NEUTRAL CITATION: [2019] EWHC 378 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

No. CR-2016-007340

Rolls Building
Fetter Lane
London EC4A 1NL

Wednesday, 6 February 2019

Before:

HIS HONOUR JUDGE PAUL MATTHEWS

(Sitting as a Judge of the High Court)

B E T W E E N :

(1) LUCY JANE MCCALLUM-TOPPIN
(2) JULIE BRYAN
(in their capacity as the Trustees of Angus McCallum-Toppin's Will Trust)

Petitioners

- and -

(1) ALISTAIR BRUCE MCCALLUM-TOPPIN
(2) ALLAN ANDREW MCCALLUM-TOPPIN
(3) BERTHA ANNE MCCALLUM-TOPPIN
(4) AMT COFFEE LIMITED

Respondents

MR N. DOUGHERTY and MISS C. STAYNINGS (instructed by BDB Pitmans LLP) appeared on behalf of the Petitioners.

MR T. ELIAS (instructed by Forsters LLP) appeared on behalf of the First Respondent.

MR M. MORRISON (instructed by Blake Morgan LLP) appeared on behalf of the Second Respondent.

MR T. WALKER (instructed by Freeths LLP) appeared on behalf of the Third Respondent.

THE FOURTH RESPONDENT was not present and was not represented.

J U D G M E N T

(As approved)

HHJ PAUL MATTHEWS:

1 The main judgment in this matter was handed down on 29 January 2019, under neutral citation [2019] EWHC 46 (Ch). Yesterday and today I have been considering consequential matters. Following my decision yesterday, in principle, on the question of costs to be paid by the respondents in favour of the petitioners (under neutral citation [2019] EWHC 377 (Ch)), today I am dealing with particular issues that arise in considering what costs are included in that order. First, the respondents object to the costs of the expert evidence, on the basis that I had in fact held that the expert evidence adduced by three of the four parties was inadmissible and therefore could not be relied on. And Mr Elias, in particular, says that what I should do is to exclude all the costs of dealing with the expert evidence, that is to say the preparation of that evidence, the preparation for cross-examination at trial and the two days of trial at which the expert evidence was heard.

2 There is no doubt that the court has the discretion to exclude the costs in this way, even though the preference of the court undoubtedly is not to exclude the costs of issues, but rather to go for percentage reductions. CPR rule 44.2(2)(c) allows the court to make a different order, and examples of the orders that may be made are given in rule 44.2(6). In that sub-rule, para (a) relates to an order for payment of a proportion of another party's costs, so a percentage reduction could be made, and also, para (e) refers to an order for costs relating to particular steps in the proceedings and para (f) to one for costs relating only to a distinct part of the proceedings. So it is clear that the court has the power to make an order of the kind which is sought by the respondents.

3 I should say that the third respondent, Anna, has some extra arguments which I will go on to consider in a moment. However, dealing first of all with the point of principle, Mr Dougherty, on behalf of the petitioners, referred me to two authorities. One is the decision in *Francis v Francis & Dickerson* [1956] P 87, a decision of Sachs J. That was in fact a case not only in the 1950s, and so under the old costs rules, but it was a case of a legal aid taxation rather than a party and party taxation. Indeed Sachs J says in his first paragraph:

> "The observations of the district registrar, and this application, relate solely to a legal aid taxation, there having been no party and party taxation."

4 Then Mr Dougherty referred me to a paragraph at p.95 which reads:

> "When considering whether or not an item in a bill of costs is 'proper' the correct viewpoint to be adopted by a taxing officer is that of a sensible solicitor sitting in his chair and considering what in the light of his then knowledge is reasonable in the interests of his lay client. That is, of course, a very different angle to that called to mind by the registrar's observation; it is wrong for a taxing officer to adopt an attitude akin to a revenue official called upon to apply rigorously one of those Income Tax Rules as to expenses which have been judicially described as 'jealously restricted' and 'notoriously rigid' and 'narrow in their operation'. I should add that, as previously indicated, the lay client in question should be deemed a man of means adequate to bear the expense of the litigation out of his own pocket - and by 'adequate' I mean neither 'barely adequate' nor 'super-abundant'."

5 I was also referred to a paragraph on p.96 which reads:

> "Where a solicitor *bona fide* acting in what he considers the best interests of his client has incurred expenditure which, unless allowed on legal aid taxation, will fall on him personally, it would be wrong for the court to be astute in seeking reasons to disallow the items, and in particular care must be taken not to be affected by what is colloquially termed 'hindsight'. Indeed, there is authority for saying that, as regards some honestly incurred expenditure (assuming there is nothing that can fairly be termed unwarrantable or excessive about it) the taxing officer on a 'common fund' taxation should take a 'liberal view' (per Horridge J in *Re Lavey).* In no matter is this more important than when dealing with expenditure upon inquiries - for otherwise there might creep in a tendency towards 'payment by results', which would be contrary to the best interests of justice."

6 Mr Dougherty also referred me to a passage in the judgment of Master O'Hare in the case of *Hobbs v Guy's and St Thomas' NHS Foundation Trust.* This is a decision which does not, as far as I can see, have a neutral citation number, but was made on 2 November 2015. In that decision, Master O'Hare said this at para.34:

> "In my judgment, although it was reasonable for the claimant's solicitors to incur these costs it is unfair to expect the defendant to pay for these items (compare the view taken by two of the Lords Justices in *Medway Primary Care Trust v Marcus* [2011] PIQR Q4, a case in which the claimant reasonably sought damages exceeding £500,000, necessarily incurred at least £50,000 pre-issue but ultimately won only £2,000). The rule against the use of hindsight in costs assessment (*Francis v Francis and Dickerson* …) is a rule based upon reasonableness, which, today, is trumped by proportionality (see. r.44.3(2), quoted above)."

7 So it is clear, from both of those cases, that the court deplores the use of hindsight in the assessment of costs. Of course, both of those cases are, in effect, dealing with the stage of assessment of costs rather than the stage of the court deciding what order it ought to make in the first place. There is no doubt that, as CPR r.44.3(1) says, the court will not, in either case, allow costs which have been unreasonably incurred or are unreasonable in amount, but I am not sitting here today to assess these costs. I am simply deciding whether or not to make a different order under r.44.2(3). Mr Morrison points out that the court will, under r.44.2(4)(b), have regard to certain circumstances, including whether a party has succeeded on part of its case, even if that party has not been wholly unsuccessful. Then, in r.44.2(5)(c), the conduct of the parties, which is also to be taken into account, includes the manner in which a party has pursued or defended its case or a particular allegation or issue. And it is therefore submitted that, because the petitioners put forward expert evidence which was ruled to be inadmissible, that is a sufficient basis for deciding that the court should make a different order here and exclude the costs of that evidence, as I have already described.

8 I am not aware of any authority which deals with such a question as this. Of course, that is not very surprising because, as is well known, every case in relation to costs, being based on discretion, is fact-sensitive. Looking at the matter here squarely on the facts of this case, there can be no doubt that the expert evidence which I excluded could be regarded as a discrete part of the case, but I have to look at the matter more broadly than that. I have to look at the conduct of all of the parties, and also take into account the points which Mr Morrison has drawn my attention to.

9 When the parties made their decision to adduce the expert evidence which they did, following the permission given by the court at an early stage, they did so in good faith and with the intention of advancing each of their clients' respective interests, and they did so

because they thought that it would be admissible. The fact is that it has turned out, in my judgment at least, not to be admissible. That means that they did not have the evidence that they thought they would have, but they did at least put it forward.

10 I am inclined to treat this case as not dissimilar to the case where evidence is put forward by a number of witnesses and the judge prefers the evidence of one witness to another, saying that one is more satisfactory or more cogent or is better placed to have seen the acts or the events which are in question and of which the evidence is being given. In those circumstances, for example, I do not think it would be right for the court to say, because I preferred the evidence of this witness to that witness, I am going to exclude the costs of adducing and cross-examining on the evidence of the witness I have not preferred, at least unless there were some special circumstances.

11 On the whole, therefore, I do not think I should make a different order in relation to this expert evidence. It is simply part of the preparation in good faith for the trial. The fact that it has not proved to be helpful at the end of the day, in the court reaching its decision, does not detract from the propriety, if you like, of putting it forward as part of the preparation for the trial. So that is what I will do in principle.

12 Mr Walker puts forward a number of considerations which are different, he says, in relation to the third respondent. She did not, after all, call any expert evidence and therefore the expert evidence, so far as his client was concerned, was largely, if not wholly, irrelevant and, therefore, the cost of it should be disallowed. The third respondent's involvement in the expert reports, and indeed in the evidence being given, was minimal and, therefore, even if I did not accede to the application on the part of the other respondents to exclude the costs of this evidence, I should do so in relation to his client.

13 It seems to me that, whilst I see the basis upon which Mr Walker puts that forward, the position is not really very different. The evidence that was adduced by other respondents was of some assistance to and indeed prayed in aid by Mr Walker on behalf of his client, and he did, albeit to a lesser extent, take part in the cross-examination of the expert witnesses at the trial. In part, the reason he did not have to do much, or not so much as the other respondents, was because he went third, and the other respondents had asked at least some of the questions that he might have done had they not been there.

14 Accordingly, whilst I see there might be some grounds for distinguishing the third respondent from the others, I do not think it right to make a different order even in respect of her costs.

LATER

15 It is argued by Mr Elias for the first respondent that there should be a reduction in the costs payable to the petitioners by the respondents by a percentage, to take account of a number of matters which he relies on as conduct of the petitioners justifying such a reduction. These relate to the excessive remuneration issue, the non-pursuance of certain allegations. There was a point also about the petitioner's late application to amend, but I think that that is dealt with by the terms of the order which I made at the time of the permission to amend, or to re-re-amend. There is a point taken on the document in which the petitioners made certain admissions, and then on the evidence given by the first petitioner, especially in relation to her third witness statement, and finally there are points made on the correspondence which show how the respondents were anxious to try to resolve the matter and were ready to negotiate.

16 However, although these points were put with some skill, nonetheless I think that Mr Dougherty is right to observe that it is rare to find litigation of this type where there are no possible complaints that can be made against the successful party for pursuing some points which in the event did not succeed. One has to stand back a little and look at the matter broadly. The matters which are mentioned here, even if I were to accept the force in relation to each of them, would not, either individually or collectively, make me take the view that a significant reduction in the percentage of costs to be awarded to the petitioners should be made. If I found them justified, they would amount to the order of, at most, 1 or 2 per cent. They are really rather small beer in comparison with the most serious allegations, namely the point about excessive remuneration, the complaint about the directors' loan accounts and the complaint about the dividends policy.

17 A point was made by Mr Elias, comparing this to the ordinary case of divorce of married persons. I have no particular experience in relation to the divorce jurisdiction, but in those cases in which I have had the professional duty to be even marginally involved, there always seem to me to be a huge number of allegations being made by one side or the other, often both sides, which go nowhere and they do not tend to figure very much in the costs judgments. It seems to me that, here, one must be realistic. A lot of allegations are made at the beginning of litigation which, it turns out, do not have legs for one reason or another. Unless they are in some way exceptional or enormous, I do not think that they should justify a percentage reduction, so I will not reduce the petitioners' costs on that account.

LATER

18 Mr Elias, on behalf of the first respondent, asks that the costs associated with the privilege issue which was argued before Fancourt J on the second day of the trial, when the court did not sit in relation to the petition, should be excluded from the costs payable to the petitioners

under the order I decided yesterday, so far as relates to the first respondent. Obviously, he does not ask for the order to be modified so as to affect liability of the other respondents in relation to the costs of the privilege issue. The ground on which he asks for this is that he was in effect excluded from discussion of this issue both before Fancourt J, and at the pre-trial review. On the basis that he has, therefore, had no input, and has not taken part in the argument, he is not therefore fully aware of what actually happened or was decided.

19 Mr Dougherty, on behalf of the petitioners, says, I think correctly, that these were costs (that is expended by the petitioners in relation to the privilege issue) as part of the general pursuit of the litigation constituted by this petition. In essence, it is no different from the case of costs incurred in looking for a particular witness to deal with a particular issue, which, as it happens, seems to affect one respondent rather than another. So it would not be right, in my submission, for Mr Elias to say, "Oh well, the costs incurred by the petitioners in dealing with an allegation against, say the second respondent should be excluded from the costs which I am liable to pay."

20 In this kind of litigation, all these costs incurred in the general pursuit of the litigation, on the face of it, are costs which a joint and several costs order ought to cover. The question, however, is whether it is unfair to Mr Elias' client so that there should be an exception made for him on the basis that he was not involved and that he does not know exactly what happened. However, the fact is that it cannot be said by Mr Elias that his client obtained no benefit from this part of the case, because the first respondent did use some of the material obtained by the privilege issue in cross-examination and it did arise in a more general way in relation to other issues, such as the consent and acquiescence issue. Overall, I am not persuaded that it is unfair, or so unfair that the costs of the petitioners ought to be reduced in relation to the privilege issue.

LATER

21 The petitioners apply for an interim payment on account of costs. In accordance with the rules, the court should accede to this application unless there is a good reason not to do so. I think, in principle, it is clear that there ought to be an interim payment in this case. What the petitioners ask for essentially is for a figure equivalent to 70 per cent of non-budgeted costs and 90 per cent in relation to budgeted costs which have been incurred.

22 Mr Elias criticises the latter figure on the basis that there is no sufficient information as to how far the costs budget has been exceeded under particular heads, although there is information as to shortfalls in three or four cases. In my judgment, that criticism is misplaced. It does not matter if the budget has been exceeded by £1 or by £1m. The figure that the court has approved at the costs budget stage is the figure which it has approved, and the authorities show that it is appropriate to begin by thinking of a figure of about 90 per cent to be ordered as an interim payment. I can see no reason in this case not to order 90 per cent, so I will do so.

23 In relation to the incurred non-budgeted costs the matter is more at large because, obviously, the court has not had the opportunity to give an opinion as to the reasonableness of the costs being sought. The first respondent says that it should not exceed 50 per cent, whereas the petitioners ask for 70 per cent. My experience as a solicitor in practice until about three years ago was that the percentages achieved of non-budgeted costs on detailed assessment were higher than when I started my career as a solicitor. In other words solicitors were getting better at estimating what the costs were going to be, or rather what the court process was likely to achieve, so I am not sure that 70 per cent is really out of line with that. In all the circumstances, I see no good reason for reducing it below 70 per cent, so I will leave it at that figure.

24 In relation to the third respondent, the position, again, is slightly different because of the different order that I made yesterday in relation to the third respondent's liability for costs. It seems to me that, once one works out the total figure of the interim payment, the question is what percentage of that should the third respondent be liable for. In response to a question from me, Mr Walker suggested that 25 per cent would be on the high side. I agree that it would not be right to split it equally, as one-third for the third respondent, and that a lower figure would be appropriate. In all the circumstances, I think 20 per cent is the right proportion.

LATER

25 Mr Dougherty applies for the usual order, that the interim payment be made within fourteen days, or possibly a little longer; twenty-eight days was mentioned. Mr Elias, on behalf of the first respondent, asks for six weeks. He refers to the problems of the insurers, about whose liability to the respondents there is now a question, and he says that the matter may become clearer within that increased time. Mr Morrison adopts the same view; Mr Walker has nothing to add.

26 Mr Dougherty points out that there is no transparency as far as his clients are concerned. The fact is that it will be unlikely that if the petitioners are informed that something is happening, or what is happening in relation to the insurance problem, that the petitioners will want to engage in other methods of enforcement of the liability if there is a possibility of the insurers paying out. To my mind, all this means that there is no good reason not to make an order for payment within a reasonably short time, and it will then be a matter of information supply and negotiation as to what happens thereafter. However, in deference to

the size of the payments involved, I will make the interim payment due in twenty-eight days from now, 4.00 p.m. four weeks from today.

LATER

27 Mr Dougherty, on behalf of the petitioners, applies for an interim payment on account of the purchase price that will become payable under the process which I have already ordered to take place for the purchase of the petitioners' shares by the first and second respondents. That jurisdiction is established by the decision in *Annacott Holdings Limited* [2011] EWHC 3180 (Ch). However, the first and second respondents seek to dismiss the application at the outset by a summary process - striking out as it might be - on the basis that, in particular, the process of valuation will be concluded sufficiently quickly and therefore the benefit to be derived from the interim payment would be reduced, if not minimal, and, in any event, the impecuniosity of the respondents means that this will be unfair and it will further deplete the resources which they have to deal properly with this litigation.

28 It seems to me that it would not be right for me to go into any of the merits of the application, as long as I am not satisfied, convinced perhaps, that the application could not succeed. But, on the contrary, it seems to me that the application may succeed. I do not know for certain; we have not yet seen the evidence, obviously. There will have to be directions in relation to that. I consider that, although it may be that the valuation is produced by the valuer within a relatively short time, there are all kinds of vicissitudes that may come into play in the process and may lengthen it, and I think it is entirely reasonable in the circumstances for the petitioners to make an application for an interim payment such that I should not shut it out at this stage.

29 I will, therefore, proceed to give directions, which I hope, in the first instance, can be agreed between the parties, as to what is needed, but there will obviously be evidence to be given in support of the application and then evidence in answer, and then an opportunity, which may perhaps not be taken up, to reply, and then it should be dealt with. Whether it should be dealt with by me, when I am based in Bristol most of the time and sit only occasionally at the Rolls Building, or whether it should be listed before an ICC judge, in relation to whom I do not think that the burden of getting up to speed would be too great because it is only a very small part of the litigation that is being carried on, it does not really matter at this stage. It may be that the parties will agree what is the most convenient way to do it. If, however, the matter has to be heard, it is worth bearing in mind that I am due to be sitting at the Rolls Building for two weeks from 25 February, and that may or may not be of assistance. It is probably not because it is perhaps too soon, but the next time after that, I think, is not until June or July.

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