph [44], and – as a matter of fact - did not refer on its face to any credit. There was therefore no factual error at all, whether fundamental or otherwise. However, whether the invoice did or did not refer to a credit had nothing at all to do with the reasoning and conclusion which led to the failure of the claim: (a) at paragraph [153], the Court concluded that none of the pleaded bases of implied term relating to the date upon which payment became due and upon which the claim for statutory interest rested were necessary or obvious. This alone is sufficient for the claim to fail; (b) at paragraph [154], the Court concluded, in any event, that the parties had expressly agreed the sums that would be paid on account, inconsistent with a claim that a remainder was 'due' for the purposes statutory interest running. The Claimant does not engage with the substance of these findings. The Claimant has not raised any ground that stands any prospect of success with regard to the claim for statutory interest.

The judge was wrong to hold that the quantum of the bonus was £157,500.

27. The four sub-grounds of appeal stand no reasonable prospect of success. Appealing a first instance Court's finding of fact based on consideration of expert evidence, following cross-examination and where the Court has the benefit of seeing the witnesses, faces a very high threshold, which the Claimant's criticisms do not remotely approach. Taking them in turn:

    (1) As to 10.1, the expert evidence from the Claimant's own expert was that there was a '*very very broad range*' of what might be considered 'reasonable' (see paragraph [131] of the Judgement). The fact that the Defendant's expert considered that the amount offered to Assensus by Wirsol (but which had been rejected by Assensus) of £257,000 was reasonable, is plainly not inconsistent with his own assessment of what - when coming to a single answer – Mr Rigby concluded was the market rate of £157,000. The expert expressly dealt with this in evidence: '*Well, you are jumping to the conclusion that because they offered 257 that automatically makes 157,000 unreasonable, which I can't agree with that….*'. The reasoning when arriving at £157,000 was considered in the Judgment in detail (see paragraphs [135] to [143]) and regarded, with justification, as cogent. The ground stands no realistic prospect of success.

    (2) the related grounds of appeal at skeleton argument paragraphs 10.2 and 10.3 concern the fact that in identifying the profit by which at least one method of identifying a reasonable bonus could be calculated, a later, contingent profit of £7.3m earned by Wirsol was not included by Mr Rigby. This approach was preferred by the Court, which considered the point in some detail at paragraph [139] of the Judgment. The criticism at 10.2 ignores the passage of evidence (at [127]) in which Mr Rigby expressly explained his reason not to include £7.3m within the profits (as he had also done in his Report). Whilst the expert accepted that he 'failed' to include this sum in his calculation, in the sense that he had not done so, he explained why he had specifically considered that it should not be taken into account. He plainly did not accept the proposition that it should have been included. The ground at 10.3 does not add anything. The experts had different views on this point; the different views were considered at paragraph [139] of the Judgment, and there is no realistic prospect of arguing that it was not open the Court to prefer Mr Rigby's evidence on the point.

    (3) As to 10.4, the basis of the Court's rejection of Mr Kriete's evidence was set out in 6 detailed sub-paragraphs at [133] of the Judgment. The skeleton argument does not begin to explain how or why the Court was not entitled to come to these views. This ground has no realistic prospect of success.

Stay of Execution

28. The Claimant sought a stay of execution pending appeal.

29. In considering an application for a stay the court has a broad discretion to make an order which best accords with the interests of justice taking into account all of the circumstances. The essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. If it is contended that the effect of an

order would be to stifle an appeal then this contention needs to be established by the appellant on the balance of probabilities.

30. No witness evidence was served by the Claimant stating the basis upon which the Court could conclude that ordering an interim payment would stifle the claim. Mr Khan submitted that I can nevertheless come to that conclusion where:

(1) on the available evidence, it is common ground that the limit of the Claimant's ATE cover is £400,000;

(2) the balance sheet for Assensus dated 30 January 2024 shows that its liabilities (£135,044) exceed its assets (£46,520) (**X2/24**); and

(3) the Defendant was seeking an interim payment, '*far in excess of the ATE cover and the Claimant's means*'.

31. In fact, the Order I have made means that the interim payment to be made is £7,913.39 in excess of the ATE insurance cap. Ms Box relies upon Hincks v Sense Network Ltd [2018] 3 Costs LR 511, in which Lambert J concluded that, where there was no evidence concerning the appellant's level of earnings, nor concerning any assets which he may or may not hold; or of how he has funded the litigation, the mere assertion that such an order would stifle an appeal is insufficient.

32. There is no evidence before me which establishes the proposition that an Order that the Claimant pay the sum ordered in excess of the level of ATE insurance will stifle any appeal. I bear in mind that, as was common ground at trial, the Claimant is effectively a vehicle by which Mr McCarthy operated as a self-employed consultant. There is no evidence as to how, notwithstanding the 'paper insolvency' relied upon by the Claimant in its submissions, the litigation has been funded so far, or how or why that route of funding would not be available in the context of an appeal.

33. The application for a stay of execution fails.