Neutral Citation Number: [2024] EWHC 301 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No. PT-2022-NCL-000010**

BUSINESS AND PROPERTY COURTS IN NEWCASTLE

PROPERTY, TRUSTS AND PROBATE LIST

Date: 15 February 2024

Before:

Mr Andrew Sutcliffe KC, sitting as a Judge of the High Court

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BETWEEN:

MUSTAFA ERDEM BALDUDAK

Claimant

and

MARK MATTEO

Defendant

- -

Mr Seth Kitson (instructed by **Sintons LLP**) for the Claimant
Mr Michael Pryor (instructed by **Clarke Mairs Law Ltd**) for the Defendant

Hearing dates: 5-8 December 2023
Written submissions on costs received 7 and 14 February 2024

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JUDGMENT ON COSTS

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 is handed down may be treated as authentic.

MR ANDREW SUTCLIFFE KC:

Introduction

1 Further to my judgment in the trial of this matter ("the Main Judgment"), handed down on 31 January 2024 (neutral citation number [2024] EWHC 167 (Ch)), I must now deal with the issue of costs.

2 In the Main Judgment I granted the declaration sought by the Claimant that the Property was held on trust by the parties for the Claimant alone and as a consequence the Defendant has been ordered to transfer his legal interest in the Property to the Claimant. This judgment proceeds on the assumption that its readers will be familiar with the detail of the Main Judgment and the definitions and abbreviations used therein will also be applied here.

3 The principal issue I have to decide is whether the Claimant is the successful party. The secondary issues are whether the Claimant should only get a proportion of his costs and/or get his costs only from a certain date and whether there is a good reason not to order the Defendant to make a payment on account of costs.

The Law

4 The court's discretion is a wide one and is regulated by CPR Part 44.2 , which is well known and I do not need to set out in full in this judgment. It is common ground that the general rule (in CPR 44.2(2)) is that the unsuccessful party will be ordered to pay the costs of the successful party, but that the court may make a different order.

5 As Gloster J emphasised in HLB Kidsons v Lloyds Underwriters [2008] 3 Costs LR 427, "[t]he aim always is to 'make an order that reflects the overall justice of the case'", a point also emphasised by Briggs J in *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS* [2010] 5 Costs LR 657 at [4] by reference to the overriding objective: "Besides taking due account of the specific provisions of Part 44 , the court must in framing an appropriate order for costs bear constantly in mind the need to comply with the overriding objective, that is to deal with cases justly."

6 The general rule set out in CPR 44.2(2) was described by Lord Woolf MR in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507 (at 1522–1523) as a "starting point from which the court can readily depart". However, whilst the court may depart from the general rule, "it remains appropriate to give 'real weight' to the overall success of the winning party" (per Gloster J in *HLB Kidsons* at [10]). In addition, I bear in mind that commercial litigation is complex and that, in almost every case, the winner is likely to have failed on some issues. There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues (see *HLB Kidsons* at [11]).

7 In deciding whether to depart from the general rule, the court must have regard to all the circumstances of the case, including "(a) the conduct of all the parties" and "(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; …" (CPR 44.2(4)). Insofar as relevant for the purposes of this judgment, conduct of the parties includes conduct before and during the proceedings, whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue, and the manner in which a party has pursued or defended its case or a particular allegation or issue (CPR 44.2(5)(a)–(c)).

8 The various orders which the court may make are set out in CPR 44.2(6). They include (at (c)) the ability to order costs to be paid from or until a certain date only and (at (f)) costs relating only to a distinct part of the proceedings.

9 In relation to consideration of the relevance of payment from certain dates, Mr Pryor for the Defendant relies on the authority of *Boeco Ltd v. Alfa Laval Co Ltd* [1995] QB 137. In that case a claimant's late amendment substantially altered the case which the defendant had to meet, and the defendant got its costs down to the date of the amendment.

10 I note the terms of CPR 44.2(7) to the effect that before the court considers making an order for costs relating only to a distinct part of the proceedings (i.e. an issue-based order) it will consider whether it is practical to make an order for a proportion of another party's costs or for costs from, or until, a certain date only. As was pointed out by Jackson J in *Multiplex Constructions* v *Cleveland Bridge* [2009] EWHC 1696 at [72 (iv)–(v)], the court will hesitate before making an issue-based order "because of the practical difficulties which this causes" (amongst other things the additional time and expense that may then be spent on assessment) and because of the steer provided in CPR 44.2(7). In many cases "the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order".

11 Mr Pryor also draws my attention to CPR 44.11(1)(b) and (2)(a) and (b) which enable the court to disallow all or part of the costs which are being assessed or to order the party at fault to pay costs which that party has caused any other party to incur in circumstances where it appears to the court that the conduct of a party before or during the proceedings was unreasonable or improper.

12 Finally, Mr Pryor relies on CPR 44.12 which provides that where a party entitled to costs is also liable to pay costs, the court may assess the costs which that party is liable to pay and either (a) set off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance; or (b) delay the issue of a certificate for the costs to which the party is entitled until the party has paid the amount which that party is liable to pay.

Who is the successful party?

13 There can be no doubt that the Claimant is the successful party. He succeeded on his claim and the Defendant's counterclaim has been dismissed.

14 I found as follows (by reference to paragraphs in the Main Judgment):

(1) the Claimant and the Defendant agreed prior to purchasing the Property that the Claimant would pay the purchase price through his director's loan account [¶87];

(2) following on from that agreement, it was agreed that the Claimant's loan to PCB would be novated to HTS with the purchase price deducted from his director's loan account with HTS accordingly [¶87];

(3) there was never any agreement between the Claimant and the Defendant that the Property would be owned beneficially by each of them in equal shares [¶74] and the Defendant did not come close to rebutting the presumption of resulting trust [¶95];

(4) the Defendant had elected to take the benefit of the Claimant paying for the Property in the previous proceedings and he was not permitted to resile from that election in these proceedings [¶¶99-104];

(5) the Defendant was estopped from denying that the Claimant funded the purchase of the Property by reason of the findings made in the Remedies Judgment [¶¶110-114].

15 The Claimant's pleaded case, as set out in the claim form and particulars of claim, was that (i) he contributed the entirety of the purchase price of the property, (ii) no gift was intended by either party and (iii) the Property was therefore held on a resulting trust by the Claimant and Defendant for the Claimant's benefit.

16 The Defendant denied that case and pleaded a case that PCB purchased the property as a gift for the Claimant and the Defendant. As an alternative case (which was not clearly articulated in the defence itself but became clear at trial), the Defendant alleged that the parties had agreed the Claimant would pay for the Property and gift half of it to the Defendant. The Defendant was unsuccessful in both defences at trial and as a consequence his counterclaim was dismissed.

17 The Defendant submits that the Claimant only pleaded the case on which he succeeded when he pleaded in his amended reply what I describe in the Main Judgment as the Election and Estoppel Issues. I do not agree. Those issues were properly raised in response to the Defendant's case that the Claimant agreed to advance £750,000 to PCB "to be used exclusively for business investments which investments were to be owned equally by the Claimant and the Defendant" (which agreement was defined in the defence as "the Purpose").

18 As I explain in ¶¶35-39 of the Main Judgment, one of the consequences of the beneficial ownership issue not being determined in the previous proceedings was that I had to decide whether and if so to what extent findings of fact made by the Judge in those proceedings gave rise to an issue estoppel in these proceedings (the Estoppel Issue) and whether it also followed that the Defendant had made an election from which he should not be permitted to resile (the Election Issue). Those matters (in addition to the Quistclose Issue) were fully pleaded in the Claimant's reply and the Defendant's rejoinder in sufficient time for them to be properly argued at trial.

19 I accept the Claimant's submission that the doctrines of issue estoppel and election simply fed into the fundamental question in the case which was whether the Property was held on a resulting trust for the Claimant. The Claimant has succeeded on the claim pleaded in his particulars of claim. He is the successful party and there is no good reason to depart from the general rule in CPR 44.2(2).

20 It follows that I reject the Defendant's submission that the Claimant should only have his costs from the date on which he pleaded his amended reply or alternatively from the earlier date on which he indicated he would rely on the Estoppel and Election Issues. I do not consider that justice would be served either by preventing the Claimant from recovering his costs incurred prior to those dates or by awarding the Defendant any part of his costs incurred prior to those dates.

Should there be a reduction in the Claimant's costs?

21 The Defendant submits that the Claimant's costs of disclosure should be disallowed. He refers to ¶¶40-47 of the Main Judgment and argues that the Claimant's witness statement dated 14 July 2023 was contemptuous of his obligations to give disclosure and either avoided answering or gave transparently untrue answers to the questions he was required to answer. It is said that this conduct was unreasonable and improper, justifying an order for indemnity costs in respect of costs incurred by the Defendant in dealing with this aspect of the Claimant's disclosure. The Defendant further submits that the Claimant should receive nothing for his disclosure costs and should pay the Defendant's costs of dealing with that issue from 14 July 2023 up to and including trial. He suggests that the Claimant should be required to pay 15% of his preparation and trial costs.

22 In addition, the Defendant submits that the Claimant should not be permitted to recover his costs of preparing his trial witness statement in view of the fact that, despite sitting in court during the trial, he chose not to give evidence or otherwise rely on that witness statement.

23 As I indicated in ¶¶73-74 of the Main Judgment, I do not ignore the fact that the Claimant chose not to give evidence at the trial and in so doing did not make himself available to answer questions about his failure to give disclosure of

WhatsApp messages during what the Defendant called the Crucial Period. I found that, whatever those missing WhatsApp messages may have said, the effect of having accepted Mr Duffy's evidence as regards the instructions he was given by the Defendant in early 2017 meant that I could rely on that evidence as well as the important finding in the Liability Judgment that the sum of £750,000 advanced by the Claimant to PCB was a loan and not an investment.

24 Nevertheless, I consider that it is appropriate to make a reduction in the Claimant's costs in order to reflect the fact that (i) his conduct in relation to non-disclosure of WhatsApp messages during the Crucial Period caused both parties to incur additional unnecessary costs, (ii) he did not rely on his trial witness statement and (iii) he was unsuccessful on the Quistclose Issue. In my judgment, the appropriate reduction is 15% which means that I will order the Defendant to pay 85% of the Claimant's costs to be assessed on the standard basis if not agreed.

Should there be a payment on account of costs?

25 Pursuant to CPR 44.2(8), if the court makes a costs order it will order the paying party to make a payment of costs on account pending detailed assessment, unless there is good reason not to do so. The Defendant submits that there is good reason not to make an order for payment of costs on account in this case, or at least to stay its enforcement.

26 The Defendant has filed a statement of Vivienne Burbidge dated 6 February 2024. Ms Burbridge is a partner in Clarke Mairs Law Ltd, the solicitors instructed by the Defendant in these proceedings as well as the previous proceedings. In summary, she states as follows:

(1) the Defendant was successful in the previous proceedings and on 14 December 2022 (the "2022 Order") was awarded his costs on the indemnity basis. On 4 January 2023 the Claimant made a payment on account of £200,000 which was followed by a further payment of £45,114 on 31 January 2023, making a total amount paid on account by the Claimant in the previous proceedings of £245,144;

(2) she is presently reviewing and finalising a draft bill of costs with a view to serving the same upon the Claimant. Without waving privilege, she states that the provisional figure for the bill of costs is £541,972.08. After applying the percentage reductions required by the 2022 Order, the bill is reduced to £414,266.88. There is a provisional figure yet to be incorporated reflecting additional costs incurred by the Defendant with his former solicitors which she does not anticipate being more than £25,000 which will again be reduced to reflect the percentage reduction required by the 2022 Order;

(3) after taking into account the payments on account of costs made by the Claimant in January 2023, she calculates there is a provisional balance due to the Defendant of £169,303.88, subject to either the parties agreeing the cost figure or detailed assessment taking place. This figure is said to exceed the Claimant's budgeted costs in these proceedings and ought therefore to operate as a set off against any payment on account of costs ordered against the Defendant.

27 Accordingly, the Defendant submits there should be no order for costs on account because the Claimant will be facing a bill of costs from the previous proceedings which is "not unlikely" to be equivalent to or even significantly in excess of his costs budget for these proceedings. The Defendant further argues that whilst the court is not yet in a position to ascertain the precise effect of the ultimate set-off, a set-off is inevitable and it will most likely extinguish or significantly reduce the costs ordered in these proceedings. In the circumstances, he says an order for costs on account would be pointless, because it would be unfair for that order to be enforceable before the assessment of costs of the previous proceedings, and there is no point in making an order and staying its enforcement (which would be the only just response).

28 Mr Kitson for the Claimant points out that the sum ordered to be paid on account by his client in the previous proceedings was in fact £259,500, from which was deducted an outstanding costs order in the sum of £14,386 in the Claimant's favour, which resulted in the total sum actually paid of £245,114. He relies on the case of *Benyatov v Credit Suisse Securities (Europe) Ltd* [2020] 1 WLR 2913 for the proposition that "CPR 44.2(8) would be undermined if a party was able to bring into account contingent and uncertain costs entitlements in order to defeat another party's sure entitlement to an interim payment" (quoted from the headnote, and discussed at ¶¶20-23 of the judgment). He submits that the same reasoning applies to this case where the Defendant is seeking to set off inherently contingent and uncertain cost entitlements to defeat the Claimant's claim to a payment on account of his costs.

29 The Claimant makes the following further points:

(1) A party who waits 18 months to commence detailed assessment proceedings and raises them only in response to a pending costs application should expect the court to scrutinise his application for a stay or set off very carefully.

(2) In the previous proceedings, the Defendant has had the benefit of a substantial payment on account of £259,000. He now seeks to deprive the Claimant of that same benefit. There is no suggestion that the Claimant will not be able to repay any costs order if that is the net effect of the detailed assessment process.

(3) The Defendant filed two relevant cost budgets in previous proceedings. First, a budget for the Liability Trial dated 8 October 2021 which totalled £303,807.08, made up of (a) incurred costs (not approved) of £175,304.58 and (b) budgeted costs approved in the sum of £128,502.50. Second, a budget for the Remedies Trial (never considered by the court) which totalled £135,037. Thus, overall total costs (budgeted and incurred) came to £438,844.08. Those costs were certified as being reasonable and proportionate by the Defendant's solicitors.

(4) The Defendant did not obtain an order for all of his costs in the previous proceedings. Rather, as confirmed in Ms Burbridge's witness statement, he only obtained an order for 70% of his costs in respect of the Liability Trial (70% of £303,807 is £212,665, and overall total of costs budgeted and incurred of £347,702). The Claimant made two payments in January 2023 of £178,500 and £81,000 (totalling £259,000) on account of the costs of those proceedings that he was ordered to pay, leaving a balance of £88,702 to be argued over on detailed assessment.

(5) The Defendant now suggests, through Ms Burbridge, that he has incurred an additional £103,128 in costs in the previous proceedings.

(6) The Defendant has not yet commenced detailed assessment proceedings, nor has he committed himself to doing so. If he never chose to do so, and the court acceded to his request for a set-off or stay, the Claimant would have been deprived of an interim payment on account of his costs in these proceedings for no reason.

(7) The correct forum in which to argue about the further costs to which the Defendant is entitled pursuant to the 2022 Order (including the recoverability of the additional £103,128 or whatever sum the Defendant seeks to claim in his bill of costs when served) is in detailed assessment proceedings. It is not appropriate for the Defendant to invite this court to speculate or prejudge proceedings which are not on foot and may never be brought.

(8) In summary, the Defendant's argument is misconceived as a matter of law (per *Benyatov* (supra) at ¶¶20-23) but, even if it is arguable as a matter of fact, it does not come close to providing a 'good reason' for departing from the usual rule that the court should order a payment on account of the successful party's costs pending any detailed assessment.

30 I accept the Claimant's submissions. In my judgment there is no good reason for departing from the usual rule that the successful party is entitled to a payment on account of his costs pending any detailed assessment.

Amount of the payment on account

31 CPR 44.2(8) provides that a 'reasonable sum' should be ordered as a payment on account. The Claimant seeks 90% of his cost budget as a payment on account. His Precedent T dated 11 September 2023 was agreed in the sum of £131,218.80 by the Defendant. However, of that figure £23,177 were incurred costs, which were not agreed by definition. Thus the agreed budgeted figure was £108,041.80, not the overall figure.

32 In a case where (as here) the court has made a costs management order, the receiving party's budget is a sensible starting position for determining a 'reasonable sum'. Absent the existence of a good reason to depart from a budget, it is appropriate to order that 90% of a party's budgeted costs be paid on account: *Thomas Pink Ltd v Victoria's Secret* [2015] 3 Costs LR 463.

33 The Claimant seeks a payment on account equivalent to 90% of 85% of his costs budget of £131,218.80 which is £100,382.38. He submits that the figure for incurred costs (£23,177), although not agreed, is nevertheless a reasonable figure.

34 The Defendant submits that only the agreed budgeted cost figure of £108,041.80 should be taken into account for the purposes of arriving at a reasonable sum to be paid on account. He also contends that £8,650 should be deducted from that sum for the purpose of calculating a payment on account because this was the budgeted figure for ADR costs and there was no significant ADR process. Applying the same percentage reductions, this results in a figure of £76,034.73.

35 The court should strive to ensure, in accordance with the principle enunciated in *Mars v Teknowledge*, that the payment on account does not result in an overpayment and should select a figure which is an irreducible minimum. I bear in mind the Defendant's point that there appears to have been no significant ADR process. I also take account of the fact that the Claimant's incurred costs, whilst not agreed and remaining subject to detailed assessment, do not on their face seem unreasonable. I have concluded that the appropriate reasonable amount which the Defendant should pay on account of the Claimant's costs is £90,000.

Conclusion

36 For the reasons given, the Claimant is entitled to be paid 85% of his costs, assessed on the standard basis if not agreed, and to a payment on account of those costs of £90,000.