NEUTRAL CITATION NUMBER: [2024] EWHC 1055 (Comm)

Part 7 Claim No. CL-2021-000412
Commercial Court
7 Rolls Buildings
Fetter Ln
London EC4A 1NL
[Court 28]

1 May 2024

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

Before

ADRIAN BELTRAMI KC
(SITTING AS A JUDGE OF THE HIGH COURT)

B E T W E E N:

INVEST BANK P.S.C.

Applicant/Claimant

- and –

(1) AHMAD MOHAMMAD EL-HUSSEINI
(2) MOHAMMED AHMAD EL-HUSSEINY
(3) ALEXANDER AHMAD EL-HUSSEINY
(4) ZIAD AHMAD EL-HUSSEINY
(5) RAMZY AHMAD EL-HUSSEINY
(6) JOAN EVA HENRY
(7) VIRTUE TRUSTEES (SWITZERLAND) A.G.
(8) GLOBAL GREEN DEVELOPMENT LIMITED

Respondents/Defendants

MARC DELEHANTY (Instructed by **PCB Byrne LLP**) appeared on behalf of the Claimant
NIRANJAN VENKATESAN (Instructed by **Debenhams Ottaway LLP)** appeared on behalf of the Second and Sixth Defendants

---

APPROVED JUDGMENT

Digital Transcription by Epiq Europe Ltd,
Lower Ground 46 Chancery Lane WC2A 1JE
Tel No: 020 7404 1400
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

1. **THE DEPUTY JUDGE:** I heard two disclosure applications by the claimant for wide ranging disclosure relief against a number of respondent defendants. By the time of the hearing, parts of the application had been compromised, at least to the extent of offers made by some of the respondents, which had been accepted, to undertake certain of the tasks which had been the subject matter of the applications. Those offers were made especially by the second, fifth, sixth and eighth defendants. I will leave aside for the moment the third and fourth defendants. Nevertheless, there remained matters in dispute for which I gave judgment in favour of the claimant bank on one of the, as I perceived it, significant aspects of the applications, namely in respect of intra-family communications. It is correct that I didn't give the claimant exactly what it had asked for under that category but I did give it substantially more than had been offered by the respondents.

2. Otherwise, the judgment was largely in favour of the respondents on the various issues at stake, although I do record that, at least at the hearing, by far the largest part of the argument concerned (a) the intra-family communications on which I found at least in part in favour of the claimant; and (b) bank statements on which I found in favour of the respondents. There were other issues as set out in my judgment albeit they occupied a relatively small part of the argument on the day.

3. It has now come to an argument for costs. The claimant asks, as against D2, 5, 6 and 8, for 25 per cent of its costs of the applications, on the basis, it says, that it was largely the successful party though subject to a significant discount. D2, 5, 6 and 8, in turn, ask for all of their costs for the opposite reason.

4. The claimant's broad contention is that I should take on board two matters in particular. First, the significant concessions made and agreements reached before hearing. As the claimant sought to describe it, this meant that the disclosure landscape had radically transformed before the hearing. This was as a result of the applications and absent the applications it would not have happened. As it was put, the claimant is in a significantly different position now vis à vis disclosure than it would have been and therefore the applications have benefited the claimant to a significant degree. It refers to the fact that, prior to the first application, there was no engagement by the respondents in respect of

what were alleged to be serious disclosure deficiencies, and that, such engagement as did occur only happened as a result of that application and the detailed evidence in support.

5. As described by the claimant in its argument, the content of the agreed matters was extensive, in particular D2 has agreed to completely reperform his disclosure exercise including further collection and model D review by the use of additional key words. D6 has also agreed to reperform her disclosure exercise as have in fact D5 and D8 albeit within certain agreed parameters.

6. The second matter relied upon by the claimant is the fact, as I have mentioned, that it did succeed, at least in part, in respect of intra-family communications. The claimant argued that this was a critical part of the application and the outcome was a major victory, or at least the claimant so regarded it.

7. D2 and 6, also supported by D5 and 8, say that it is wrong to concentrate, or to be influenced by, the mere outcome of the matters which were agreed. As a matter of basic principle I have to ask who is the successful party. They say they were the successful parties on the contested matters which I resolved in my Judgment. As for the matters which were agreed in advance of the hearing, in circumstances in which the respondents expressly did not concede the validity of the relief sought by the claimant and purportedly compromised only for pragmatic reasons in order to narrow the issues, I must consider the counterfactual question of whether such relief would have been ordered had it been contested and argued out.

8. I was referred to a number of cases, including *Brawley v Marczynski* [2003] 1 WLR 813. I can take this I think from the headnote which is to the following effect.:

"that where litigation has been settled save as to costs there is no convention that there should be no order as to costs; that in such a case it was ordinarily irrelevant that the claimant was legally aided and the court's overriding objective was to do justice between the parties without incurring unnecessary court time and additional cost; that where it was obvious which party would have won had the substantive issues been fought to a conclusion it would be appropriate to award costs to that party; that where that was not obvious the extent to which the court would be prepared to look into the

previously unresolved substantive issues in order to determine the issue of costs would depend on the circumstances of the case including the amount of costs at stake and the conduct of the parties; that in the absence of a good reason to make specific order the court would make no order as to costs…".

9. The other Court of Appeal decision referred to was *Shahi v Secretary of State* [2021] Costs LR 1397, a judicial review case, the principles of which are transferable in this respect to this court, and the effect of which is apparent from paragraphs 69, 70 and 73 of the judgment. In summary, where there has been a settlement absent an acceptance of responsibility, the court should not for the purpose of costs proceed on the basis that the applicant had achieved that which it had sought and therefore for that reason alone should be considered the successful party.

10. In light of those cases, D2 and 6 submit as follows:

    a. It is wrong to approach the issue of costs by reference to the mere fact that they had agreed substantial concessions before the hearing. Success is to be judged not by the outcome per se but by the question of entitlement to the relief.

    b. Hence, I should undertake the task of considering what the outcome would have been had the matters been contested. Otherwise, this would be to penalise a party for seeking in advance to narrow the issues.

    c. If the threshold measure of that task is "*obviousness*", they meet that measure.

    d. If not, there should be no order as to costs on those matters.

11. The claimant submitted that the cases I have referred to are not apposite because disclosure falls into a different category and the cases are concerned either with trials or other matters involving substantive rights, whereas disclosure is an ongoing process of continued obligation. I don't read in those cases anything to support the conclusion that the approach they describe is not apposite in the disclosure context. That said, I do accept that the application of the approach may take on a different character depending on the nature of the issue and the underlying circumstances. In the disclosure context, or at least

in the context of an application such as this, where the claimant sought multiple heads of relief against numerous parties with very extensive evidence in support, it is unlikely to be consistent with the overriding objective to embark on a notional hearing of settled matters, just to determine the incidence of costs. In my judgment, I should on this application approach the issue by reference to the threshold of obviousness and, unless that test can be met either way, no order for costs would follow on those matters. That necessarily involves a relatively high level assessment, albeit bearing in mind that I did hear argument on some matters which overlapped with or were at least adjacent to the settled issues.

12. I should add that the claimant also referred to a decision of Mr Justice Andrew Baker in *Fiesta Hotels and Resorts and Deutsche Bank AG* [2024] EWHC 557 (Comm) but I do not read that short judgment on costs at the end of the judgment as indicating a departure, from the principles which I have already referred to or an indication that those principles are inapplicable in the disclosure context.

13. Applying this approach, I am not satisfied that it is obvious that the respondents would have succeeded on at least all of the points which were the subject of the concessions. It may be that they would have succeeded on some of them and I see the force in the submission that, given the analytical approach in my judgment, it may well be likely that they would have done so but, equally, it is at this remove difficult to engage in that counterfactual exercise with any level of confidence. The nature of the application would have been very different had those concessions not been made and had the focus of the argument been elsewhere. Given the constraints on the exercise, in the midst of a consequentials hearing which is already occupying a full day, I am unable to reach a firm conclusion on the obviousness of the entitlements either way.

14. That then takes me to the matters which were in dispute. On those, as I have said, the two largest matters at the hearing were the intra-family communications issue and the bank statements issue. On those issues the claimant won some of the first point and the respondents won the second point but there were also other matters in dispute on which plainly the claimant lost and the respondents won. It also seems to me of relevance in this context, as I mentioned in my judgment, that I did consider the applications as

a whole to be excessive in their reach, and this fed through ultimately into the hearing where a lot of the matters which were asked for couldn't be determined in the time given.

15. Taking all those matters in the round, as I must do, I think it is right to acknowledge that so far as the disputed matters are concerned, D2, 5, 6 and 8 were the successful parties but that comes with the caveat that success is relative in this situation because it wasn't complete.

16. In the circumstances, what I propose to do is as follows. I could in theory make separate orders in respect of the settled matters and the contested matters. But that would not be in the interests of the parties as it would be likely to complicate matters and increase costs. What therefore I propose to do, in the exercise of my discretion and given the very broad nature of that discretion on a costs application, is to make a rough and ready aggregate calculation of an overall costs order taking into account all of the matters that I have referred to. Doing the best I can, the costs order I am going to make is to order 25 per cent of the costs in favour of D2, 5, 6 and 8 and obviously correspondingly no order in favour of the claimant against those parties.

17. So far as the other respondents are concerned D3 has not to date provided any disclosure and is now something of the order of 6-months late. I did mention in my judgment that I wasn't clear as to why that had happened and I must say I am still not clear why that has not happened and it is also relevant that the effect of the order that I have made was to give the third defendant the extension of time which he apparently sought in his application albeit that it wasn't listed before me.

18. It seems to me that the balance is rather different as between the claimant and the third defendant and in my judgment the claimant is entitled to its costs against the third defendant for those reasons.

19. So far as D4 is concerned, the claimant didn't seek costs against him and I didn't hear an application by the fourth defendant for costs against the claimant and therefore I am going to make no order as to costs in relation to the fourth defendant.

20. The other point to address is the application by D2, 5, 6 and 8 for indemnity costs against the claimant. The factors relied upon in support of that submission, remembering that the relevant test is whether the matter is sufficiently out of the norm to justify what is perceived as being a penal outcome, were as follows. First it is said there was an unfounded allegation of wrongdoing which was not pursued. I was taken to the allegation by counsel for the second and sixth defendants. That allegation, of at least suspected wrongdoing, was mentioned in the witness statement in support of the application. It wasn't then pursued as I understand it in correspondence or in skeleton arguments or at the hearing. I accept the submissions of the claimant that the wording was relatively measured and I also accept the submissions that the claimant did obtain relief in respect of the very subject matter referred to. Not condoning the wording, I don't think that that single sentence, in and of itself, is a strong factor in support of an indemnity costs application for the costs of the hearing as a whole.

21. The second point is that some of the heads of relief were unarguable. I am not prepared to make that judgment now. In any event I would struggle to support an indemnity costs application by reference to a submission that some heads were unarguable when plainly a lot of heads were at the very least arguable and indeed on some of them the claimant succeeded.

22. The third factor was that the timing of the application has caused disruption to the defendants in their preparation for trial. This may well be correct as a matter of fact but it wasn't submitted that there was some unreasonable delay in the first application and its timing. Indeed, my sense is that it was made relatively shortly after the disclosure exercise had been undertaken and correspondence had followed after that exercise. If the timing itself can't be criticised, which it wasn't in the submissions, the fact that that has caused a hearing to be conducted at a time when the defendants would otherwise be preparing for trial may be an unfortunate consequence of the application but I don't regard that as supportive of a claim for indemnity costs.

23. The fourth factor was that the claimant abandoned large parts of its application and sought to retain those parts at least in theory through a proposal that there be liberty to apply in respect of such matters. That was discussed at the hearing. The point disappeared and the matters were formally abandoned. As the claimant submitted, the

fact that a party abandons parts of his application is not in and of itself a reason for indemnity costs and on one view it ought to be encouraged so as to reduce the issues between the parties.

24. The only additional factor here is the liberty to apply feature which as it was put, or as I think the argument would run, involved blowing hot and cold in that the heads of relief were abandoned but at the same time sought to be retained. I see that point and the matter struck me as being an unsatisfactory one at the start of the hearing but in the scheme of this application a relatively small matter and again not something that really tends to indemnity costs.

25. The fifth point was that there was a previous hearing in which applications were made which were dismissed with costs. I don't know very much about that hearing but I don't think it appropriate for me in this application to build on that one, whatever its merits or demerits, in support of an indemnity costs order on the applications before me.

26. So taken individually and taken as a whole those matters do not to my mind justify an application for indemnity costs on this application and therefore the costs order that I have made earlier will be for costs on the standard basis.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: civil@epiqglobal.co.uk