Neutral Citation Number: [2020] EWHC 1017 (QB)

Case No: QA-2019-000090

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2020

Before :

MR JUSTICE CHAMBERLAIN
MASTER ROWLEY (ASSESSOR)

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Between :

Michael Wilson & Partners Limited	**Appellant**
- and -	
T I Sinclair	**Respondent (1)**
SOKOL HOLDINGS INC	**Respondent (2)**

- -
- -

Joshua Munro (instructed by **Michael Wilson & Partners**) for the **Appellant**
No attendance by or on behalf of the 1st & 2nd Respondent

Hearing dates: 17 March 2020

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Approved Judgment No. 2

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 as handed down may be treated as authentic.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

1. This second judgment should be read with my first judgment of 24 March 2020 (neutral citation: [2020] EWHC 704 (QB)). In the first judgment, I gave my reasons for concluding that the Appellant's ("MWP") appeal against the order of Master Gordon-Saker (the Senior Costs Judge or "SCJ"), setting aside a default costs certificate obtained by MWP on 22 January 2019, should be dismissed insofar as it sought to challenge the decision in principle to allow the detailed assessment of MWP's costs to proceed. I invited further written submissions on three questions:

   (a) whether the SCJ erred in declining to make the setting aside of the default costs certificate conditional on payment of costs certified in previous assessments;

   (b) if so, whether I should vary the SCJ's order so as to impose such a condition;

   (c) if so, precisely what condition should be imposed.

Submissions for the Appellant

2. For MWP, Mr Munro submitted that he had referred the SCJ to "various judgments, orders, default and final costs certificates" in the Appellant's favour, which the Respondents had not satisfied. The SCJ erred by not taking these into account. It would be unfair simply to set aside the default costs certificate without first requiring payment of all previous orders, because that would require WMP to incur further costs (of the assessment) which, in view of the Respondents' previous non-compliance, it was clear they would not be willing or able to pay.

3. Mr Munro invites me to vary the SCJ's order so as to make the setting aside of the default costs certificate conditional on payment within 14 days of the following amounts, which he says remain outstanding from previous judgments, orders and costs certificates:

   (a) NZD 34,907 plus all interest accrued and accruing pursuant to judgments, orders and costs certificates of the New Zealand High Court, recognised by order of Master Thornett of 6 March 2018;
   (b) USD 249,654.17 plus all interest accrued and accruing pursuant to Bahamas Court of Appeal certificate of taxation, recognised by order of Master Eyre of 22 October 2014;
   (c) USD 88,072 plus all interest accrued and accruing pursuant to Bahamas Supreme Court certificate of taxation, recognised by order of Master Eyre of 22 October 2014;
   (d) £91,112.79 plus all interest accrued and accruing pursuant to default costs certificate 37 of 2018 issued by the Senior Courts Costs Office on 21 February 2018;

(e) £148,327.98 plus all interest accrued and accruing pursuant to default costs certificate 18 of 2018 issued by the Senior Courts Costs Office on 21 February 2018;
(f) £4,857.33 plus all interest accrued and accruing pursuant to the default costs certificate issued by the UK Supreme Court on 11 July 2018;
(g) £4,889.03 plus all interest accrued and accruing pursuant to the default costs certificate issued by the UK Supreme Court on 11 July 2018;
(h) £77,000 plus all interest accrued and accruing pursuant to the order of Chief Insolvency and Companies Court Judge Briggs of 4 December 2018;
(i) USD 159,278.25 plus all interest accrued and accruing pursuant to a costs certificate issued by the Bahamas Court of Appeal, recognised by Master Eyre on 19 October 2014;
(j) All amounts payable by the Respondent to MWP plus all interest accrued and accruing pursuant to the order of Master Cook of 11 October 2019;
(k) £18,410.62, £83,410.62 and £22,010.75 plus all interest accrued and accruing pursuant to an assessment by the Judicial Committee of the Privy Council, recognised by order of Master Eyre of 6 August 2015 and the order of Master Cook of 11 October 2019.

Submissions for the Respondents

4. For the Respondents, Mr Sinclair responds that the SCJ was invited to make his order setting aside the default costs certificate conditional on payment of these judgment debts, but in the exercise of his discretion declined to do so. There is no basis for interfering with this. In any event, Mr Sinclair submits that MWP, whilst seeking to impose draconian conditions on the Respondents, ignores court orders and judgments against it. He relies in this respect on the judgment of Master Leonard of 25 February 2020, assessing costs payable to MWP by the Mr Sinclair in respect of proceedings in Privy Council appeals nos 74-79 of 2013. Addressing in general terms the proportionality of the costs claimed by MWP, Master Leonard said this at [50]-[54]:

> "50. MWP has produced documentation purportedly evidencing Mr Sinclair's refusal to pay judgment debts. Whilst conduct is a factor in considering proportionality, I should make clear my view that Mr Sinclair's attitude to debt is not a significant consideration when judging the proportionality of MWP's claimed costs of applications 2013/0074 to 2013/0079, if only because it has nothing to do with the level of costs incurred by MWP on those applications. Even if it were a significant factor, I could hardly overlook the fact that MWP has been criticised by the Court of Appeal in the strongest terms for exactly the same sort of conduct.
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> 51. Having assessed MWP's costs against Mr Sinclair in the High Court, the Supreme Court and the JCPC I am in a position to know that Mr Wilson is the driving force behind MWP's costs claims and that costs recovery, for Mr Wilson, is not a means of achieving a reasonable and proportionate indemnity against costs expended. It is, rather, yet another weapon in a personal war.

> …
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> 53. Anyone who comes between Mr Wilson and his opponents becomes, in that context, another opponent. So much is evidenced by the confrontational tone and content of much of MWP's correspondence with courts, including the costs clerk to the JCPC, and Mr Wilson's occasionally openly furious response to adverse rulings. Everything is taken personally: hence, for example, MWP's frequent announcements of its intention to appeal, which seems to be seen by Mr Wilson as something between a threat and a promise of personal vindication.
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> 54. In short proportionality, for MWP, is not and has never been a consideration. Because of that; because reductions to date have been strictly limited to specific points raised by Mr Sinclair; and because MWP's bills as assessed on that basis alone remain exceptionally large for what has been done, I am quite unable to accept MWP's submission that its costs have already been reduced so much that they cannot now be disproportionate in amount."

5. The criticisms referred to by Master Leonard at [50] of his judgment are contained principally in the judgments in *Emmott v Michael Wilson & Partners Ltd* [2019] EWCA Civ 219, [2019] 4 WLR 53. In my first judgment, I explained that, although Mr Sinclair was not a party to that decision, that did not mean that things said in the judgments there were irrelevant to the exercise of the SCJ's (or my) discretion. On the contrary, the observations of Gross and Peter Jackson LJJ (with whom Rose LJ agreed) were relevant and illuminating. For present purposes, it will suffice to set out a few excerpts:

   (a) At [16], Gross LJ noted that in 2015 Burton J had given Mr Emmott leave to enforce the arbitration award against MWP in the same manner as a judgment or order of the High Court.

   (b) At [17], Gross LJ made reference to the judgment of Sir Jeremy Cooke (the judgment under appeal: [2017] EWHC 2498 (Comm)) in which he noted at [8] "the ability on the part of Mr Wilson in particular, to state that black is white" and observed that the "distortions of the truth as to what has and has not been decided elsewhere are quite extraordinary".

   (c) At [24], Gross LJ cited a number of other observations about the conduct of MWP and Mr Wilson, including that the former had delayed enforcement of the arbitration award "by mounting appeals that are not simply hopeless, but ones he must have known to be hopeless" and had insisted on telling courts worldwide that the awards were under appeal when they were not. At [25], Gross LJ described these as "coruscating factual conclusions", which "comprise a devastating indictment of the conduct of MWP and Mr Wilson".

   (d) At [62], Gross LJ said:

   > "…[T]his was not a case of 'Can't pay'; this was a case of a most emphatic 'Won't pay'. It is unnecessary to delve into the

> detail of MWP's accounts, though there is more than sufficient material there to support the judge's conclusions in this regard at paras 20 and 31 of the judgment. Importantly, MWP has resisted winding up in the BVI on the ground that it is solvent. It cannot be permitted to both approbate and reprobate. In any event, it is amply clear from the stance taken by MWP before the judge and before this Court that it is determined not to pay the judgment, regardless of its ability to do so."

(e) At [70] Peter Jackson LJ said:

> "Having listened to the history of the litigation between these two solicitors, I protest at the shameful waste of time and money caused by their private dispute, which has now continued for 13 years and left their reputations in tatters. We were told that Mr Emmott's global costs amount to £2.5m, and Mr Wilson's several times that. Courts in four countries have been (and in at least two cases are being, with no end in sight) plagued with their proceedings and counter-proceedings. It appears that Mr Wilson will stop at nothing to prevent Mr Emmott from receiving the award to which, for all his deceit, he is entitled. Against that background, the robust and principled approach taken by Sir Jeremy Cooke was entirely appropriate. Any court in this jurisdiction that has to consider this dispute in future would do well to remember that the overriding objective in civil proceedings includes a duty on the court to save expense, deal with the case expeditiously and fairly, and allot to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; further, that the parties have a duty to help the court to achieve this. This pathological litigation has already consumed far too great a share of the court's resources and if it continues judges will doubtless be astute to allow the parties only an appropriate allotment of court time."

Discussion

6. The SCJ did not in terms address Mr Munro's submission that the setting aside of the default costs certificate should be made conditional on the payment by the Respondents of outstanding judgment debts. It can, however, be inferred from his order that he decided, in the exercise of his discretion, not to accede to that submission. In the absence of reasons, it might well be open to me to interfere with this exercise of discretion if I considered that the discretion should have been exercised differently. In my judgment, however, the SCJ was correct not to impose conditions on the setting aside of the default costs certificate. Even if I were exercising the discretion myself, I would not have imposed the conditions sought by Mr Munro. I shall give my reasons briefly.

7. First, whilst the setting aside of a default costs certificate can in principle be made conditional on the payment of outstanding judgment debts, any decision to impose such a condition would have to take account of the conduct of the parties in the round.

8. Second, as I explained in [7] of my first judgment, Mr Sinclair discharged the interim payment of some £670,000 ordered in the present proceedings by way of set-off of debts owed by MWP to Mr Emmott, whose costs in previous proceedings had been covered by Mr Sinclair. When considering the parties' conduct, I (in agreement with Master Leonard) would regard it as wholly artificial to exclude from consideration what the Court of Appeal said about MWP's refusal to discharge judgment debts in favour of Mr Emmott.

9. Third, that being so, the effect of imposing the condition sought by Mr Munro on the setting aside of the default costs certificate *may* be to enable MWP to recover some £500,000 of costs not properly or reasonably incurred in circumstances where MWP is deliberately keeping Mr Emmott (whose costs of earlier proceedings were in part funded by Mr Sinclair) out of money to which he is entitled. That would be unjust.

10. Fourth, and in any event, this is an appeal from a case management decision of the SCJ setting aside a default costs certificate. For reasons explained in my first judgment, the SCJ did not err in concluding in principle that the certificate should be set aside; had the discretion been mine to exercise, I would have reached the same conclusion. Having reached that conclusion, the imposition of the condition sought by Mr Munro – based as it is on a submission about Mr Sinclair's conduct – would require a detailed analysis of the balance of right and wrong in a complex web of litigation. The SCJ was, in my judgment, right not to embark on such an analysis; I would also decline to so for reasons of proportionality. To understand the sheer volume of litigation involved, it may be noted that a database search for the terms "Michael Wilson and Partners Ltd" and "Emmott" or "Sinclair" produces some 28 *reported* decisions, not including those made by costs judges. Peter Jackson LJ's description of this dispute as "pathological" is apt. As he said, the law does not entitle a party to litigation of this kind to insist on a wholly disproportionate deployment of judicial time.

Conclusion

11. I would therefore hold that the SCJ did not err in setting aside the default costs certificate without imposing the condition sought by Mr Munro. If it had fallen to me to make the decision myself, I would also have refused to impose that condition.

Postscript

12. This judgment, exactly as it appears above, was produced in draft in the usual way and sent, under embargo, to the parties for their editorial corrections. Professional lawyers ought to know that the circulation of draft judgments for this purpose should

not be taken as a pretext to reargue the case. It has been said on many occasions that an invitation to go beyond typographical and other minor corrections and reconsider the substance should be made only in the most exceptional circumstances: see e.g. *Egan v Motor Services (Bath) Ltd (Note)* [2008] 1 WLR 1589, [49]-[51] (Smith LJ); *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2011] QB 218, [4] (Lord Judge CJ); *In Re I (Children)* [2019] 1 WLR 5822, [25]-[41]. As King LJ put in in the latter case, at [41], "a judge's draft judgment is not an 'invitation to treat', nor is it an opportunity to critique the judgment or to enter into negotiations with the judge as to the outcome or to reargue the case in an attempt to water down unpalatable findings".

13. Nonetheless, on the day before judgment was to be handed down, I received a document entitled "Appellant's Note", carrying the names of both Joshua Munro, MWP's barrister, and MWP itself. The main purpose of the "Appellant's Note" was not to identify editorial corrections (there was only one, which I consider below), but rather to invite me to re-open the appeal, because the draft judgment "ignores and fails to follow the previous directly relevant judgments of the English (and New Zealand, recognised in England) courts in the period 2014-2018". Those judgments are said to give rise to issue estoppels in MWP's favour. There then follows a long and tendentious summary of the highlights of the litigation, so far as MWP is concerned. At §17 of the Appellant's Note, it is said that "MWP proved, and even Mr Emmott was forced to admit that… only £2m and US$1m remains due" from MWP to Mr Emmott. The word "only" is included because MWP says that the Respondents have been overstating the amounts due to Mr Emmott by virtue of unsatisfied judgments against him. But the Appellant's Note makes plain that MWP accepts that there are very significant sums which it has been ordered to pay to Mr Emmott and which it has not paid. This is what occasioned the comments of Gross LJ cited at [5(d)] above.

14. The burden of the Appellant's Note is to suggest that the criticisms made of MWP by the Court of Appeal, set out at [5] above, were "wrong", because the total judgment debts for which Mr Emmott is jointly and severally liable to MWP exceed the total of MWP's indebtedness to Mr Emmott; and that the position as between MWP and Mr Emmott is irrelevant when considering the position as between MWP and Mr Sinclair/Sokol. The author or authors also thought it appropriate to suggest that Peter Jackson LJ's criticisms, set out at [5(e)] above, should be discounted because of his lack of expertise in this area.

15. I can deal with these points briefly:

    (a) The Appellant's note reveals a misunderstanding of the nature of the issue before me. The issue before me is whether the setting aside of the default costs certificate should have been made, or should now be made,

conditional on the payment by Mr Sinclair/Sokol of judgment debts owed to MWP. It is *MWP* which seeks the imposition of that condition and, in support of it, invites me to consider fairness and the conduct of the parties.

(b) The point made at [8] above was simply that the imposition of the condition sought by MWP would require me to look to the wider history of these proceedings, including those between MWP and Mr Emmott. Nothing in any of the judgments cited to me suggests that this is a wrong approach *to the issue now before me* – viz. the exercise of the court's discretion to impose conditions on the setting aside of a default costs certificate.

(c) What I said at [9] above flows from the passages I have quoted from the judgments of Gross and Peter Jackson LJJ in the Court of Appeal. Even if it were open to me to reach a different conclusion, embarking on the kind of analysis necessary to do so would – as I made clear in [10] above – involve a wholly disproportionate deployment of judicial resources. One of the reasons why the exercise would take so long is that, as Gross LJ observed in the passage quoted at [5(b)] above, Mr Wilson is an unreliable historian of this litigation, so it would be necessary to consider a very large number of reported and unreported judgments. There may be some kinds of proceedings in which such an exercise would be unavoidable. The present (an appeal against a decision to grant relief from sanctions in a costs assessment) is not one. As Peter Jackson LJ said, it is unfair to other litigants to spend such a disproportionate amount of judicial time on one dispute. I continue to regard his observations as pertinent to the question before me and I have applied them.

16. The one editorial correction sought by MWP was that Mr Emmott should be added as a party on the title page. He was a party to the underlying proceedings in which the costs being assessed here were incurred. He was not, however, party to the assessment proceedings or appeal, so was not included on the title page of my first judgment (which was circulated in draft). His name will not, therefore, be added to the title page of this judgment.

17. The appeal will not be re-opened. It will be dismissed.