TRANSCRIPT OF PROCEEDINGS

Claim No.: HC-2017-002524

Neutral Citation Number: [2018] 4038 EWHC (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Rolls Building
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Dated 17/12/2018

Before:

THE HONOURABLE MR JUSTICE FANCOURT

Between:

ALDFORD HOUSE FREEHOLD LIMITED (Claimant)

-v-

GROSVENOR (MAYFAIR) ESTATE (First Defendant)
K GROUP HOLDING INC (Second Defendant)

MR E JOHNSON QC appeared on behalf of the Claimant
MS G DE CORDOVA appeared on behalf of the First Defendant
MR S JOURDAN QC and MR T JEFFERIES appeared on behalf of the Second Defendant

Hearing date: 17th December 2018

Approved Judgment

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MR JUSTICE FANCOURT:

(1) Following the judgment that I handed down last Friday, I now have to decide issues relating to the costs of the action and various other consequential matters. Dealing with the incidence of costs, it is clear from my judgment that the defendants are the successful parties in this claim and the claimant is the unsuccessful party. The usual order for costs would be that the unsuccessful party pay the successful party's costs but, of course, the court may depart from the usual order in appropriate circumstances.

(2) The circumstances in which it might do so and the basis on which it might do so are set out in Part 44.2 of the Civil Procedure Rules and are well-known. The only basis for any principled departure suggested in this case is that, although the defendants have been successful in the claim, they have not succeeded on all the issues that were argued. The claimant suggests that they failed on certain important issues and that the order I make for costs should take that into account.

(3) Where I refer in this judgment to the costs of the action, I make clear at the outset I am excluding the costs of the two applications made by the second defendant shortly before trial for permission to adduce further evidence in relation to the section 4 point. It is accepted by the second defendant that it should not recover its costs of those applications and it should pay the other party's costs of the applications.

(4) Returning to the main costs of the action, the issues on which the defendants did not succeed were the following. First, the authority of Ms McNeil to sign the initial notice on behalf of certain of the tenants, Aweer, Lembe, MBOSE and Rokkibeach. Two of those were conceded by the second defendant after the pre-trial review and shortly before the trial was due to start – the cases of Aweer and Lembe.

(5) At trial, the second defendant and the first defendant contested the authority of Ms McNeil in relation to MBOSE and Rokkibeach. And, further, on that issue, there was a contest about the authority of Ms McNeil in relation to Leclipse and the defendants won that issue on the basis there could be no valid ratification of an initial want of authority.

(6) The second main area where the defendants say that they succeeded was whether or not Chapter 1 - Part 1 of the 1993 Act applied at all. This was referred to as the section 4 issue.

(7) The first of those two issues entailed the provision of expert evidence on foreign law; that is to say, the law of Gibraltar in relation to Aweer and Lembe and the law of the British Virgin Islands, Jersey and the Bahamas in relation to MBOSE, Rokkibeach and Leclipse.

(8) The second defendant concedes that it should pay the claimant's costs in relation to Gibraltar law. The issue is what order, if any, should be made separately in relation to the costs incurred in dealing with BVI, Jersey and Bahamas law. The first question

is whether I should make any differential order to reflect that the defendants did not succeed on those issues.

(9) I am satisfied that I should make a differential order rather than order those costs to be costs of the action that the defendants should recover. These were discrete points put in issue by the second defendant for its own advantage. They were potentially very important points, and they had significant consequences in terms of the nature and scope of the evidence that was required for the trial and the issues dealt with at the trial.

(10) The defendants argue that they should not be deprived of their costs in relation to BVI or Jersey law and Bahamas law, on this basis, that they had to deal with some quite unclear allegations on the part of the claimant as to how Miss McNeil did have authority in relation to the tenants in question; and, secondly, that BVI law was needed in any event to deal with the case that was put forward, in which they were successful, and, thirdly, there were certain motives not to admit the position in BVI law substantially ahead of preparation of evidence. The claimants should have admitted it but did not.

(11) I accept the defendants' submissions in relation to BVI law. It seems to me a relatively narrow issue of BVI law that can be regarded as part of a case in which the defendants succeeded and not a case on which they failed and it could and should have been admitted as non-controversial at an earlier stage and would not, therefore (inaudible) differential order in relation to costs of the BVI expert evidence and the consideration of it by the lawyers.

(12) So far as concerns the Jersey and Bahamas costs, on the other hand, in my judgment the defendants should not recover the costs in relation to the preparation and provision and consideration of that evidence. The evidence was required because of a point that the second defendant raised and the first defendant adopted. For tactical reasons these were points that the defendants wished to pursue at trial. They have pursued them and they failed on them. In those circumstances, I should make an order that the defendant will not recover costs in connection with the preparation and consideration of the expert evidence relating to Jersey law and Bahamas law.

(13) The claimants seek to persuade me to go further and say that they should have their costs of considering BVI law, Jersey law and Bahamas law. That is a slightly unusual order to make where a successful party loses a discrete issue, but it is an order that can properly be made in appropriate circumstances. The right approach to such an issue was considered by Nugee J in the case of *R (on the application of) Viridor Waste Management v HM Revenue and Customs Commissioners* [2016] EWHC 2502 (Admin). Nugee J emphasised that to make a positive order in favour of the unsuccessful party in the action is an unusual course to take. It does not depend on it being established that the issue raised was unreasonably raised by the successful party in the action but, nevertheless, there must be a good reason for making what, on one view, may be regarded as an exceptional order. That is to say it is not an order that is made in the ordinary course of costs orders.

(14) The claimant does not suggest that the defendants acted unreasonably in raising the issues about authority. They do say it gave rise to a distinct issue or issues in relation to the equivalent foreign laws in relation to which substantial and discrete costs were incurred.

(15) The claimant's total costs, they say, in preparing and considering the issues in relation to all the foreign laws are in the region of £195,000, a remarkably high figure on any view, very much higher than the equivalent figure for the second defendant's costs which were in the region of £71,000 on an equivalent basis.

(16) The likely reason, as I see it, for the very substantial costs that were incurred by the claimant in relation to the expert evidence in question is the degree of confusion in the claimant's case about the exact basis on which it was going to be contended that Miss McNeil did have authority to act on behalf of the various tenants. A great number of disparate issues and arguments were raised at various times. In the event, the issue was decided at trial on a much narrower basis than had been adumbrated in the statements of case and correspondence and was decided on the basis of relatively few documents and a limited issue of expert evidence. The expert evidence prepared by the claimant went very much wider than that.

(17) In those circumstances, given that the issue of authority was not raised unreasonably and that a large part of the costs are properly attributed more to the claimant's own approach to the issue than the issue that the defendants had raised, I do not consider that it would be just in the circumstances of this case to order the defendants to pay the claimant's costs of that evidence. The right order to make so far as the second defendant is concerned is that the second defendant does not recover its own costs in relation to the expert evidence of Gibraltar law, Bahamian law and Jersey law and the consideration of that evidence and the preparation of arguments in relation to it by the lawyers acting for the second defendant.

(18) Given the nature of the discrete issues raised, this is, unusually, one of those cases in which it is perfectly appropriate to make an order in those terms, excluding costs which would otherwise be payable by the claimant to the defendants as the cost of the action. It is not necessary for me to attempt to estimate a percentage deduction from the overall costs of the second defendant.

(19) On the second issue that is raised, the section 4 point, apart from the costs of the two applications for permission to adduce further evidence, which I have already dealt with separately and which are non-controversial, it seems to me that the costs in relation to the section 4 issue, first of all, are not easily and separately identifiable in the way that the costs of the expert evidence are and, secondly, are going to be relatively modest. There was very little evidence relating specifically to the issue and the costs, therefore, are really the costs of presenting and arguing the point.

(20) It seems to me it is right to treat the costs of that issue in the language used by Nugee J in the *Viridor Waste Management* case as costs that were incurred along the way in fighting other substantial issues rather than that being a discrete point. It is also relevant, in my judgment, that the only basis on which the defendants can be said to have lost that issue, is that they succeeded on the earlier issue, as to the number of flats

in the building, and the fact that the sixth and seventh floors were therefore clearly residential space in the building.

(21) So far as costs between the claimant and the first defendant are concerned, Ms De Cordova submits that the first defendant should be dealt with somewhat differently and should recover all of their costs because there are not really any identifiable costs which they incurred in relation to the expert evidence issue. That may or may not be right. I do not know. There is no detailed summary of the first defendant's costs that is put before me, but it seems to me that there were particular time costs incurred on behalf of the first defendant in considering the expert evidence and whether or not to adopt the arguments of the second defendant, which the first defendant eventually did. Those costs ought to be treated in the same way as the costs that the first defendant incurred in relation to those issues. I consider that the same order, making an exclusion in relation to the costs incurred in relation to Gibraltar law, Bahamian law and Jersey law, should be made in relation to the first defendant too.

(22) Accordingly, the order will be that the claimant pays the costs of the first and second defendants to be assessed on the standard basis if not agreed, save in relation to those costs I have just identified in my judgment; that is to say the expert evidence costs and legal costs associated with them, but not the section 4 costs that will be treated as part and parcel of the costs of the trial itself.

(23) The next issue is whether or not there should be a payment on account. So far as the second defendant is concerned, the net total costs are £534,000. On the basis of the decision that I have made as to the exclusion of expert evidence costs and legal costs relating to the expert evidence it appears from a schedule that Mr Jourdan helpfully provided that something in the region of £56,000 may be attributable to those costs and, therefore, deductible from the grand total. That brings them down to something in the region of £470,000.

(24) I am willing to make an order in the circumstances that there should be an interim payment of two-thirds of that amount. If, whatever that figure is calculated to be, it is less than the total sum that has been paid into court as security for costs, then the figure so calculated should be paid out to the second defendant. If the sum calculated exceeds the total amount in court, then the total amount in court should be paid out towards the interim payment.

(25) So far as the first defendant is concerned, as I have said there is no schedule of costs for me to consider. There is just a total figure put forward recently in a letter and informed to the court today as £185,000. Ms De Cordova seeks 70 per cent of that. I need to be more cautious in my assessment of what is an appropriate figure given the absence of a schedule of costs and the inability to assess what costs are to be excluded from the total in relation to expert law evidence.

(26) In the circumstances I agree with Mr Johnson, who submitted that a conservative approach should be taken and a figure of £80,000 to be paid on account of costs is the right figure. Mr Johnson asks on behalf of his client for six weeks in which to make the payment. In the circumstances of the nature of the claim, with the nominee purchaser having to look to the participating tenants perhaps to provide funds, I am

prepared to accept, in the absence of any strenuous objection by either defendant, that there should be a period of six weeks for payment.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Addendum:

I first received a transcript of my costs judgment in early September 2019, nine months after the judgment was given. The transcript was hopelessly incomplete because of the poor quality of the recording. I sent it back for a further transcription to be made. The further transcript was better but still had numerous "(inaudible)" passages. I have done my best to make sense of it, but my memory of exactly what was said is, naturally, incomplete at this stage.

Mr Justice Fancourt