IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION

NCN: [2024] EWHC 822 (KB)

Case No: QB-2021-003966

Royal Courts of Justice
Strand
London
WC2A 2LL

Monday, 29th January 2024

Before:
MASTER DAGNALL

B E T W E E N:

CCP GRADUATE SCHOOL LTD

and

THE SECRETARY OF STATE FOR EDUCATION

MR GILES appeared on behalf of the Claimant
MR MCGURK appeared on behalf of the Defendant

APPROVED JUDGMENT

MASTER DAGNALL:

1. I have to decide what orders to make regarding the costs of the various applications and of this Claim.
2. Civil Procedure Rule 44.2 provides as follows:

"44.2

(1) The court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

(3) The general rule does not apply to the following proceedings –

(a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or

(b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

(6) The orders which the court may make under this rule include an order that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment.

(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.

(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

3. That Rule confers a general discretion about whether to make costs orders and if so, what they are to be, but the court must carry out its exercise of that discretion in a principled fashion. The general rule is that the unsuccessful party will be ordered to pay the successful party's costs; but the court can make a different order, and takes into account all matters, including whether a party(ies) has been partially successful, and conduct, which includes conduct both during and before the proceedings.

4. I am there reminded that under CPR44.2(6) the court can make a variety of different orders, although under CPR44.2(7), it will ask itself whether it can make a proportionate or costs from a certain date only order in preference to a costs relating to a distinct part of the proceedings order. I also bear in mind CPR44.2(8), being that "Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so".

5. There is a limited issue, where the parties are in fact on agreement, with regards to the costs of the claimant's application made for permission to appeal and to extend time. They agree that there should be no order as to the costs of that application and it seems to me that there are substantial reasons as to why they should have come to that conclusion, but in any event

they are in agreement, and I will make no order as to the costs of that application.

6. As far as general costs are concerned, Mr Giles for the claimant takes the realistic approach that the claimant is the unsuccessful party and therefore should pay the defendant's costs. That seems to me is right in principle, Mr Giles, however, makes points relating to the fact that in the section of my judgment dealing with whether the direct contract argument, had it been successful, would have enabled the claimant to succeed, and as to two arguments advanced by the defendant as to why that would not have been the case.

7. Mr Giles refers me to that section of my judgment and the fact that I did not hold in the defendant's favour with regards to those two arguments; but rather that, if the claimant had succeeded in showing that it had reasonable prospects of success on the direct contract argument, I would not have held that the claimant still lacked reasonable prospects of success because of either the point that the claimant had chosen to retain their students on its DTTLS course whilst entering them for the DET qualification or in relation to whether there were any relevant students who fell within relevant funding parameters at all.

8. Mr Gile's submits that in these circumstances that I should only award the defendant a proportion or limited part of the defendant's costs. Mr McGurk submits to me that the defendant was the overall successful party, succeeded in showing the direct contract argument had no real prospects of success to start with, and, while I would not have decided in the defendant's favour on these two points, would point out that even if the direct contract argument had had real prospects of success, I would have granted reverse summary judgment against it or have struck it out on limitation grounds, and also in any event have struck it out on *Henderson v Henderson* [1843] 3 Hare 100/*Aldi v WAP Group Plc* [2008] 1 WLR 748 grounds.

9. It seems to me that, subject to one point, this is a situation where the claimant has succeeded on certain sub-issues but which have not affected the ultimate determination; and it falls within the category of a usual sort of situation referred to in many cases where a party advances a number of arguments at a trial or hearing, wins overall, but fails on some sub-issues, and where those cases hold that the likely appropriate outcome is simply that the successful party obtains all their costs. It does not seem to me that those issues were, subject to one point, so distinct as to make it just and appropriate for the court effectively to split up certain costs and deprive the defendant of some of them. Rather, It seems to me much more a case that the defendant was advancing a general case and attack, and succeeded on it so as to defeat the Claim in its entirety; and the facts that the defendant failed on certain of the

sub-issues were merely minor facets of an overall victory.

10. That is, however, subject to point specifically referred to in paragraph 132 of the transcript of my oral judgment and onwards; being that the Secretary of State came to advance a number of different spreadsheets with regards to students, and in doing so ended up somewhat modifying elements of its sub-case, and even to the extent that the Secretary of State accepted that certain monies might, in principle, still have to be paid to the claimant, albeit that those monies were a relatively small amount in context.

11. It does not seem to me that I was given any good explanation as to why these various mutations had to occur. Mr McGurk's fallback position is that, perhaps, the costs of certain of these spreadsheets should be disregarded. What I am going to direct is that the claimant should pay the defendant's costs to be subject to detailed assessment, except (insofar as they are otherwise recoverable) half the costs for the preparation of the various spreadsheets by the defendant, and the witness statements relating to those spreadsheets. It seems to me that that reflects the justice of that aspect of the case.

12. The defendant seeks a payment on account under CPR44.2(8).

13. At the hearing on 16 June 2023 the claimant indicated that he would be seeking a payment of £75,000. Mr Coulter, then counsel for the claimant, indicated that the claimant was supported by an insurance company and that they would have some sort of involvement. I stated that in the light of the timing etc.,

> "What I am going to do, I am going to provide that within let us say 28 days, give your insurers enough time as to Mr Coulter and I will provide that within 21 days, by the end of July, clarify that to say by 4.30pm on 22 July you will produce and serve a statement as to:
> (a) whether you propose to pay any sum of money on account of costs; and
> (b) why it should not be the £75,000 sought.
> Mr McGurk's side has permission to, if so, if they do not accept that, to do a responsive statement from them to the court, and I will consider that as a sort of informal application".

14. The grammar that I used was not of a high standard, but it seems to me that I was making clear that I was laying down a procedure that: the claimant must by 22 July provide a statement setting out to set out whether they accept that they should have to make the £75,000 proposed interim payment or whether they opposed that course with reasons; and that the defendant should be able to respond to it. What in fact happened was that the claimant did not comply with that direction at all, although at some much later point in time they suggested an interim payment of £45,000 subject to the approval of their insurers. At

first sight, that latter suggestion would seem to lack substance as it was simply dependant on what their insurers might consider in due course to be or not to be appropriate.

15. The defendant has now submitted a costs schedule totalling £169,000. This is in circumstances where solicitors and counsel are not charging any Value Added Tax because the solicitor's fees element is calculated on ordinary guideline profit costs rates, irrespective of the amount actually payable by way of salary or the like to the relevant solicitors who are in house, and because Mr McGurk, as Attorney General's Panel counsel is only charging distinctly low rates. The costs schedule is actually made up of some £14,000 of counsel's fees and something like £155,000 of solicitor's costs.

16. Looking at the material before me, which is limited in terms of number of bundles, and where much of the bundles consists of print-outs of very lengthy standard form documents emanating from the Department of Education, the total of £155,000 for solicitor's costs is at first sight distinctly surprising. Mr McGurk, however, contrasts the overall figure with that for the claimant, and says that his side's costs are in fact lower than the claimant's cost figures as appear within their schedules.

17. I approach this applying CPR 44.2(8) in circumstances where Mr Giles accepts that there is no good reason not to order an interim payment. I have to consider what is a reasonable sum to be ordered to be paid on account of costs, bearing in mind that, under CPR 44.3 and CPR44.4, on a standard basis assessment, costs which are unreasonably incurred or are of an unreasonable amount, are not to be allowed, and the court will only allow an amount which is proportionate to the matters in issue. Further, the court will resolve any doubt it may have as to whether costs were reasonably incurred, or reasonable an amount, or are proportionate to the matters in issue in favour of the paying party, here the claimant.

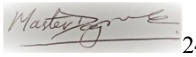
18. It further seems to me that I should not be seeking to compare the two costs schedules. That is, firstly, because, as a general rule, the tests as to reasonableness and proportionality are simply a question of looking at the receiving party's costs schedule; and the paying party's costs schedule, which may have been created on a distinctly different basis, is, at first sight, of dubious, if indeed any, relevance. Secondly, the claimant's costs have been incurred on a very different basis and structure than that of the defendant. The claimant's costs schedule includes an amount of a sizeable number of tens of thousands of pounds for counsel's fees, which is not at first sight surprising, and which results in a very different balance between counsel's and solicitors' fees than that which exists in relation to the Secretary of State's costs, where the balance is very much due to, some might even say skewed by, the low

Attorney General Panel rates. It therefore does not seem to me that the claimant's cost's schedule is particularly relevant.

19. Mr McGurk for the Secretary of State seeks £100,000 being two thirds of the Secretary of State's costs schedule. In an ordinary case that might well be the amount upon which I would fix, but it seems to me that I should fix on the amount of £75,000. I do that having considered the matter generally but being further influenced by, firstly, the fact that it seems to me that the claimant's solicitor's costs at first sight are very high. Secondly, this is the amount which the defendant was seeking previously, and I cannot see any particularly good reason for the defendant changing their position. Thirdly, that, while I could see reason for going below that figure in some circumstances, I do have to look at the matter generally as to what is reasonable; and where there is a full particularised costs schedule, and where, although Mr Giles has attacked some items, albeit he has only had a limited amount of time to formulate and present such attacks, those items in terms of amount are cumulatively not great. Fourthly, it does seem to me that I should take into account the fact that the claimant simply failed to comply with my direction, which direction was intended to ensure that this type of argument was better presented and argued out. Whether that is relevant as a matter simply as conduct under CPR 44.2, or as a matter of the court considering what flows from non-compliance with its orders, does not really seem to me to matter; it is simply a factor which I have weighed in the balance.

20. For all those reasons I am going to order an interim payment of £75,000.

End of Judgment

Approved  24.4.2024

Transcript from a recording by Acolad UK Ltd
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