



Neutral Citation Number: [2024] EWHC 2529 (Comm)

Case No: CL-2020-000358

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

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

Date: 04/10/24

Before :

HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

Between :

ALEXANDER GORBACHEV

Claimant

- and -

ANDREY GRIGORYEVICH GURIEV

Defendant

Paul Stanley KC and Christopher Lloyd (instructed by **CMS Cameron McKenna Nabarro
Olswang LLP**) for the **Claimant**
Helen Davies KC, Daniel Cashman and Rowan Stennett (instructed by **PCB Byrne LLP**) for
the **Defendant**

Hearing dates: 24 September 2024

Approved Judgment

This judgment was handed down remotely at 14:00pm on 04/10/24 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE PELLING KC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling KC:

Introduction

1. This judgment resolves the following issues concerning the costs consequences that should follow from the dismissal of the claim:
 - i) Whether the claimant should be ordered to pay the defendant's costs of the claim to be assessed on the indemnity or on the standard basis;
 - ii) Whether the defendant should be ordered to pay the costs of and occasioned by an application by the claimant for third party disclosure including the costs paid by the claimant to the third parties by an order made on 2 May 2023;
 - iii) Whether defendant should be ordered to meet his own costs of and occasioned by:
 - a) the adjournment of the original trial and
 - b) the Defendant's change of solicitors (from Brown Rudnick LLP to PCB Byrne LLP) in or about May 2023following the defendant becoming a sanctioned individual;
 - iv) What sum should the claimant be ordered to pay the defendant by way of a payment on account of costs;
 - v) Whether the claimant should be ordered to disclose not merely the names and contact details of all the persons who have (directly or indirectly) contributed or agreed to contribute to the claimant's costs but also to disclose all agreements or documents that contain or evidence the terms on which any person has directly or indirectly contributed or agreed to contribute to his costs.

Following the hand down of the judgment, Ms Davies KC applied for an order that the claimant pay the defendant's costs of and occasioned by the claim. Mr Stanley KC was not able formally to agree that on behalf of the claimant but he did not oppose the making of such an order and I made that order for the short reasons that I gave orally at the time. I resolve below each of the issues identified above in the order set out above. In doing so, I do not repeat what I have set out in the substantive judgment at [2024] EWHC 2174 (Comm). All other consequential issues have been agreed between the parties.

The Basis of Assessment

2. The overarching general principle is that a successful party who or which is entitled to his, her or its costs is entitled to recover only what is assessed recoverable on the standard basis: "*The fact of success, however resounding, is not sufficient of itself to justify an award of costs to be assessed on an indemnity basis*" – see Amoco (UK) Exploration Company v. British American Offshore Limited (Unreported, 22 November 2001) *per* Langley J at [2] and Excalibur Ventures LLC v. Texas Keystone Inc [2013] EWHC 4278 (Comm) *per* Christopher Clarke LJ at [7].

3. Before costs can be ordered to be assessed on the indemnity, as opposed to the standard, basis, “... *there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement*” – see Excelsior Commercial and Industrial Holdings v Salisbury Hamer Aspden & Johnson [2002] EWCA Civ 879 *per* Lord Woolf CJ at [33] and Waller LJ at [39]. That is the applicable principle on which what is otherwise a judicial discretion should be exercised. Other statements in other cases are either applications of that general principle or provide nonexclusive examples of what may constitute conduct justifying a direction that costs be assessed on the indemnity as opposed to the standard basis. It was in that context that in Three Rivers DC v Bank of England [2006] EWHC 816 (Comm), Tomlinson J (as he then was) gave as examples of conduct that may justify such a direction, conduct by the paying party that

“(a) advances and aggressively pursues serious and wide-ranging allegations of dishonesty or impropriety over an extended period of time.

(b) advances and aggressively pursues such allegations despite the lack of any foundation in the documentary evidence for those allegations and maintains the allegations without apology to the bitter end.

(c) actively seeks to court publicity for its serious allegations both before and during the trial.

(d) turns a case into an unprecedented factual inquiry by the pursuit of an unjustified case.

(e) pursues a claim which is to put it most charitably thin, and in some respects far-fetched.

(f) pursues a claim which is irreconcilable with the contemporaneous documents.

(g) commences and pursues large scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant and during the course of the trial of the action the claimant resorts to advancing a constantly changing case in order to justify the allegations which it had made, only then to suffer a resounding defeat.”

4. In my judgment this claim is one that was outside the norm, was one that fell within all the examples of conduct given by Tomlinson J in Three Rivers (ibid.) set out above other than (c) and merits a direction that the defendant recover his costs to be assessed on the indemnity basis. My reasons for reaching that conclusion are as follows.

5. Firstly, that this claim came within the examples of conduct given by Tomlinson J is apparent from the substantive judgment when read as a whole.

6. Secondly, I accept Ms Davies’ submission that in commencing and pursuing this claim the claimant has pursued serious and wide-ranging allegations of dishonesty or impropriety and has done so as she puts it “*to the bitter end*”. That this was a case in

which allegations of dishonesty were being made is apparent on the face of the Particulars of Claim – see (a) paragraph 153 of the amended Particulars of Claim, where the unamended and undeleted allegation was that the defendant had acted in “*deliberate and/or fraudulent breach of his duties as trustee*”; (b) paragraph 155, where the unamended and undeleted allegation was that the defendant had “... *committed a deliberate and/or fraudulent breach of his duty of care in administering and dealing with the trust property*” and “... *to take proper care of the trust property and/or to preserve and manage the trust property for the benefit of...*” the claimant; and (c) paragraph 157, where it was alleged that the defendant had acted “... *in deliberate and/or fraudulent breach of the fiduciary duties owed by him...*” to the claimant and where various factual allegations were made expressly in support “... *of the allegations of deliberate and/or fraudulent breach of duty...*” pleaded in the earlier paragraphs I have identified.

7. Mr Stanley submits that this is an unfair analysis because the allegations were made for the purpose of meeting a limitation defence and, at any rate by the time the trial started, there was no continuing need to investigate whether the alleged breaches were fraudulent because it was accepted that if the underlying facts were true they would constitute deliberate breaches. I am prepared to accept that point as far as it goes but it does not alter the fact that for most of the life of this litigation the defendant was required to defend himself from allegations of fraudulent misconduct, and fraud is a thing apart from deliberate misconduct or can be. That an allegation of fraud was made to avoid a limitation defence is not to the point. An allegation of fraud is such an allegation for whatever purpose it is made.
8. Additionally, as Mr Stanley accepted, his client’s case depended upon whether the claimant could prove his case that the defendant had entered into a trust arrangement with the claimant. However, it was that case that Mr Stanley described in his opening submissions (in my judgment entirely correctly) as involving the investigation of the parties’ respective factual cases that “*fundamentally ... can’t both be true. One or other of them at least must be dishonestly false*”. I agree with this analysis, as did Ms Davies. This led Mr Stanley to describe the defendant in his closing submissions as “*fundamentally dishonest*”. On the conclusions that I reached it was the claimant’s case that was rejected, not the defendant’s case. In the course of the trial, the claimant made serious allegations of wrongdoing against the defendant that in the end he was either unable to establish or which I rejected on the evidence available. Whilst I do not suggest that these conclusions require me to conclude that costs should be assessed on the indemnity rather than the standard basis, it is a powerful consideration when taken together with the other factors to which I refer below.
9. The other factors that in my judgment provide more than sufficient support for the conclusion that I should direct that costs be assessed on the indemnity basis include at least the following.
10. The claim was on any view weak depending as it did on alleged declarations of trust made orally in the course of conversations in London to which only the claimant and defendant were parties, which were entirely uncorroborated and which in material respects were contradicted by contemporaneous documentation or documentation created by the claimant or on his behalf by his professional advisers on his instructions. Particularly significant was what had been alleged in the Cypriot proceedings commenced in his name and which could only have been based on instruction supplied

by him. To make allegations in one set of legal proceedings that were factually the “*polar opposite*” of the case being advanced in these proceedings was unequivocally outside the norm. Whilst there may be circumstances in which alternative cases can properly be advanced, that is not so where the underlying factual allegations are fundamentally contradictory in each of the separate claims.

11. What made this situation worse was that it became apparent in the course of the claimant’s oral evidence that no reliance could safely be placed on his uncorroborated evidence. It is not necessary that I set out the detail – it is all set out in the substantive judgment. In places I rejected his evidence as untruthful in part and was consciously exaggerated in other parts. A particularly bad example of untruthful evidence was his attempt to maintain as true the reasons that he had given to the Secretary of State for the Home Department when applying for asylum as his reason for leaving Russia. What made defending an unmeritorious claim significantly more of a burden for the defendant was that it involved a detailed investigation of events that took place between 20 and 30 years ago. In seeking to advance what was inherently a weak (and in reality a dishonestly false) case, the claimant adduced evidence from witnesses whose evidence was at best tangential to the issues that mattered and some of whom were self-interested in the outcome and otherwise obviously partisan. This added inevitably both to the cost of preparing for trial and the length and therefore the cost of the trial itself. It is also worth noting that in commencing and continuing these proceedings, the claimant forced the defendant to participate against his will in litigation in a foreign country in a language that he neither speaks nor reads. In my judgment this last mentioned factor exacerbates the effect of all the factors I have so far considered and is made worse by the material changes to the claimant’s case throughout the history of this litigation and in particular between what was pleaded and what was written by the claimant in his witness statement for use at the trial. The detail of at least some of these changes is set out in the substantive judgment. Whilst these factors do not inevitably lead to the conclusion that costs should be assessed on the indemnity rather than the standard basis, they do when taken together, and together with the factors to which I refer hereafter.
12. This litigation lasted for some years. There were various stages when its continuation could and should have been reviewed. Aside from the stages that arise in any commercial litigation (close of pleadings, completion of disclosure and exchange of witness statements [when the conflicts between what was set out in that document and what had been pleaded was or should have been apparent to the claimant]) there were at least three offers that ought to have been accepted. The first was the offer of US\$30m by way of final resolution of all claims and obligations which was first made in 2012 and repeated in 2013 – that is many years before the commencement of this litigation. Although there was an issue about disputed loans made to the claimant to assist in the purchase of his home, it was made clear at least by 2013 that those were to be waived by the lenders. Any objective assessment of the claimant’s claim ought to have led to the acceptance of this offer. However, the claimant rejected it. The entirely unreal approach of the claimant to this litigation is reflected in his pretrial offer to settle for US\$850m plus 12.375% of the shares in PhosAgro.
13. This entirely unreal, unreasonable and almost irrational approach to this litigation continued once the trial had started. During the course of the claimant’s evidence the defendant offered to permit the claimant to discontinue the claim with no order as to

costs. The defendant's costs at that stage were of the order of £16m. It follows that the offer had a financial value of not less than approximately £12m. The offer was made while the claimant was still giving evidence but at a time when the sorts of difficulty with his evidence identified in the judgment had started to become apparent. Although the defendant criticised the claimant's advisers for not permitting that offer to be put to the claimant during the course of his evidence, I make it clear that I consider the claimant's advisers were not merely entitled to take that position but were correct to do so. However, once the claimant's evidence was complete, the offer was rejected. Extraordinarily it was said on behalf of the claimant that he was a credible witness. The claimant made a counter-offer to settle in the sum of £1bn. That was obviously unreasonable to a high degree and manifestly outside the norm in the context of this litigation.

14. All this, when taken in combination with what I have said already, manifestly takes this case outside the norm. I accept and adopt as a correct analysis Ms Davies' submission that this claim was at all stages outside the norm because:

“.. the Claimant [was] seeking to make the Defendant personally liable to him for a trust that did not exist and had no basis in fact. The stakes for the Defendant were extremely high: he has been required to deal with these most serious allegations claimed to affect a very significant proportion of his assets for more than a decade. The Defendant was required to defend himself in a foreign court, in a foreign language and to answer accusations of giving false evidence. He should not have been put through the ordeal at all.”

15. Mr Stanley submits that the conduct of the defendant ought to be taken into account and ought to be regarded as mitigating the position. I do not agree. Whilst it is true to say that there were continuing difficulties with disclosure that continued well into the trial, that misses entirely the point that the claim in respect of which disclosure continued to be sought was one that was outside the norm for all the reasons set out above. An ongoing dispute concerning disclosure cannot alter that or justify concluding at any rate on the facts of this case that costs should not be assessed on the indemnity basis. The conduct that is relevant and overwhelming in its effect is the commencement and continuation of what was a thin claim founded on untruthfulness not a continuing row concerning disclosure. The notion that the US\$30m offer was one that it was reasonable to reject because it was made before disclosure is one that I reject as one that is based on an unmerited hope that something might turn up to support a case that was otherwise contradicted by contemporaneous material and was fundamentally factually different to claims advanced by the claimant in Cyprus.
16. In the result I direct that the defendant should recover his costs of and occasioned by the claim to be assessed on the indemnity basis.

The Third Party Disclosure Application

17. Mr Gorbachev seeks an order pursuant to CPR 44.2(6)(f) that Mr Guriev pay his costs incurred in obtaining disclosure from the corporate trustees of two Cyprus based trusts and their London solicitors Forsters, which revealed that the Second Option Agreement had been significantly back-dated. In summary, the claimant sought third party

disclosure from Forsters and the corporate trustees of two Cyprus based trusts, which is said now to have been sought for, or at any rate principally for, the purpose of testing whether the Second Option Agreement had been backdated.

18. This application gave rise to two first instance hearings concerning the issue of principle as to whether a third party disclosure order could be sought from a party located outside England & Wales, followed by an appeal to the Court of Appeal and thereafter at least one hearing concerning the scope of what was being sought, because it was submitted that what was being sought by the claimant was far wider in scope than was necessary or appropriate. In the event, following a narrowing of the material being sought, Forsters took a neutral stance in relation to the application and the trustees consented to disclose what was being sought. The result is that this whole exercise generated substantial costs because not merely did the claimant have to meet his own costs of and occasioned by the application but he also had to meet the costs of the third parties in resisting the application and then complying with it. The claimant maintains that £205,000 was paid by the claimant in respect of Forsters' costs, £313,000 in respect of the trustees' costs and about £376,900 in respect of his own costs. The claimant maintains that it was only following this disclosure that the defendant amended his Defence to acknowledge that the document had been backdated. The claimant maintains that but for the disclosure the defendant would not have made this concession, that this was an important issue in the claim and ought to result in the defendant being required to pay the costs of the exercise.
19. In my judgment, whilst ultimately the question is a fact sensitive one which will depend on the facts of the particular case in which the issue arises, in many cases, costs of this sort ought to be treated as being costs in the case. On the facts of this case, that would leave the claimant meeting all of these costs. In my judgment there is much to be said for adopting this approach on the facts of this case, not least because the application was made for third party disclosure in aid of a claim that was brought outside the norm for each and all of the reasons noted already. Secondly, on its face the application was brought for disclosure in relation to numerous issues apart from the backdating issue and the claimant did not succeed at trial in relation to those issues. Thirdly, he did not succeed at trial on the backdating issue either because immediately following disclosure the defendant amended his case to acknowledge that the Second Option Agreement had been backdated so that there was no dispute about the fact of backdating at trial. Even if it could be said that the amendment might in principle justify the claimant recovering at least some of the costs, on the facts of this case I do not agree. The backdating was relied on by the claimant to make good his claim that the Second Option Agreement was a sham. That case failed at trial. Thus if the correct approach to the question I am now considering is whether there should be an issue-based order, the issue (whether the Second Option Agreement was a sham) was not one on which the claimant succeeded. The back-dating point was simply part of the evidence adduced in relation to that issue. That does not justify an issue-based approach. Further, I have found that the defendant had instructed Mr Mariashin to conclude the Second Option Agreement at the end of 2003 and that the defendant thought at the time the B&C arrangements were being made that the Second Option Agreement had been or would be entered into. Finally the application failed initially because what was sought was too broad in scope. There is no reason why the defendant should be responsible for this element of the application. Even if otherwise an issue-based approach was the correct one, it would be impractical if not impossible to arrive at even a percentage of the relevant costs that should be

recovered once account was taken of the fact that the application was too broadly based and made for purposes apart from the back-dating question. For these reasons and in light of the conclusions reached above concerning the merits of the claim, I reject the submission of the claimant that the defendant should be required to meet the costs of the third party disclosure application.

The Sanction Related Costs Issue

20. The issue that arises here concerns the adjournment of the trial and additional costs incurred by the defendant in changing representation. In summary, when the defendant became a sanctioned individual in April 2022 it was necessary for him to apply for a licence to expend money on legal fees both from the UK authorities and the US authorities because the law firm acting for him was affiliated with Brown Rudnick LLP, a US law firm. The UK authorities granted the necessary licence in November 2022 but the US authorities were dilatory and in the end have not granted the necessary licence. The trial had been listed to commence on 23 January 2023 but had to be adjourned and eventually the defendant instructed PCB Byrne to act for him in May 2023 after it had become apparent that the necessary licence would not be forthcoming from the US authorities. In order to facilitate the smooth and cost-effective transfer of instructions, the two partners handling the dispute on behalf of the defendant moved firms. The claimant maintains that he should not have to bear the costs of and occasioned by the adjournment or the increased costs incurred by the defendant as a result of having to move law firms.
21. Mr Stanley submitted that the purpose of imposing sanctions was to make life economically difficult for those who are sanctioned. I reject this submission without hesitation, at any rate in relation to the conduct of litigation. Sanctions prevent expenditure without a licence. Both a general licence and, when granted, specific licences permit expenditure on legal costs. There is nothing in the sanction regime that precludes a sanctioned individual from recovering his or part of his otherwise properly recoverable costs of litigation to which he was party. Such a submission by the claimant is all the more unattractive on the facts of this case because (a) of the conclusions I reached concerning his claim in the substantive judgment; and (b) the defendant is a foreign domiciled and resident individual who has been sued in this jurisdiction against his will. This claim is one that ought not to have been commenced. It is a claim that ought to have been critically reviewed at various stages and the point at which the defendant became a sanctioned individual was one of them. Had the claim not been started or been compromised at or about that point, the additional costs or most of them would have been avoided. Further, I consider this application to be opportunistic – it was not suggested that the additional costs attributable to hearing the defendant’s evidence in Dubai should be recovered or not paid by the claimant. His case that now that he has lost he should not have to meet the cost suffered by the defendant as a result of becoming a sanctioned individual is entirely inconsistent with the position he adopted in relation to evidence being given in Dubai. In addition, if and to the extent this submission involves re-visiting costs orders that have already been made as between the parties, that is wrong in principle as well since they have not been appealed and could not be set aside by a first instance court at this stage applying the conventional principles that apply to such applications.
22. For those reasons I reject the claimant’s submission that the costs recoverable from him should be reduced by reference to the adjournment and or his change of representation.

Payment On Account

23. The principle is not in dispute – the correct figure should be one that represents the likely level of recovery subject to an appropriate margin for error – see Excalibur Ventures LLC v Texas Keystone Inc [2015] EWHC 566 (Comm) at [22]-[23].
24. I have directed that the costs the defendant is entitled to recover should be assessed on the indemnity basis. This means that the percentage of the costs actually incurred that should be permitted to be recovered as a payment on account will be higher than if I had directed the costs to be assessed on the standard basis. The defendant estimates his likely actual costs as not less than £16.9m. Given the very substantial sum involved some degree of caution is necessary. That said, I consider it appropriate to direct that there be an interim payment on account of £12m.

Disclosure of Third Party Funder Documentation

25. It is common ground that the claimant should be required to disclose the names and contact details of all the persons (other than those already identified by him pursuant to the Order of Bright J dated 5 October 2023) who have (directly or indirectly) contributed or agreed to contribute to his costs. The issue between the parties is whether in addition the claimant should be required to disclose all:
 - “(i) written agreements which contain the terms on which a person has directly or indirectly contributed or agreed to contribute to the claimant’s costs in these proceedings;
 - (ii) exchanges of correspondence which constitute an agreement containing the terms on which a person has directly or indirectly contributed or agreed to contribute to the claimant’s costs in these proceedings; and
 - (iii) if a person has directly or indirectly contributed or agreed to contribute to the claimant’s costs in these proceedings pursuant to an oral agreement, documents evidencing the terms of that oral agreement.”
26. I regard this issue as essentially one of case management because, as Mr Stanley accepts, whether it is necessary or proportionate to order disclosure of funding agreements is a matter for the Court’s discretion. There are reported cases in which courts have adopted different views essentially for fact specific reasons.
27. To my mind on the facts of this case such disclosure at this stage will further the Overriding Objective and is a proportionate and reasonable step to take not because it will enable the defendant to identify those in principle against whom an order under s.51 of the Senior Courts Act 1981 could be sought but because it will enable the defendant to arrive at a judgement as to whether it would be proportionate or appropriate to bring such a claim. It is not in dispute that such material could be obtained by application once the funders have been joined as a party for the purpose of seeking a s.51 order. However logically that could lead to a situation where parties are joined then claims discontinued thereby requiring further court resources to be allocated to this claim and exposing the defendant to costs that would otherwise be avoided. There is no case management logic in adopting such a course on the facts of this case, particularly when it is common ground the claimant himself is unable to meet the costs

claim against him and it is accepted by the defendant that there should be an express exception in the order in respect of any document for which a claim of legal professional privilege is made and which also permits redaction of any material within an otherwise disclosable document that is claimed to be subject to such privilege. As things stand, adopting the course the claimant proposes will or at any rate might generate avoidable cost, whereas the course proposed by the defendant will certainly avoid such costs whilst at the same time not generating any countervailing risks.

28. In the result there will be an order in relation to disclosure in the terms proposed by the defendant in the most recent draft order.

Disposal

29. The parties are directed to (a) submit a track changed copy of this judgment with any suggested typographical or obvious errors corrected and (b) a draft order that gives effect to the Rulings set out above by no later than 4pm on 2 October 2024.