Neutral Citation Number: [2022] EWHC 2046 (Ch)

Case No: HC-2017-000642
Appeal No. CH-2020-000020

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
APPEALS (ChD)

In the matter of an appeal by the Claimant/Appellant against the order of Deputy Master Lloyd dated 18th December 2019 (Appeal No. CH-2020-000020)

And in the matter of applications by the Fifth and Sixth Defendants for summary judgment and/or striking out orders (Case No. HC-2017-000642)

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: 29th July 2022

Before :

MR JUSTICE EDWIN JOHNSON

- -

Between :

SEEMA ASHRAF **(the personal representative of the estate of SYED UL HAQ deceased)**	**Claimant**
- and -	
(1) LESTER DOMINIC SOLICITORS (a firm) **(2) MR L. KAN** **(3) MR ATTARIAN** ~~**(4) MR BAVINDER SINGH NIJJAR AND MRS SONIA NIJJAR**~~ **(5) THE CHIEF LAND REGISTRAR** **(6) THE BANK OF SCOTLAND PLC** **(7) REES PAGE (A FIRM)**	**Defendants**

- -

- -

JUDGMENT ON THE COSTS OF THE APPLICATIONS OF THE FIFTH AND SIXTH DEFENDANTS

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 2.00pm on Friday 29th July 2022.

Mr Justice Edwin Johnson:

Introduction

1. On 21st March 2022 I handed down my judgment ("the Judgment") on the appeal and applications in this case which I heard on 5th and 6th October 2021 and 27th and 28th January 2022. Defined expressions in the Judgment have the same meaning (where employed) in this judgment. I also assume, in this judgment, familiarity with the content of the Judgment. References to the paragraphs of the Judgment are given as [J1] for paragraph 1 of the Judgment, and so on. I have added italics to quotations in this judgment.

2. The terms of the order consequential upon the Judgment have been agreed between the parties, and are embodied in the order which I made on 27th June 2022 ("the Order").

3. Paragraphs 9, 11, and 12 of the Order provide for the costs of the Applications (the applications of the Fifth and Sixth Defendants for summary judgment on the claims made against them in the action and/or the striking out of those claims) to be dealt with on the basis of written submissions, unless the court otherwise directs. The relevant parties, namely the Claimant, the Fifth Defendant, and the Sixth Defendant, have filed written submissions on the costs of the Applications.

4. I have agreed to deal with the costs of the Applications on the basis of the written submissions, without a hearing. This is my judgment on the costs of the Applications.

The costs of the Application of the Fifth Defendant

5. The Fifth Defendant's case is that it should have its costs of its Application. Assuming an order to that effect, the Fifth Defendant seeks a summary assessment of those costs, or alternatively the detailed assessment of those costs with an interim payment on account of the costs in the sum of £20,000.

6. The Claimant argues that the costs of the Application should be cost in the case or, as a fallback position, that the costs of the Application should be the Fifth Defendant's costs in the case. If the Claimant is required to pay the Fifth Defendant's costs, the Claimant says that there should be a summary assessment of those costs in the sum of £17,500. The total sum claimed in the statement of costs filed by the Fifth Defendant for the hearing of the Application is £36,249.90.

7. Dealing first with the incidence of costs, the Claimant's argument is that the Application has been unsuccessful. The claim for an indemnity against the Fifth Defendant, so it is submitted, has not been struck out, but continues, by reason of the opportunity which I gave to the Claimant to re-amend the Estate's claim against the Fifth Defendant for an indemnity.

8. In this context I note that the recitals to the Order record that the Fifth Defendant has consented to the re-amendments which the Claimant proposes to make in respect of the claim for an indemnity.

9. I am in no doubt that the Claimant must pay the Fifth Defendant's costs of the Application (the Fifth Defendant's Application). It is not correct to say that the Application was unsuccessful. The existing claim for rectification of the Land Register was dismissed. More importantly, I decided that the claim for an indemnity also fell to be struck out, by reason of the failure of the Claimant to plead the *"decision"* which is an essential element of a claim for an indemnity under paragraph 1(3) of Schedule 8. What saved the claim for an indemnity from being struck out immediately was my decision to give the Claimant an opportunity to retrieve the position by an appropriate re-amendment; see [J268]-[J273].

10. This was not a victory of any kind for the Claimant, but the giving of an indulgence to the Claimant. As I noted, at [J271], there was an argument that the Estate, having failed to help itself by making a timely application to re-amend the claim for an indemnity, either prior to the Application or in the face of the Application, should have been left to face the consequences of its own failure to act. Fortunately for the Claimant, I decided to take a more indulgent line. I did make a striking out order, but I made that order as an unless order, which gave the Claimant an opportunity to retrieve the position.

11. The above position is only compounded by the fact that the Claimant did produce the RPOC, but then decided to disclaim the RPOC and sought to leave the question of re-amendment up in the air. I described this situation as unsatisfactory, at [J220]. As I commented, it was hard to avoid the impression that the Estate had decided to abandon the RPOC once it appreciated that its content was actually destructive of its case.

12. I should also add that I did make it clear in the Judgment that a striking out order should be made on the Fifth Defendant's Application, but in the form of an unless order. I mention this because the unless order does not appear in the Order. I assume that the only reason why the unless order does not appear in the Order, on the Fifth Defendant's Application, is because the Claimant has done what should have been done some time ago, and made the required re-amendment to the Estate's claim for an indemnity, in terms acceptable to the Fifth Defendant.

13. In summary, I agree with the Fifth Defendant that the Application was successful, and that the general rule in CPR 44.2(2)(a), to the effect that costs should follow the event, applies. I take into account that only one of the four grounds relied upon in support of the Application was successful, with the other grounds failing for the reasons set out in the Judgment. In my judgment this is not a case where an issues based costs order is appropriate. I consider that success on the one ground should be sufficient to carry the costs of the Application.

14. I therefore conclude that the Fifth Defendant should have its costs of its Application.

15. Turning to quantum the Claimant has filed some supplemental submissions addressing the quantum of the costs sought by the Fifth Defendant. The solicitors' costs sought by the Fifth Defendant are said to be excessive, and I am invited by the Claimant to reduce the total costs claimed from £36,249.90 to £17,500. The proposed reduction strikes me as excessive, but I also note that the Fifth Defendant proposes, as an alternative to summary assessment of its costs, an order for detailed assessment with a payment on account of £20,000. Looking through the Fifth Defendant's statement of costs, the sum of £20,000 strikes me as a perfectly reasonable and legitimate sum to award by way of an interim payment on account of costs. As such, it seems to me best to take the alternative course proposed by the Fifth Defendant, and to order an interim payment on account of costs in the sum of £20,000.

16. I will therefore award the Fifth Defendant its costs of its Application against the Claimant, to be subject to a detailed assessment on the standard basis, if not agreed. I will order an interim payment on account of those costs in the sum of £20,000. The default position is that the interim payment will have to be made within 14 days of the order for payment. I will however grant the Claimant a period of 28 days within which to make the interim payment.

The costs of the Application of Sixth Defendant

17. The Sixth Defendant's case is that it should have its costs of its Application. Assuming an order to that effect, the Sixth Defendant seeks a detailed assessment of those costs, with an interim payment on account of the costs in the sum of £51,000 or £40,800. The reason for these two alternative figures is that the Sixth Defendant also seeks an order that its costs be subject to a detailed assessment on the indemnity basis. If the assessment is on the indemnity basis, the sum claimed by way of interim payment is £51,000. If the assessment is on the standard basis, the sum claimed is reduced to £40,800.

18. Starting with the incidence of costs, the arguments between the parties are essentially the same as those between the Fifth Defendant and the Claimant. The Sixth Defendant says that it has been the successful party, and that the general rule in CPR 44.2(2)(a) should apply. The Claimant argues that costs should be in the case, or should be the Sixth Defendant's costs in the case, on the basis that the Application was unsuccessful. The claim against the Sixth Defendant, so it is submitted, was not struck out.

19. As with the position as between the Fifth Defendant and the Claimant, it seems to me that the Claimant's submission is not correct. A striking out order was made against the Estate on the Sixth Defendant's Application. The striking out order can be found in paragraph 10 of the Order. It is in the form of an unless order, which gives the Claimant an opportunity to retrieve the position, if she can obtain permission to re-amend the Estate's claim against the Sixth Defendant, so as to put that claim into a viable form. The fact that the Claimant has been given this opportunity to retrieve the position does not seem to me to alter the fact that the Sixth Defendant's application was successful. As with the Fifth Defendant's Application, the outcome of the Sixth Defendant's Application was not a victory of any kind for the Claimant, but the giving of an indulgence to the Claimant.

20. I should also say that the position seems to me to be even stronger, in the case of the Sixth Defendant, than in the case of the Fifth Defendant. As matters stood when the Sixth Defendant's Application was heard, the Estate had no viable claim against the Sixth Defendant at all. In the case of the Fifth Defendant, the Claimant can, on the basis of what I have decided in the Judgment, at least say that the Estate had a viable claim for an indemnity against the Fifth Defendant, which was only vitiated by the failure to plead the required *"decision"*. In the case of the Sixth Defendant, as I said in my judgment at [J275], the Estate started some way further back. There was no viable pleaded claim against the Sixth Defendant in the Amended Particulars of Claim. There was no identification of what a viable pleaded claim would look like. There was only the claim set out in the RPOC, which the Estate had declined to identify as its proposed re-amended claim against the Sixth Defendant. In those circumstances it is not surprising that I expressed the view that the Estate might be said to have been lucky to escape from a simple strike out of its case against the Sixth Defendant; see [J285].

21. It would in my view be perverse, given what I have said in my previous paragraph, to take any course, in respect of the costs of the Sixth Defendant's Application, other than to order the Claimant to pay the Sixth Defendant's costs of the Sixth Defendant's Application.

22. I note that it is not yet clear whether the Claimant will be able to retrieve the position, as against the Sixth Defendant. According to the recitals to the Order the Claimant has applied for permission to re-amend, as against the Sixth Defendant. It appears that that application is going to require a separate hearing, with a time estimate of one day; see paragraph 13 of the Order. I deduce from this that the application to re-amend is contested by the Sixth Defendant. It seems to me however that the application to re-amend is irrelevant to what I have to decide in relation to the costs of the Sixth Defendant's Application. The costs fall to be decided on the basis that the Claimant was given the opportunity to retrieve the position. Whether that opportunity is successfully taken seems to me to be irrelevant to the costs issues I am dealing with in this judgment.

23. I therefore conclude that the Sixth Defendant should have its costs of its Application.

24. The Sixth Defendant is content, subject to an interim payment being ordered, for those costs to go to a detailed assessment. The next question is therefore whether that detailed assessment should take place on the indemnity or standard basis. In his written submissions on costs Mr Allcock, for the Sixth Defendant, has referred me to two authorities, which summarise the relevant principles which govern the question of when costs can be ordered on the indemnity basis. The authorities are *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson* [2002] EWCA Civ 879 and *Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595.

25. As Lord Woolf (then Lord Chief Justice) explained in *Excelsior*, at [32], the categories of case in which costs can be awarded on the indemnity basis are not closed. The critical requirement, before costs can be awarded on the indemnity

basis, is that there must be some conduct or some circumstance which takes the case out of the norm:

> *"32. I take those two examples only for the purpose of illustrating the fact that there is an infinite variety of situations which can come before the courts and which justify the making of an indemnity order. It is because of that that I do not respond to Mr Davidson's submission that this court should give assistance to lower courts as to the circumstances where indemnity orders should be made and circumstances when they should not. In my judgment it is dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR. This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement."*

26. As Waller LJ explained in *Esure*, the relevant conduct or circumstance which takes the case out of the norm does not have to be unusual or rare. What matters is whether there is something which takes the relevant case outside the ordinary and reasonable conduct of proceedings. In *Esure* the Court of Appeal were concerned with the bringing of a dishonest claim, but conduct or circumstances outside the ordinary and reasonable conduct of proceedings are not confined to cases of dishonesty. At [24] to [26] Waller LJ said this:

> *"24. In my view the Recorder here misdirected himself in failing to place the words "out of the norm" in Excelsior in their proper context. It was well established prior to the CPR and prior to Excelsior that a court might mark its disapproval of dishonest conduct by making orders for indemnity costs, and 44.3 with its reference to the conduct of the parties was on any view preserving that position. Thus it was to misconstrue the words "out of the norm" to place on them construction which somehow might constrain the ability of the court to mark that disapproval.*
>
> *25. The Recorder seems to have construed the word "norm" as indicating that if the situation facing the court was one that quite often occurred that would mean that the situation was within the norm. In my view the word "norm" was not intended to reflect whether what occurred was something that happened often so that in one sense it might be seen as "normal" but was intended to reflect something outside the ordinary and reasonable conduct of proceedings. To bring a dishonest claim and to support a claim by dishonesty cannot be said to be the ordinary and reasonable conduct of proceedings.*
>
> *26. In my view the Rules entitle a court to take account of the conduct of the parties whether that conduct occurs on many occasions or whether it is rare. So in my judgment, as I say, the Recorder has misdirected himself. That being so, it is for this court to exercise the discretion anew."*

27. In support of the case for costs on the indemnity basis Mr Allcock relies, in general terms, upon the conduct of the Claimant in relation to the Sixth Defendant's Application. My attention has been directed, in particular, to what was said in the Claimant's evidence filed in response to the Application, and in

correspondence, and in the submissions made on the Claimant's behalf in response to the Application. The essential point being made is that the Claimant, instead of making a realistic response to the Application and seeking to re-amend the Estate's case, attempted to fight the Application on an unrealistic and unacceptable basis, while engaging in unjustified criticism of the Sixth Defendant's position.

28. I accept these submissions in part. The criticisms made of the Sixth Defendant in the Claimant's evidence and submissions, and in the correspondence from the Claimant's solicitors were certainly ill-judged. Indeed, the same point can be made about those criticisms so far as made against the Fifth Defendant. I do not think however that these criticisms, taken on their own, take the present case *"out of the norm"* for indemnity costs purposes. Taking the relevant criticisms in isolation, I am inclined to see them, ill-judged as they were, as part of the rough and tumble of litigation, albeit an undesirable part.

29. What seems to me to be more serious, in the present case, is the particular way in which the Claimant chose to fight the Sixth Defendant's Application. It seems to me that the Estate's claim against the Sixth Defendant, as set out in the Amended Particulars of Claim, was always hopeless, once the claim for rectification had been dismissed, as against the Fourth Defendants, by the order of Master Clark made on 4th April 2018. That left the Claimant in a position where, if the Estate's claim against the Sixth Defendant was to be saved, it was necessary for the claim to be re-pleaded. That, in turn, required the Claimant to produce draft Re-Amended Particulars of Claim, and to seek permission to make the re-amendments required to maintain a claim against the Sixth Defendant. If the Claimant had taken that course in good time, and produced a re-amendment which pleaded a viable claim against the Sixth Defendant, the Sixth Defendant's Application would either not have been necessary or, if it had been made, would have proceeded in an entirely different legal landscape, where the focus would have been on whether the Claimant should be granted permission for the relevant re-amendments. This is of course what I understand will now happen, pursuant to the relevant terms of the Order, when the Claimant's application to re-amend, made following the handing down of the Judgement, comes to be heard.

30. The Claimant did not however take this course. Instead the Claimant, having produced the RPOC, then disclaimed the RPOC and sought to resist the Sixth Defendant's Application on the basis that there would, at some unspecified point in the future, be an application to re-amend the Estate's case, which might or might not resemble the claim pleaded against the Sixth Defendant in the RPOC. As I made clear in the Judgment, I did not regard this as an acceptable way to proceed; see in particular [J264].

31. It will be apparent from the relevant part of the Judgment ([J274] to [J287]), that I did not find it easy to make a decision on whether the Claimant should be given the opportunity to retrieve the position. Eventually, I was just persuaded that the Claimant should be given a final opportunity to retrieve the position. There were good reasons why it would have been legitimate not to give that final opportunity to the Claimant. As I commented, at [J285], the Estate might be said to have been lucky.

32. There is, in my view, an instructive contrast to be drawn between the position as between the Fifth Defendant and the Claimant, and the position as between the Sixth Defendant and the Claimant. So far as the Fifth Defendant's Application was concerned, I decided that there was a defect, or gap in the Estate's pleaded case against the Fifth Defendant. The point was something of a technical point, although that did not mean that the point lacked merit. While it would have been more sensible for the Claimant to have addressed this point by an appropriate re-amendment at an earlier stage, it does not seem to me that there is anything in the Claimant fighting and losing on this point which would have justified costs on the indemnity basis.

33. In the case of the Sixth Defendant the position seems to me to have been very different. In the absence of an application to re-amend in order to plead a viable claim against the Sixth Defendant, the Claimant had no case against the Sixth Defendant. In my view it was not acceptable for the Claimant to make a fight of the Sixth Defendant's Application on the basis that there would be a re-amendment at some unspecified point in the future. This is not an acceptable way to proceed in litigation. In a case such as the present case, a party should not be permitted to leave its pleaded case hanging in the air in this way. The result of the Claimant's conduct, so far as the Sixth Defendant's Application is concerned, is that there has been an extremely expensive and time consuming fight over the Application, which has not served any useful purpose. As I have pointed out, it is only now, with the Claimant's belated application to re-amend, that the real issue between the Claimant and the Sixth Defendant has been properly joined.

34. In my judgment, and for the reasons which I have set out above, the Claimant's conduct in relation to the Sixth Defendant's Application has been unreasonable and has taken this case out of the norm. Applying the authorities to which I have been referred to the relevant facts in this case, I conclude that the basis of assessment, in relation to the costs which I have awarded to the Sixth Defendant, should be the indemnity basis.

35. This leaves the question of the interim payment on account of those costs. The Sixth Defendant served its statement of costs of its Application on 22nd March 2022, in the sum of £67,994.28. The sum sought by way of interim payment, given my decision to order costs on the indemnity basis, is £51,000, which is very close to 75% of £67,994.28. As Mr. Allcock points out in his written submissions, the Sixth Defendant will have incurred some further costs since that date, in dealing with matters consequential upon the Judgment, including the costs issues I am dealing with in this judgment.

36. The supplemental submissions, filed by the Claimant in relation to costs, criticise the Sixth Defendant's costs, of both solicitors and counsel, as excessive. The figure proposed by the Claimant as an interim payment on account of costs is £17,500.

37. I have been through the Sixth Defendant's statement of costs, with a view to seeing where the total figure might end up, if the Claimant's criticisms are justified. The hourly rates for the Sixth Defendant's solicitors compare

favourably with what I understand were the rates of the Claimant's solicitors. I also understand that the Claimant's statement of costs for the Applications (excluding the Appeal) was in the sum of £58,280. The Claimant was of course respondent to the Applications. There is therefore some similarity between the Claimant's costs and the Sixth Defendant's costs, even allowing for the fact that the Claimant's costs will, I assume, have related to both Applications.

38. I can see that there are points which could be made on assessment regarding the number of hours claimed by the Sixth Defendant's solicitors and the number of solicitors who did work on the Application. I can also see that there are points which could be made on the quantum of counsel's fees. There is also a substantial claim for VAT, which does not appear to be challenged. I do not know if the VAT can in fact be reclaimed by the Sixth Defendant. I also bear in mind that the Sixth Defendant will have the benefit of the indemnity basis on the assessment of its costs, and that the total figure in the Sixth Defendant's statement of costs will be subject to some increase to take account of costs incurred on consequential matters.

39. Putting all of the above together I think that an interim payment of £51,000 is within the range of reasonable estimates of what the Sixth Defendant might expect to recover on a detailed assessment conducted on the indemnity basis. I will therefore order an interim payment on account of costs in that sum.

40. I will therefore award the Sixth Defendant its costs of its Application against the Claimant, to be subject to a detailed assessment on the indemnity basis, if not agreed. I will order an interim payment on account of those costs in the sum of £51,000. The Sixth Defendant is content for the Claimant to have 28 days to pay that sum. I will therefore grant the Claimant a period of 28 days within which to make the interim payment.