Neutral Citation Number: [2019] EWHC 374 (QB)

Case No: HQ17X02869

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
QB

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2019

Before:

Mr Justice Freedman

- -

Between:

MICHAEL O'NEILL

Claimant

- and –

AVIC INTERNATIONAL CORPORATION (UK) LTD

Defendant

- -
- -

Mr Justice Freedman :

1. On Friday 1 February 2019, Judgment was handed down dismissing the claim of the Claimant against the Defendant ("the Judgment"). On the same day, an application for permission to appeal was dismissed.

2. On 1 February 2019, the Court heard consequential applications as regards the incidence of costs, interest on costs, the basis for assessment of costs and for a payment on account of costs. This is the reserved Judgment in respect of those matters.

Incidence of costs

3. The Defendant has succeeded in resisting the claim. The starting point is that the winner should recover costs: CPR 44.2(2)(a). In this case, having regard to the reasons set out in the Judgment, there is no reason to depart from that: CPR 4.2(2)(b). Accordingly, the costs of the action should be paid by the Claimant to the Defendant.

Basis of assessment

4. The Defendant seeks that costs should be assessed on the indemnity basis, and in particular:

   (1) the conduct of the Claimant before proceedings;

   (2) the conduct of the Claimant in refusing to accept the offers of settlement;

   (3) the conduct of the Claimant during the action and particularly in and about the trial of the action.

5. As regards the conduct before the proceedings, reference is made to correspondence referred to in the Judgment at J/99 in a letter to Avic China copied to the Chinese Ambassador, the Claimant referred to Mr Lou and his wife repeatedly as rogue employees and sought their deportation. The Judgment referred to the Claimant being *"motivated by a desire to punish Mr Lou and Ms Fan."* Earlier correspondence referred to in the Judgment from November 2015 is at J/152 and J/153.

6. As regards the refusal to accept offers of settlement, there were three offers of settlement made by the Defendant. First, there was an offer made on 9 March 2016 (without prejudice save as to costs), to settle all disputes for a total sum of £50,000. Second, on 12 August 2016, a Part 36 offer was made to settle for £65,001 plus costs. Third, on 15 October 2018, a further without prejudice save as to costs offer was made of £130,000 inclusive of costs in full and final settlement of all claims. It may be an indicator as to the approach of the Claimant to settlement that he made a Part 36 offer, on 22 December 2017, to receive a sum of £450,000 plus costs in settlement of the action (comprising about 80% of the value of the action). The Defendant has done better than its Part 36 offer in that as a result of the Judgment, nothing is payable to the Claimant.

7. As regards conduct in the action, reference is made to the following within the Judgment:

(1) like Mr Lou, Ms Fan was the subject of abuse in the letters to which I referred above. Mr O'Neill also made personal remarks about her relationship with Mr Lou and about the 10-year old daughter in distress [T4/170/5 – T4/171/3], [T4/186/4-6] and [T4/191/17-21];

(2) Mr O'Neill made accusations of corruption against Mr Lou and Ms Fan which I found to be assertions unsupported by evidence: see J/98. Although he has now relented, Mr O'Neill accused Mr Prichard of fraud on 16 occasions in his evidence: see J/109.

(3) Mr O'Neill showed a desire to punish Mr Lou and Ms Fan in his later correspondence to the Board of Avic China and to the Chinese Ambassador to the UK calling them "rogue employees", asking for their deportation and referring to them as despicable: see J/99

(4) Mr O'Neill's cross examination of Mr Lou went beyond the boundaries of what was legitimate and must have been very hurtful and difficult to endure: see J/102

(5) Mr. McNab was accused by Mr O'Neill on about 34 occasions of lying in this case: see J/119. It was said that he was party to collusion in a horrendous fraud with Mr Byatt: see J/116(3).

8. Mr Scher on behalf of the Defendant also relies on findings in the Judgment, including that the Claimant was told by Mr Byatt and Mr McNab that the problem could not be solved by government to government communications and yet he has sought to portray that he procured this to take place: see J/86. Mr Scher has adverted to the conclusion that the Claimant was being manipulative (see J/88) and how the Claimant sought to take control of Avic UK: see J/95. I have taken these findings and the rest of the Judgment into account.

9. As regards the relevant principles, the Court has generally refused to provide guidelines as to when to order indemnity costs, although there are some clear themes which emerge in the cases. Without citing authority extensively, the following matters are to be noted:

(1) the discretion of the Court is broad and the exercise of it is entirely fact sensitive;

(2) the starting point is that costs on the standard basis is the usual order and therefore to justify an award of indemnity costs requires something 'out of the norm';

(3) it is not necessary to find deliberate misconduct or dishonesty or moral blame: unreasonableness to a high degree suffices. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight: for this and the previous proposition, see *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (Costs)* [2002] EWCA Civ 879;

(4) the rejection of reasonable attempts to settle will not normally, by itself, justify an award of indemnity costs: see *Kiam v MGN Ltd (No.2)* [2002] EWCA Civ 66 at [13].

10. As regards the offers made, I am clearly of the view that the conduct of the Claimant in refusing to accept them was not 'out of the norm' or unreasonable to a high degree.

The Claimant may have been unwise to have rejected the offers, but that fact by itself does not, in my view, begin to justify an award of indemnity costs. He also finds himself subject to the regime of CPR Part 36, but since he is a Claimant and the relevant offer is a Defendant's offer and not a Claimant's offer, there is no prescribed sanction of indemnity costs. It is something to be borne in mind in respect of costs, but it is far from decisive as regards the basis of assessment. In all the circumstances, I revert back to the normal order which is costs to be assessed on the standard basis.

11. In looking at the conduct of the Claimant, I must temper criticism of the conduct of the Claimant by a number of factors. First, there are undoubtedly serious difficulties of being a litigant in person. The Claimant seems to have believed that he needed to put his case to a very high level and almost not give up until he had secured an admission. On several occasions during the trial, the Court tried to disabuse him of that notion. I mention it because this goes some way, but not all the way, to explain why he made such serious accusations against the Defendant's witnesses.

12. Secondly, I must allow for the possibility of over-vigorous cross-examination based upon the stress of the litigation. Whilst for other purposes like relief from sanctions, the Court is reluctant to make a great distinction between a litigant in person and a lawyer, here there is an important distinction. It is professional misconduct for a lawyer to make allegations of fraud without a reasonable basis for the allegation. The litigant in person is not subject to any such code. That is not to say that this gives a green light to a litigant in person to behave how he likes without sanction.

13. Thirdly, although there have been repeated accusations by the Claimant of lies, fraud and conspiracy, this was only in relation to trying to persuade the Court that the oral agreement for which he contends was not made or not made in the terms contended for. The claim was not a fraud claim, nor did dishonesty form a part of the claim. It is simply the apparent belief of the Claimant that anybody who contradicts his case must be a liar and/or guilty of fraud and/or conspiracy.

14. Fourthly, the conduct of the action did not significantly add to the length of the claim because of the allegations about dishonesty and the like, or the deeply unpleasant repeated references to suicide, or the unwarranted references both within and outside the litigation to the Claimant seeking that Mr Lou be deported. The real reason for the length of the case has been that it has been conducted by a litigant in person who found himself generally able to put his case, but often in a very long-winded way and requiring considerable direction from the Court. I have not made findings that the case as a whole was a dishonest case: that has been unnecessary for the purpose of the judgment.

15. Fifthly, the case when pleaded by lawyers was a perfectly conventional case which could not have attracted an indemnity costs order. I considered whether it must attract the indemnity costs order for a part of the litigation because of the way in which the trial has been conducted and the preparation of the witness statement of the Claimant in October 2018. I have had regard to the correspondence to Avic China and to the Chinese Ambassador and to the matters which I set out above and in the Judgment. I have also looked at the conduct as a whole, as well as its separate parts. In addition to conduct, I have taken into account the findings adverted to by Mr Scher and the findings generally in the Judgment.

16. However, in the end, taking into account the entirety of the material before the Court, I have concluded that the essence of the case does not attract an indemnity costs orders. In my judgment, the unacceptable aspects of its presentation to which I have referred as well as the findings in the Judgment do not persuade me to depart from the usual order of a standard basis assessment. I have come to the view in the exercise of my discretion that the appropriate order is for the Claimant to pay the Defendant's costs on the standard basis.

Interest on costs

17. There is a general power to order interest on costs to compensate the party for the loss of use of the moneys from the time of the payment of the moneys into court: see CPR 40.8(2), which provides that interest may run from a date before the date when the judgment is given. It is common for interest to run at a rate of 1% above base rate or even a higher percentage, usually from the date when the costs are paid until judgment.

18. In this case, there is a basis for interest to be at a higher interest rate since there was a Part 36 offer made by the Defendant to the Claimant, which the Claimant refused. The result is that the Court has the ability to award further interest on costs, provided that the overall amount of interest does not exceed 10% above base rate.

19. The interest on costs is designed to provide a generous percentage to compensate the Defendant from being out of pocket, perhaps raising a typical percentage from 1.5% to 3% above base rate, without unduly penalising the Claimant. In accordance with CPR 36.17(1)(b) and 36.17(3), the Defendant is entitled to interest on its costs from the end of the 21-day relevant period following service of a Part 36 Offer. The relevant offer was made on 12 August 2016.

20. I order interest on costs. In the exercise of the Court's discretion, I award interest at the rate of 4% above base rate from the date when any costs were paid in respect of costs from 3 September 2016. In relation to costs prior to that date, there will be interest at the rate of 1% above base rate from the time when they were paid, but from 3 September 2016, the rate of interest will be 4% above base rate from when the costs were paid. For the avoidance of doubt, this rate is a combination of the orders available pursuant to CPR 40.8(2) and the powers under CPR 36.17(1)(b) and 36.17(3).

Payment on account of costs

21. The Court is required by the provisions of CPR Part 44.2(8) to order the paying party to pay a *"reasonable sum on account of costs, unless there is good reason not to do so".* I have had regard to a whole variety of circumstances. It includes the possibility of an application for permission to appeal and an appeal to follow. In case that is in the pipeline, I shall give substantial time to pay: in any event, in the case of a substantial order against an individual, I take the view that an extended time to pay is appropriate. The Court has also had regard to the resources of the Claimant. The Claimant has not given evidence of his assets, but his assertion is that he lacks financial resources to be able to pay. (He said that he would need 10 years to be able to pay, but this seemed to be a way of mirroring his evidence about Mr Lou requiring 10 years to pay, which evidence was rejected in the Judgment). It is necessary to take into account the need for the payment on account not to be so high that it might exceed a sum to be awarded on an assessment.

22. The amount of the budgeted costs was a sum of £232,203.32. The actual costs are said to be significantly greater, for example, because the case took 2 days longer which was, in my judgment, primarily caused by the difficulties of the Claimant as a litigant in person. I bear in mind that Master Thornett has expressed concern in the costs management order about costs relating to Simmons & Simmons which were "substantial and unspecified". The Defendant claims that the Court should award 90% of the budgeted costs comprising a rounded-up sum of £209,000. I consider that there is no good reason not to award a sum on account of costs, and that a reasonable sum to order in all the circumstances is a rounded-up sum comprising just over 60% of the budgeted costs, that is to say £140,000. It is to be paid within 8 weeks of the date of the making of this Order, which on the basis that it is to be made on Tuesday 26 February 2018 will be by 4pm on Tuesday 23 April 2019.

Other consequential matters

23. In respect of permission to appeal, this was sought by the Defendant in respect of the first judgment of 1 February 2019. I refused the application, and it is not known whether the Defendant has applied to renew his application to the Court of Appeal. Permission to appeal, if sought against this second judgment, is a separate matter from permission to appeal the first judgment. For the purpose of completeness, in case there is to be an application for permission to appeal against this second judgment, I shall adjourn any such application in case it cannot be brought on Tuesday 26 February 2019: see *Jackson v Marina Homes Inc* [2007] EWCA Civ 1404. Unless there is a request for an oral hearing, I should be able to deal with any such application in writing. That should be done with the typographical corrections by Monday 25 February 2019 10am if possible (but if for some reason that is not possible, then some other proposal should be made). If there are any other consequential matters with which I need deal, they should also be identified with the corrections. For the avoidance of doubt, the 21-day period for any renewal application for permission to the Court of Appeal starts to run after the date that the decision is made (see CPR part 52.12). It follows that any application for permission to appeal against the second decision is separate from permission to appeal against the first decision, and time periods are separate.

I ask the Defendant to draw up a draft order reflecting the matters set out in this Judgment, and to seek the approval of the Claimant before lodging it with the Court. I shall then consider the appropriate form of or