



Neutral Citation Number: [2020] EWHC 400 (QB)

Case No: QB-2017-005811

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2020

Before :

MR JUSTICE FREEDMAN

Between :

- (1) Payroller Limited (In Liquidation)
(2) James Bernard Stephen and
(3) Shane Michael Crooks (in their capacity as
joint liquidators of Payroller Limited)
(4) Newbain Services Limited

Claimants

- and -

- (1) Little Panda Consultants Limited
(2) Christian Paul Burton
(3) Bluday Limited
(4) Keith Ellis
(5) Kellcon Construction Limited
(6) Leslie Thompson

Defendants

Matthew Cook (instructed by Pinsent Mason) for the Claimants
The Fourth Defendant did not appear and was not represented

Hearing date: 21 February 2020

JUDGMENT

Mr Justice Freedman (12:17 pm):

1. I have given judgment against the fourth defendant. I now turn to consequential matters comprising:
 - (1) Rate of interest;
 - (2) Basis of assessment of costs;
 - (3) A payment on account of costs.

Rate of interest

2. I will order that interest be payable at 2 per cent above base rate as sought, in respect of the fourth defendant. Since the base rate has been as low as it is, the practice in the Commercial Court did change so that 1 per cent above base was no longer the starting point. It is very frequently the case that 2 per cent is awarded and there are even cases where a higher rate has been ordered than 2 per cent above rate. 2 per cent above base was the basis that was agreed between the claimants and the first and second defendants. It was also the basis that was determined by the court following the default judgment against the fifth defendant.
3. I refer to that not because that it is binding on this court as regards the appropriate rate, but because it is informative as to what is commonly awarded. In my judgment, a rate of 2 per cent above base in the circumstances of this case is appropriate.

Basis of assessment of costs

4. Having succeeded in their claim, the claimants are entitled to their costs against the fourth defendant. The Claimants seek indemnity costs. Such an order is 'outside the norm', but it is provided for in the rules. In the White Book at 44.3.8 it refers to the fact that the court in *Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879 declined to give detailed guidance as to the principles to be applied by judges intending to make orders for costs on the indemnity basis, taking the view that they should not strive to replace the language of the rules with other phrases and the matter should be left so far as possible to the discretion of judges at first instance. The court 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) were such as to take the situation "out of the norm" in a way which justifies an order for indemnity costs.
5. In my judgment, in this case an assessment on the indemnity basis is appropriate. I am satisfied that this case is out of the norm for the following reasons. First, the fourth defendant put in a defence denying his dishonesty and also seeking to set out, at least in bare outline, why the transactions in question were legitimate commercial transactions. I have found in my judgment that in fact the transactions were dishonest. It follows from this that the defendant was perpetuating his dishonesty through the defence.
6. Second, I am impressed by the submission that the fourth defendant has by his conduct brought about additional and unnecessary costs. He has not participated in this case

since the disclosure stage. He did not serve a witness statement, he did not appear at the trial, he did not give evidence and he has not given any explanation for this. Yet, by having put in the original Defence and having never withdrawn it, the fourth defendant had made it necessary for the claimants to continue to incur costs against him in order to prove to the court the case and to disprove the defence.

7. In my judgment, what has happened has been that a dishonest defence has been exacerbated by continuing with the defence despite feeling unable to put in evidence or to participate in the trial because of what must be assumed to be knowledge that the underlying transactions were shams and the conduct dishonest. In those circumstances, to cause the case to continue rather than withdraw the defence was deliberately to cause costs to be incurred in circumstances where it was known that there was no defence to the claim. I find that to seek to take advantage of, and not withdraw, the defence knowing that it could not be supported takes the case out of the norm. For these reasons, it is appropriate to order that the costs should be assessed on the indemnity basis.

Payment on account of costs

8. As regards the £50,000 sought in respect of a payment on account of costs, the starting point under CPR 44.2(8) is that there should be an order for such a payment. The costs schedule for the cost budgeting showed a budget of £1,138,225.92. A part of those incurred costs at the time, which were £751,635.92, were the costs in connection with the freezing injunction against the fourth and fifth defendants. Although I have no schedule, I have been told that those costs would have exceeded £50,000 as regards the Fourth Defendant (presumably including also the Fifth Defendant). Further, there would have been costs also common to the claim against all the defendants at the initial stages when the particulars of claim were put together and the matter progressed up to disclosure and when the defence of the fourth defendant had to be considered. In addition to that, there will have been some of the costs, albeit a small part of the costs, of opening the trial in circumstances where it was apprehended that only the first and second defendants were going to attend. Thereafter, the continuing consequences of the defence of the fourth defendant remained alive were the costs of today and in connection with today. I am therefore satisfied that the minimum amount of costs against Mr Ellis will very comfortably exceed the sum of £50,000. The Claimant only seeks the sum of £50,000 which is in this context a modest amount to seek by way of a payment on account of costs, and I therefore order that payment on account of costs.