Neutral Citation Number: [2022] EWHC 1179 (Ch)

Case No: CR-2020-BRS-000092

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
INSOLVENCY AND COMPANIES LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 17 May 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

JAKE VEASEY	**Petitioner**
- and -	
1. COLIN MACDOUGALL **2. TAMSIN LANDELLE** **3. T3115 LIMITED** **4. BB ZOO LIMITED**	**Respondents**

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James Wibberley (instructed by **Foot Anstey LLP**) for the **Petitioners**
Martin Budworth (instructed by **Hill Dickinson LLP**) for the **First and Second Respondents**
The **Third and Fourth Respondents** were not present or represented

Costs applications dealt with on paper

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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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This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 11:00 am on Tuesday 17 May 2022.

HHJ Paul Matthews :

1. On 12 April 2022 I handed down judgment on two disclosure applications in this unfair prejudice petition: [2022] EWHC 864 (Ch). One was made by the petitioner by notice dated 7 December 2021. The other was made by the first and second respondents (to whom I shall refer hereafter as "the respondents") by notice dated 2 February 2022. In this short costs judgment, I am concerned only with the costs of the petitioner's application.

2. The petitioner's application had been for specific disclosure of about a dozen categories of documents from the respondents. By the time of the hearing, four of them were no longer pursued. Of the remainder, five categories were ordered to be disclosed by the respondents. Three were not. The petitioner says that the categories not pursued were not pursued because he had obtained the information in other ways, or it was no longer needed. The respondents disagree. On the material before me, I consider on that the petitioner is right about this.

3. The rules relating to costs are well known. Under the general law, costs are in the discretion of the court (CPR rule 44.2(1)), but, if the court decides to make an order about costs, the general rule is that the unsuccessful party in the proceedings pays the costs of the successful party: CPR rule 44.2(2)(a). However, the court may make a different order: CPR rule 44.2(2)(b). In deciding whether to make an order and if so what, the court will have regard to all the circumstances, including conduct of all the parties and any admissible offer to settle the case (not under CPR part 36) which is drawn to the court's attention: CPR rule 44.2(4).

4. In particular, the court may make an order (amongst others) that a party must pay a proportion of another party's costs, an order that costs be paid from or until a certain date only, and an order for costs relating only to a distinct part of the proceedings: CPR rule 44.2(6)(a), (c) and (f). But before making an order of the last type, the court must first consider whether it is practicable to make one of the first two types: CPR rule 44.2(7). So, an issues-based order is possible, but the rules require the court first to consider making a proportion of costs order or a time limited order.

5. The general rule under rule 44.2(2)(a) requires the court to ascertain which is the "successful party". In *Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd* [2004] 2 Lloyd's Rep 119, Rix LJ (giving the judgment of the Court of Appeal) said (at [143]) that the words "successful party" mean "successful party in the litigation", not "successful party on any particular issue".

6. The petitioner says that, overall, he is the successful party for the purposes of CPR rule 44.2, and therefore should have his costs of the application under the general rule. The respondents say that each side has had some success, and it would be appropriate to make an issue-based costs order.

7. In the present case I am satisfied that the court should make a costs order. So the general rule should apply unless I consider that a different order should be made. Following rule 44.2(7), I must consider a proportion order or a time limited order before I consider an issue-based order. So I have done that. At this stage, I do not

see any sufficient objection to an order giving the costs of the application to the "successful party", if that party can be identified, but subject to a reduction by a proportion to reflect the fact that that party (whichever it was) was not successful on every issue. On the other hand, in my opinion it is clear that an issue-based costs order will be more time-consuming and disproportionately expensive to work out, especially if, in the absence of agreement, there has to be a detailed assessment of the costs (which both sides appear to contemplate).

8. The respondents however refer me to the decision of the Court of Appeal in *Summit Property Ltd v Pitmans* [2001] EWCA Civ 2020, where Longmore LJ (with whom Chadwick and Tuckey LJJ agreed) set out the greater part of CPR rule 44.2 (though not sub-rule (7), mentioned above), and then referred to an earlier decision in a case called *Johnsey Estates (1990) Limited v Secretary of State for the Environment* [2001] EWCA Civ 6535.

9. From this decision Longmore LJ cited a short passage from the judgment of Chadwick LJ:

> "21. The principles applicable in the present case may, I think, be summarised as follows: (i) costs cannot be recovered except under an order of the court; (ii) the question whether to make any order as to costs -- and, if so, what order -- is a matter entrusted to the discretion of the trial judge; (iii) the starting point for the exercise of discretion is that costs should follow the event; nevertheless, (iv) the judge may make different orders for costs in relation to discrete issues -- and, in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue and, in that event, may make an order for costs against the party who has been generally successful in the litigation; and (v) the judge may deprive a party of costs on an issue on which he has been successful if satisfied that the party has acted unreasonably in relation to that issue; (vi) an appellate court should not interfere with the judge's exercise of discretion merely because it takes the view that it would have exercised that discretion differently."

10. The respondents rely in particular on the proposition stated at (iv):

> "the judge may make different orders for costs in relation to discrete issues -- and, in particular, *should consider doing so* where a party has been successful on one issue but unsuccessful on another issue"(emphasis supplied).

11. That was, however, a very unusual case, where the successful defendants had succeeded at trial in defending the claim on a short point of law, although their main defence, a matter of fact, had actually failed. The trial judge held that the appropriate costs order was that the unsuccessful claimants should pay 30% of the successful defendants' costs, but that the successful defendants should pay 65% of the unsuccessful claimants' costs.

12. The judge in that case, Park J, was well aware that the order he was making was unusual. He was quoted by the Court of Appeal (at [11]) as having said this:

> "I think that issue based costs orders such as I believe are appropriate in this case will be exceptional. I would not want to be thought to be encouraging or believing that there will develop a general trend in the majority of cases for the courts to make costs orders in both directions. I do, however, consider that the circumstances in this case are special and particularly strong. I believe that it is open to me to make an issue-based costs order and I am going to do so."

13. The successful defendants, by experienced leading counsel, challenged the judge's costs decision with a number of submissions, but failed. In making their submissions, the defendants did not rely at all on rule 44.2(7), and, as I have said, it was not referred to by the Court of Appeal. In circumstances where the trial judge had deliberately decided to make an issue-based order because of the exceptional circumstances, and the Court of Appeal did not have to (or at any rate did not) consider rule 44.2(7), I do not consider that this decision provides any support for the respondents' submission that the court *must* consider an issue-based costs order merely because there has been success on one issue but not on another. It is clear from rule 44.2(7) that, *before* considering any issue-based costs order, the court must *first* consider the practicability of making a proportion of costs order or a time-limited order.

14. In my judgment, in the present case a proportion of costs order would be entirely appropriate, assuming that it is possible to identify the successful party. As to that, I am satisfied that the petitioner is overall the successful party, for the following reasons. The petitioner clearly lost on two issues, out of about a dozen. However, the most important aspect of this application was the disclosure of company financial information, including credit card statements, bank statements and underlying documents relating to expenses charged to the company. The petitioner was successful on all of these categories, as well as at least one other. In relation to those categories which were not pursued by the time of the hearing, the request for four further categories became unnecessary when relevant confirmations and information were provided by the respondents, *after* the application had been issued.

15. The next question is whether I should make a proportion reduction in the petitioners' costs of the application by reason of his failure on two issues. In my judgment I should, to the extent of 10%. The two issues were not minimal, and took up time. On the other hand, they were not that important.

16. I will therefore order that the respondents pay 90% of the petitioner's costs of his application. Rule 44.2(8) requires that if there is to be a detailed assessment of these costs, then the court will order the paying party to pay a reasonable sum on account of them, unless there is good reason not to do so. I cannot see such a reason in the present case, and invite the parties to agree what that reasonable sum is. If they are unable to agree, then they should make written submissions to me and I will decide the matter on the papers.