Neutral Citation Number: [2020] EWHC 1368 (QB)

Case No: QB-2020-000611

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/05/2020

Before:

MR JUSTICE FREEDMAN

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Between:

LES AMBASSADEURS CLUB LIMITED	**Claimant**
- and -	
MR SALAH HAMDAN ALBLUEWI (ALSO KNOWN AS SHEIKH SALAH HAMDAN ALBLUEWI and MR SALAH HAMDAN ALBELWI)	**Defendant**

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Paul Burton (instructed by **CANDEY**) for the **Claimant**
James McWilliams (instructed by **Trowers & Hamlins LLP**) for the **Defendant**

Hearing date: 22nd May 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE FREEDMAN

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 2pm.

Mr Justice Freedman:

Introduction

1. This is a judgment about costs following the decision of the Court with the neutral citation number of [2020] EWHC 1313 (QB) handed down on 22 May 2020, discharging the freezing injunctions of Cavanagh J and Waksman J made on 6 February 2020 and 17 February 2020 and dismissing the application of the Claimant for the continuation of the same. At the time of the hand-down, the Court heard arguments about costs, and judgment was reserved over the weekend.

2. The issues between the parties are as follows:
   (1) what is the appropriate order for costs;
   (2) if the Defendant is awarded costs, should the assessment be on the indemnity basis;
   (3) should there be a summary assessment; and
   (4) if not, should there be a payment on account of costs pursuant to CPR 44.2(8)?

Issue 1: the appropriate order for costs

3. The Defendant says that he should have the costs of and occasioned by the above injunctions and the costs of and occasioned by the discharge application and the continuation application.

4. The Claimant submitted that the costs should be costs in the case, but in oral submissions moved towards the Defendant's costs in the case.

5. The Defendant submitted that he is the successful party in respect of the above applications and the general rule (CPR 44.2(2)) applies in the following terms:

   "(2) If the court decides to make an order about costs –

   (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

   (b) the court may make a different order."

6. The Defendant also submits that the Court has found not only that the Claimant has not provided sufficient evidence of real risk of dissipation, but also that the Court has found instances of non-disclosure including issues relevant to whether there is a real risk of dissipation. He says that the issues have been hard fought, and the Defendant has succeeded.

7. The Claimant pointed to parts of the judgment which were critical about the Defendant, and, in particular, the points made at paragraph 41 which were characterised by Mr Burton as showing a lack of commercial probity. Mr Burton also pointed to the summary of the history (which involved disputes in the evidence) at paragraphs 19-21 and to a part of his submissions at paragraphs 25-27. He said that this contained criticisms by the Court about the Defendant, and they were matters where a fuller picture would emerge at a later stage. He, therefore, submitted that having regard to

these matters, either the order as to costs should be by reference entirely or in part to the result of the case.

8. Whilst the points made by Mr Burton are correct, the result of the applications did not hinge on these points. On the contrary, these points were taken into account in the assessment of whether as a whole there was sufficient evidence of a real risk of dissipation. Further, the points on non-disclosure were independent of these points. In my judgment, the Defendant has succeeded on both applications heard before the Court which is sufficient reason for the costs of those applications to be the Defendant's. Further, the costs of and occasioned by the without notice and the continuation injunctions should also be the Defendant's not only because they should follow the same result as the applications heard before this Court, but also because of the impact of non-disclosure. This is not therefore a case where it is just for any part of the costs to abide the event of the ultimate trial or to await adjudication at that stage. Thus, these costs shall be paid by the Claimant to the Defendant.

Issue 2: basis of assessment

9. There is no controversy as to the test for when indemnity costs are appropriate. It is not necessary to prove conduct which is *"disgraceful or deserving of moral condemnation"* or *"unreasonable to a high degree"*: see *Excelsior Commercial and Industrial Holdings Ltd [2002] EWCA Civ 879; [2002] C.P. Rep. 67*, CA. The Court there held that the making of a costs order on the indemnity basis would be appropriate in circumstances where: (1) the conduct of the parties or (2) other particular circumstances of the case (or both) was such as to take the situation "out of the norm" in a way which justifies an order for indemnity costs (at para.31 per Lord Woolf LCJ and para.39 per Waller LJ).

10. Mr McWilliams for the Defendant submitted that non-disclosure is a breach of an important duty and this without more takes the matter "out of the norm". He submitted that it is stronger still in this case because the non-disclosure was about matters which were relevant to the risk of dissipation, and which were material to whether real risk of dissipation was established.

11. Mr McWilliams submitted that there was "no basis" for the submission of real risk of dissipation. In my judgment, there is a distinction between, on the one hand, a case where there is plainly no basis for making an application and, on the other hand, a case where there is an argument to put, but the result is that when the evidence is seen as a whole, there is not sufficient evidence to establish a real risk of dissipation. This case was the latter rather than the former. There were aspects of the Defendant's conduct which were not satisfactory in respect of incurring debts and not paying for them and not engaging with attempts to make contact with him; see paragraph 7 above. In the judgment at paragraph 48, it was stated that the Court had to consider conduct lacking in commercial probity as well as all the circumstances of the case and put them into the balance. That balance was conducted throughout paragraphs 39-61, and the result was that when the relevant matters were seen as a whole, there was insufficient evidence to prove a real risk of dissipation.

12. It is relevant to take into account the non-disclosure and its inter-relationship with whether risk of dissipation was established. A factor is the importance of the duty of disclosure (in without notice applications) being upheld by its breach having consequences, often including indemnity costs. However, whilst all of this is highly relevant, it is not decisive. It is also relevant that throughout the judgment, it was found that the non-disclosure was not in bad faith e.g. paragraphs 88-90 and 92. This was a case where the failure to comply with the duty of disclosure was caused by a failure to appreciate that the matters relating to the property and the previous defaults might be relevant to the real risk of dissipation without any intention to mislead the Court. For the reasons set out in paragraph 11 above, this was not a "no basis" case, but a failure due to there not being sufficient evidence overall of a real risk of dissipation. If it were that every case of non-disclosure merited indemnity costs, then these counter-veiling considerations would be irrelevant. However, that is not the law and practice.

13. The law and practice are, in my judgment, summarised accurately in Gee on Commercial Injunctions 6th Edition at paragraph 24-044 as follows:

"Although material non-disclosure on the ex parte application is a breach of the claimant's duty to the court, there is no general practice of the court that where there has been non-disclosure, and costs are to be awarded, they ought to be on an indemnity basis. However, the fact that there has been material non-disclosure is plainly a relevant factor to be taken into account on the question of costs and is capable of justifying an award on this basis, and such an order will usually be made if the non-disclosure was deliberate or culpable."

14. The proper basis of costs is an exercise of discretion, as was said by the Court of Appeal in *Excelsior Commercial*. It is a question of weighing up the above factors. Taking full cognisance of the importance of full and frank disclosure as a relevant factor, this is not a case which is "out of the norm" or "something outside the ordinary and reasonable conduct of proceedings" (see *Esure Services Ltd v Quarcoo [2009] EWCA Civ 595).* In all the circumstances and particularly those set out in paragraphs 11 and 12 above, this is not a case where in the exercise of the Court's discretion there should be an order for indemnity costs. It follows that when the costs are assessed, they will be on the standard basis.

Issue 3: summary assessment

15. The Defendant seeks a summary assessment of his costs. The costs sought by the Defendant are about £115,000. The costs on the other side are about £80,000 (and without a revision for costs following the judgment being provided in draft and the hearing of 22 May 2020). The costs schedule of the Defendant includes substantial costs in February 2020 (for example there was a brief fee of £9,000 for the hearing on 17th February 2020), and it includes substantial costs included for complying with the worldwide freezing orders in terms of disclosure (solicitor document costs alone of £3,735.50).

16. In my judgment, this case is unfit for a summary assessment for the following reasons:

    (1) it comprises more than one day. In addition to the hearing on 22 April 2020, there are the costs arising out of the original injunction ordered on 6 February 2020, the costs of the hearing of 17 February 2020 and the costs of the hearing about consequentials of 22 May 2020. It does not necessarily follow that the Court will not order a summary assessment in a case of more than one day. However, in the exercise of its discretion, this case is too heavy for the Court to embark on a summary assessment;
    (2) The amounts involved of over £100,000 are too substantial to be dealt with summarily;
    (3) There is a particular need for scrutiny which arises out of the fact that the costs of the Defendant were much greater than those of the Claimant. That is not said by way of criticism, but it is an additional feature which calls for inquiry rather than making the assessment summarily.

17. There is a further feature which is part of the next subject, namely that there are reasons for payment not to be made at this stage. If payment is not to be made at this stage, and there may be a detailed assessment at the end of the case, then this is a reason not to have a summary assessment. That being so, this is a further reason for not having summary assessment, albeit that the reasons for not ordering a summary assessment in paragraph 16 above suffice by themselves.

Issue 4: Interim payment

18. It is now necessary to consider whether there should be a payment on account of costs. The Court will proceed on the basis that there has to be a good reason why there should not be an interim payment on the basis of a starting point under the CPR of pay as you go in interim applications, particularly where the result of the application is independent of the merits of the claim. It may also flow from the reference in CPR 44.2(8) to an order for a payment on account unless there is good reason if it applies to a case where there is no detailed assessment at this stage.

19. Mr McWilliams submitted that if there were not a summary assessment, then it had not been shown that there was any good reason not to order a payment on account. On the contrary, there were reasons to make an order for a payment on account including the following:

    (1) to reflect the fact that there was no basis for the WFO due to absence of a real risk of dissipation;
    (2) to mark disapproval of the non-disclosure, and especially the fact that it was non-disclosure relating to the critical issue of real risk of dissipation;
    (3) to indicate that the Claimant must take the Defendant as it finds him. It chose to deal with him knowing about the fact that he was an international businessman based in Saudi Arabia and so it is not surprising that his assets should be outside the UK.

20. Mr Burton submitted that there was a good reason not to order a payment on account of costs. He invoked his submissions about low commercial morality referred to above. He said that in the light of the way in which the Defendant had behaved in respect of the gambling debt, an interim payment would deprive the Claimant of the ability to set off the costs order against the gambling debt (if the Claimant succeeds in his claim). He was using set off in a broad sense rather than in its equitable meaning, in the same way as the Court sometimes stays a summary judgment on a claim because of the existence of a counterclaim. References hereafter to "set off" are in this non-technical sense.

21. In my judgment, the resolution of this issue is connected with the reasoning above as to why indemnity costs are not appropriate. The answers to the three points of Mr McWilliams at paragraph 19 above are as follows:

    (1) This was not a "no basis" case in the above sense, but one where, when the evidence was seen as a whole, there was not sufficient evidence to prove a real risk of dissipation, notwithstanding the unsatisfactory conduct of the Defendant.

    (2) There is disapproval of the non-disclosure, but in this case, as found in the judgment, it was not in bad faith. If it had been in bad faith, this point may have trumped the consideration of set off.

    (3) The Claimant taking the Defendant as it finds him only takes the analysis so far. That was a relevant factor in respect of risk of dissipation to the effect that it does not follow that his having assets abroad, by itself or with the non-payment of debts, was sufficient to infer a real risk of dissipation of assets. However, in circumstances where it may be difficult to enforce a judgment (if the Claimant succeeds in its claim) due to the absence of assets within the jurisdiction, the justice of the matter may be not to order an immediate payment so as to enable a set off to occur. It has not been suggested that there would be any difficulty in enforcing the costs the other way at a later stage against the Claimant (if the Claimant does not succeed on its claim), and interest will be payable on such costs in the interim.

22. In my judgment, the set off point is a good one in the circumstances of this case. It is not a point of general application. It reflects the fact that it was effectively conceded that the Claimant has a good arguable case. It is not for the Court to form a provisional view of the merits of the case other than it is at lowest a good arguable case. In view of the unsatisfactory features of the indebtedness referred to at paragraph 41 of the judgment, and despite a real risk of dissipation of assets not being proven, the overall justice of the case is that the Claimant should be able to set off the judgment as to costs against a judgment which it will obtain if successful in its claim.

23. It follows that, in my judgment, there is a good reason to order that there should not be a payment on account of costs. This means that the costs order made in favour of the Defendant will not be assessed until the conclusion of the proceedings in accordance with CPR 47.1 and 47PD.1.

24. I should be grateful if the parties would reflect this in a draft order to be submitted to the Court for approval. If it is the case that there are other directions going forward, I should be willing to consider whether it would be appropriate for the Court to make an order about them, provided that this can be done without a further hearing.