Neutral Citation Number: [2020] EWHC 682 (QB).

Claim No. QB-2018-001043

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 23rd March 2020

Before :

ROGER TER HAAR Q.C.
SITTING AS A DEPUTY HIGH COURT JUDGE

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Between :

VADIM DON BENYATOV

Claimant

- and -

CREDIT SUISSE SECURITIES (EUROPE) LTD

Defendant

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CHARLES CIUMEI Q.C., ANDREW LEGG and NAOMI HART (instructed by **Scott+Scott (UK) LLP**) for the **Claimant**
PAUL GOULDING Q.C., PAUL SKINNER and EMMA FOUBISTER (instructed by **Cahill Gordon & Reindel (UK) LLP**) for the **Defendant**

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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.

Roger ter Haar Q.C.:

1. This is my third judgment in this matter. The first, handed down on 22 January 2020, dealt with the Defendant's applications:

   (1) to strike out or for summary judgment in respect of the claim brought by the Claimant;

   (2) if or insofar as that application did not succeed, for a conditional order requiring the Claimant to pay £1.15 million into court;

   (3) alternatively, for an order that the Claimant provide security for costs in the sum of £1.15 million.

2. In that judgment I dismissed the applications for a conditional order and for security for costs. As to the first application, that succeeded to a significant degree but also failed to a significant degree.

3. My second judgment was handed down on 18 February 2020 and dealt with the costs of the applications. I concluded that the Defendant should pay the Claimant one third of his costs of the three applications.

4. In respect of an application by the Claimant for an interim payment in respect of his costs of the applications, I directed that the Claimant should put in his submissions as to interim payment by 10 February 2020, and the Defendant any submissions in reply by 17 February 2020. When the Defendant's submissions were received, the Claimant was permitted by me to make further submissions in response.

5. Apart from the costs of the applications, given that substantial parts of the Particulars of Claim had been struck out as a result of my first judgment, I ordered that the Claimant should pay the Defendant's costs referable to the parts of the Particulars of Claim which had been struck out up to and including the date of service of the Defence.

6. In paragraph 47 of the second judgment I said:

> "In my judgment, the Defendant is entitled in principle to have an order that it should be paid the costs incurred by it exclusively attributable to defending those parts of the case which have been struck out. It seems to me that this may be a difficult exercise in assessment, but the principle is clear."

7. There has been no application by the Defendant for an order that the Defendant should receive any payment of costs in its favour at this stage, but as explained below the Defendant seeks to resist an interim payment to the Claimant by reason of the costs to which it will in due course be entitled in respect of the parts of the pleading which have been struck out.

8. This third judgment deals with the Claimant's application for an interim payment as to costs.

9. In accordance with the directions given by me in my second judgment, the issues resolved in this judgment have been dealt with by the parties in written submissions without a hearing.

10. The starting point is CPR rule 44.2(8):

> "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."

11. Thus the default rule is that the Court "will" order a payment on account that is reasonable unless there is good reason not to do so.

12. The Defendant submits that there are four good reasons not to order a payment on account of costs, or not to do so at this stage:

    (1) There are costs orders in both directions;

    (2) There is a likelihood of a further costs order in the Defendant's favour as a result of the Claimant's proposed amendment application;

    (3) The Defendant has sought permission to appeal; and

    (4) The prospects of recovering costs from the Claimant paid to him on an interim basis at a later stage.

Costs orders in both directions

13. The Defendant's submission is that by reason of the order referred to at paragraph 5 above, it will in due course recover substantial amounts of costs thrown away in respect of those parts of the Particulars of Claim which I have ordered should be struck out.

14. The Defendant says that the costs incurred by the Defendant for the period prior to service of the Defence were £77,674.50, exclusive of VAT. It is suggested that an appropriate part of those costs which should be attributed to the parts of the pleading struck out would be 35%, giving a figure of £27,318.08.

15. The submission is that the Defendant's entitlement to payment of this, or a similar sum, by the Claimant is a good reason why there should be no order for payment on account in the Claimant's favour. In particular, it would be unfair to order a payment in the Claimant's favour but to ignore the Defendant's entitlement to payment of its costs by the Claimant. This is particularly so, submits the Defendant, when the competing costs orders were made at, and as a result of, the hearing of the same application. The Defendant further submits that the Defendant should not be prejudiced simply because there is greater difficulty in identifying precisely the amount of the Defendant's costs attributable to the struck out parts of the Particulars of Claim, which are payable by the Claimant, than the Claimant's costs of the applications, one-third of which are payable by the Defendant.

16. This is an interesting and, so far as I am aware, novel submission. In considering it, it is necessary to consider the underlying rationale of CPR rule 44.2(8), and the costs provisions in the CPR more generally.

17. On my understanding, the intent of the CPR is, in part, that where costs are incurred which are clearly attributable to a particular application, an order should generally be made for payment of the costs of that application by the unsuccessful party to the successful party, which costs will generally be summarily assessed in respect of interlocutory applications. Where summary assessment is not appropriate, an order is made for detailed assessment, but the effect of delay in payment which might otherwise result from awaiting detailed assessment is mitigated by the requirement in CPR rule 44.2(8) that an interim payment generally should be ordered.

18. It is inherent in these arrangements that a party who may in due course be successful in the proceedings at trial and then get an award in that party's favour of costs of the action as a whole may along the way have had to make payments in respect of unsuccessful applications.

19. It is also inherent in these arrangements that there may in some cases be a yo-yo effect, as the Defendant describes it – for example the Claimant may win an application on the first day of the case, but lose an application on the second day of the case.

20. The court is familiar with this where different applications are made at the same hearing – this will often result in a cost order in favour of party A on one application and in favour of party B on another application. If that results in a net figure payable to one party when one costs order (including any order for interim payment) is set off against another order (including any order for interim payment) in favour of the other party, then it is within the court's discretion to order that the net payer need only pay the net sum due: indeed that would generally be the appropriate order.

21. However, the situation which I am asked to consider is somewhat different from the example I have just given. Here, on the one hand, the Claimant seeks a specific sum by way of interim payment. On the other hand, the Defendant seeks in effect to set off an entitlement to costs in respect of which it does not apply for any interim payment at this stage, which are calculated in a necessarily imprecise way, and which can only be properly assessed at a time when a costs judge will be able to place the work thrown away in a fuller context of the costs incurred in pleading the Defence.

22. In my judgment the appropriate way to address the Defendant's submission is to ask whether the costs which it seeks to bring into credit could properly be the subject of an application for an interim payment at this stage. The Defendant does not make any such application, and in my judgment rightly so for the reasons given in the preceding paragraph of this judgment.

23. In my view, were I to adopt the approach suggested by the Defendant it would make considerable inroads into the impact of CPR rule 44.2(8), as a party would be able to bring into account contingent and uncertain entitlements as to costs to defeat an otherwise sure entitlement on the part of the other party to an interim payment. This would have the potential not only to undermine CPR rule 44.2(8) but also to encourage satellite disputes.

24. It is, of course, correct that an order for an interim payment in respect of costs will only be made in cases where summary assessment is inappropriate. However, there is a wide range of cases where summary assessment is inappropriate. In this case summary assessment of the costs incurred by the Claimant in respect of the Defendant's applications is, in my view, inappropriate because of the unusually high level of those costs as explained further below. This does not mean that a fair interim payment cannot be assessed. However, the costs which the Defendant seeks to bring into account seem to me to be different in nature. In order fairly to assess the costs incurred by the Defendant exclusively attributable to defending those parts of the case which have been struck out it is necessary for the assessor to have a full understanding of all the work carried out in preparing the Defence which

the Court cannot properly have until the case is concluded – or, even if it were possible in some cases, is information which I do not have before me.

25. The position might have been different if the Defendant had made an application for an interim payment in respect of its costs, but it has chosen not to do so.

26. Accordingly I reject the first ground of objection to the Claimant's application.

The likelihood of a further costs order in the Claimant's favour

27. The Defendant submits that in the event that the Claimant succeeds in his amendment application, it is highly likely that he will be required to pay the Defendant's costs of, and occasioned by, the amendments.

28. In my view, it would be wrong for me to deny the Claimant his entitlement to an order for an interim payment now because of a costs order which may be made in the future. It seems to me that the appropriate course is to deal with the implications of any costs order which may be made in future as and when that order is made.

The Defendant has sought permission to appeal

29. In my judgment this factor should not prevent me making an order for an interim payment at this stage. However, on the facts of this case, where the time for making an application for permission to appeal against my conclusions in my first judgment in respect of the Defendant's applications has been extended by me, I will order that the time for making the payment in

respect of costs will not start to run until that application has been determined by myself or another judge.

Prospects of recovering costs

30. The final reason put forward by the Defendant for not making an order for an interim payment is that the Claimant may not be able to repay any monies paid.

31. Leaving aside issues of general principle raised by this submission, I reject it on the facts of this case. In my first judgment, when considering the application for security for costs, I considered the Claimant's assets. In my view, the evidence which I there considered suggests to me that the Claimant would be able to repay an interim payment of the amount which I am minded to make as set out below.

Conclusion in principle

32. For the above reasons, I am not satisfied that there is any good reason for not making an order for an interim payment subject to the time for payment not running until the application for permission to appeal is determined.

Quantum

33. The Claimant says that his costs relating to the applications were £368,774.41. He seeks an interim payment of £60,000.

34. In my view I can deal with the quantification of an interim payment in a broad brush way.

35. Substantial as the Claimant's costs of these applications are, they are significantly less than those incurred by the Defendant.

36. In my view, both parties' costs are surprisingly high, which is why I would not regard this as an appropriate case for a summary assessment of costs.

37. Difficult issues of law were raised by the Defendant's applications, but the evidence was not particularly extensive.

38. On a broad brush basis, I would not feel comfortable in contemplating costs in excess of £120,000 on a 100% basis for the purposes of an interim payment, but I have no doubt that costs of that level are likely to be established in a detailed assessment, particularly given that leading counsel and two junior counsel were retained (entirely reasonably) and that the application took three days.

39. On that basis, I will order that there should be an interim payment of one third of that sum, namely £40,000.

40. I leave it to counsel to produce an order reflecting this judgment.