



Neutral Citation Number: [2023] EWHC 595 (Ch)

Case No: BL-2018-002369/BL-2021-000680

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (LONDON)
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17/03/2023

Before:

MR JUSTICE FREEDMAN

Between:

MUSST HOLDINGS LIMITED

Claimant

- and -

**(1) ASTRA ASSET MANAGEMENT UK
LIMITED**

(2) ASTRA ASSET MANAGEMENT LLP

Defendants

Mr P. Knox KC and Ms K. Bailey (instructed by **Taylor Wessing LLP**) appeared on behalf
of the **Claimant**

Mr C. Boardman KC and Mr T. Beasley (instructed by **Payne Hicks Beach**) appeared on
behalf of the **Defendants**

Costs submissions of the parties: 6 March 2023
Handed down in draft: 13 March 2023

Approved Costs Issues Judgment

**This judgment was handed down remotely at 10.30am on Friday 17 March 2023 by
circulation to the parties or their representatives by e-mail and by release to the
National Archives**

MR JUSTICE FREEDMAN:

1. The Court is asked to adjudicate about a number of costs submissions as follows:
 - (i) The costs of the Fresh Action issue: see paras. 153-156 of the Judgment dated 28 February 2023 (“the Strike Out Judgment”);
 - (ii) The costs of the Security for Costs issue: see paras. 144-149 of the Strike Out Judgment.

2. There are costs submissions both dated 6 March 2023 in respect of these issues comprising 4 pages each in accordance with the direction of the Court. It is to be noted that prior to these cost submissions, there has been agreed substantially most of the other potential issues including:
 - (i) The amount of the payment on account in respect of the costs of Astra instructing defamation counsel in respect of the defamation costs issue (whether there should be indemnity or standard basis costs);
 - (ii) The amount of the payment on account in respect of the costs of the Books and Records issue (to be paid by Musst to Astra);
 - (iii) The amount of the payment on account in respect of the costs of the hearings of 17 December 2021 and 21 January 2022 (to be paid by Astra to Musst).

3. This agreement shows that the parties have entered into fruitful discussions for which the Court is grateful. The other side of this is that that the Court would have expected that with a radical reduction of what is at stake, the costs of the remaining issues, which is the Fresh Action issue and the Security for Costs issue, would have been expected to have reduced in length the resulting submission. Despite this, the maximum of 4 pages (for all the costs issues) was still utilised in full with very detailed submissions dedicated to these remaining issues. This is despite the overall costs claimed by Musst being about £26,000 and by Astra being about £43,000.

II Costs of the Fresh Action issue

4. Astra submits that the costs of the Fresh Action issue should be paid to it because it took an unreasonably long period of time for Musst to make the concession which it did in its submissions of 13 February 2023. Musst submits that Astra should have agreed to the concession rather than contesting the matter leading to the adjudication of the Court on this issue in favour of Musst, and that it should have at least its costs from 13 February 2023. In my judgment, there is something in both those points. The costs are not large in the scale of things, being in the region of £7,000 on each side. In my judgment, in very broad terms, the points cancel each other out. Both sides have succeeded to a point and have failed to a point. The costs are too small to assess the costs up to and after 13 February 2023. The appropriate order in the circumstances is to make no order as to costs.

III The costs of the Security for Costs issue

5. Astra submits that it has succeeded in obtaining security for costs, and that it had to issue an application. It was therefore the successful party on the application. It submits that it had to issue an application in September 2022 because Musst denied any right to security. Thereafter, Musst delayed in responding for 5 months. There was then a narrowing down of issues, but there was an impasse over the form of the security. Musst contended that Astra could rely for its security upon the moneys that had been paid into court as sums said to be due under the contractual claim in the first action. Astra objected understandably to this because in the event the appeals were allowed, the contractual claim to these monies would be overturned and the moneys in court would be returnable to it. Musst maintained this position at the August hearing, and that was untenable. In the event, the Court of Appeal dismissed Astra's appeal, and so from then onwards, it was not an answer to the availability of the moneys in court that the appeals would be allowed. Nevertheless, Astra continued to pursue the security for costs in an argument which the Court rejected, but it says that the majority of the costs were incurred before 13 February 2023.
6. Musst submits that the application was premature because a few days prior to the application, it suggested that the case be stayed until after the result of the first action. The suggestion of a stay of the second action, which would have prevented costs from being incurred, was not taken up by Astra. Further, Musst emphasises that the security sought was £900,000 whereas it offered a sum of £180,000 for the first payment. Although some of the correspondence is not clear, in the skeleton argument for the hearing of 30/31 August 2022, Astra was still seeking an indemnity in the sum of £900,000.
7. When in February 2023, Musst suggested that the security for costs should be stayed until after judgment by the Court of Appeal, Astra sought that the Court consider the security for costs application before further costs were incurred. Thereafter, following the judgment of the Court of Appeal dismissing the appeal, Astra unsuccessfully argued that the security provided in the first action as to £180,000 was not sufficient security because it might be the subject of third party claims: see the Strike Out Judgment at para. 148. The Court ruled against that.
8. In my judgment, the position is that Astra was successful in obtaining security of £180,000. It took Musst too long to respond to the request for the provision of security. It was not an answer prior to the dismissal of the appeal that the £180,000 was already in court. The proposals of a stay on the part of Musst are to be taken into account and the absence of positive response to the same. Musst was successful in the end by agreement in resisting security of £900,000 up front. Musst was successful in resisting the argument about the moneys paid into court in the first action being adequate security on which the Court had to rule, although prior to the decision of the Court of Appeal, Astra was entitled to resist the argument that the moneys paid into court in the first action could be used. In the end, the Court had to rule on this point which it did in favour of Musst as above noted.
9. As a result of correspondence between the parties, the application was in large part the subject of agreement without there being agreement as to costs. Where an agreement occurs without a determination as to costs, it is discretionary whether the Court provides for such costs, and there is a real risk that the Court will make no order as to costs in all

but straightforward cases: *see BCS Software Solutions Ltd v C Brewer and Sons Ltd* [2003] EWCA Civ 939 per Mummery LJ at [4-7] and per Chadwick LJ at [24-26] and *Gossage v Bishton* [2012] EWCA Civ per Lewison LJ at [8] and per Lord Neuberger MR at [31-32]. This is relevant in large part albeit that there was a specific issue which remained for adjudication following the timing of the judgment of the Court of Appeal.

10. Another difficulty, but one that went to quantum only was that the costs of the Security for Costs Application were far more on the part of Astra than on the part of Musst, that is to say approximately £36,000 for Astra and £20,000 for Musst.
11. Taking into account all of the above matters, this is not an application where one party was successful, and the other was not: there was success and failure for both parties. The matter is far from straightforward, bearing in mind the inter-relationship of the two actions, the timing of the strike out application (“Strike Out Application”) and the appeal to the Court of Appeal, and the give and take in correspondence. It is not a matter where to the extent that matters were compromised that it is possible easily to identify which party succeeded and which did not.
12. Although the costs are larger than the Fresh Action costs, they are still modest relative to the totality of the costs even of the costs of the consequential hearings and the costs of the Strike Out Application. A split order is difficult to define because of the difficulty of defining in a way that can be reflected in the incidence of costs in the respects where Astra succeeded and where Musst did.
13. Taking into account all of the above, in the exercise of the discretion as to costs, the fair order is that there should be no order as to costs in respect of the Security for Costs Application.

IV The other costs applications

14. There is substantial agreement here. The precise payments on account of costs are the following:
 - (i) Books and Records issue: Musst acknowledge that they must pay a sum of £32,524.35 on account of costs. Astra’s figure is marginally lower, that is a sum of £32,475.32.
 - (ii) The Defamation indemnity costs issue: Musst acknowledge that they must pay a sum of £10,459.00 on account of costs. Astra’s figure is marginally higher, that is a sum of £11,042.50.
15. I do not know why the precise figures of the parties are not the same, but the differences are relatively unimportant, and it only concerns payments on account which are subject to adjustments. In both cases, the figures of Astra should be adopted.
16. Finally, the idea of a payment on account of Astra to Musst in respect of the Consequential Hearings Costs Issue and the Strike Out Application costs is accepted, but it is said that the amount cannot be agreed pending receipt of costs summary: see the brackets in paras. 5 and 10 of Astra’s draft order relating to the Hearing of 30/31

August 2022. Has a costs summary now been provided? Have the parties reached agreement?

17. In the light of this judgment, it is sought that the parties complete orders. The Court is grateful to the parties for having narrowed the issues and expresses the hope that with this judgment and following consideration of the matters referred in the preceding paragraphs, draft orders can be agreed and finalised. The parties are asked to revert with a draft order by 1pm on Wednesday 15 March 2023.