Neutral Citation Number: [2014] EWHC 1103 (Comm)

Case No: 2013 Folio 1450 & 1451

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

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

Date: 11 April 2014

Before :

MR JUSTICE EDER

- -

Between :

(1) ROBERT TCHENGUIZ
(2) R20 LTD

Claimants

- and -

DIRECTOR OF THE SERIOUS FRAUD OFFICE

Defendant

SECURITY FOR COSTS JUDGMENT

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MR JOE SMOUHA QC, MR ALEX BAILIN QC, MR ANTON DUDNIKOV and Mr JOHN ROBB (instructed by **Shearman & Sterling (London) LLP**) appeared on behalf of the **Claimants** in 2013 Folios 1450 and 1451
MR JAMES EADIE QC, MR SIMON COLTON, MR JAMES SEGAN and MS PATRICIA BURNS (instructed by **Slaughter and May**) appeared on behalf of the **Defendant**

Hearing dates: 7 & 8 April 2014

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Approved Judgment

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.

.....

MR JUSTICE EDER

Mr Justice Eder:

1. This is an application by the defendant, the Director of the Serious Fraud Office ("SFO") for security for costs against the second claimant ("R20"). The original sum claimed by way of security was £6.25m, although, as appears below, this sum was reduced for reasons described more fully below.

2. R20 is one of a number of claimants in these and another linked set of actions claiming damages against the SFO arising out of what is said to be the unlawful entry, search and seizures at certain premises in London, the unlawful arrest of Robert Tchenguiz and Vincent Tchenguiz in March 2011 and the continuing investigation by the SFO which was finally abandoned on 18 June 2012 (in the case of Vincent Tchenguiz) and on 15 October 2012 (in the case of Robert Tchenguiz).

3. The claims of the various claimants are for substantial damages on various grounds including trespass to land, false imprisonment, breaches of the Human Rights Act 1998, misfeasance in public office and malicious prosecution. The total claims of all the claimants in the related actions total some £300m. In addition there are claims for aggravated/exemplary damages. However, it is important to note that, as originally pleaded, the claims advanced by R20 were advanced on the basis of trespass only for about £1.5m plus loss of trading reputation and loss of goodwill and aggravated/exemplary damages.

4. The trial of all the claims is now fixed to commence on 1 October 2014.

5. The original application for security was supported by the 12th witness statement of Mr Cotton. Attached to that witness statement is a schedule of the total of the SFO's costs both incurred and estimated costs going forward. As explained by Mr Cotton in paragraph 43 of that witness statement, the schedule does not seek to break down the costs between the two sets of actions because "*.... they are being heard together and disclosure is being given jointly ...*". In broad summary, the schedule shows total incurred costs across the board of approximately £8m and total estimated costs going forward until the conclusion of the trial of approximately £7.5m. Together with VAT, this amounts to a total of approximately £18.7m. In calculating the total amount of security claimed on this application from R20, the SFO has allocated approximately 50% of this total figure to the claimants in the other related actions and then made an appropriate deduction to arrive at the figure of £6.25m referred to above.

6. The application for security is made pursuant to CPR 25.13(2)(c) i.e. that there is reason to believe that R20 will be unable to pay the SFO's costs if ordered to do so. In any event, it is conceded by R20 that the court has jurisdiction to make an order for security against it pursuant to that rule.

7. The only real issue before me was the amount of security that should be provided. With regard to that issue, it was common ground (at least by the time of the hearing before me) that any costs liability of R20 should be joint and several with the first claimant i.e. Robert Tchenguiz. Further, there can be no doubt as to the proper approach i.e. the amount of security is in the discretion of the court which will fix such sum as it thinks just, having regard to all the circumstances of the case: see CPR 25.12.7. As appears from those notes and the authorities there referred to, the amount of security may (but not must) relate to the total costs which have been and are likely

to be incurred in opposing the claim. I readily accept that such an approach forms the basis of many if not most applications for security for costs but there is no hard and fast rule.

8. Here, Mr Smouha QC on behalf of R20 submitted in his original skeleton argument in advance of the hearing that the approach of the SFO for security in the present case was unsatisfactory and indeed flawed for three main reasons viz:

   i) First, the total quantum of R20's claims as set out in its pleadings is only about £1.5 million and that the amount of security sought (i.e. £6.25m) is therefore "disproportionate".

   ii) Second, the suggestion that it could be appropriate to order security for costs of £6.25m to permit a claimant to continue to advance a claim of £1.5m is absurd – rather the question should then be on what basis the defendant contends that it will reasonably incur costs of that level to defend that particular claim. If R20's claim were brought on its own, the SFO's costs would obviously not be anywhere near £6.5 million. The Court would no doubt use its budgeting and other case management techniques to ensure that the costs incurred were proportionate. R20's claims are narrow in scope – unlike the claims advanced by the other claimants, the only cause of action relied upon is trespass; the heads of loss are discrete and will not require extensive evidence (or any expert evidence).

   iii) Third, assuming that all claimants (except R20) succeeded in their claims, the SFO would obviously not be entitled to recover £6.5m from R20.

9. Shortly before the commencement of argument, the solicitors acting for R20 wrote to the SFO's solicitors by letter dated 7 April 2014 stating that R20 was no longer pursuing certain of its pecuniary claims totalling approximately £1.2m as well as its claim for loss of trading reputation and goodwill. No explanation was given in that letter nor in the course of oral submissions as to why a decision had been taken to abandon such claims nor as to the timing of such abandonment.

10. Whatever the reasons may be for such abandonment and in any event, the result is a substantial reduction in the pecuniary claims advanced on behalf of R20 to approximately £264,000. This new turn of events prompted a further detailed witness statement from Mr Cotton overnight and a reduction in the amount of security sought by the SFO i.e. from £6.25m to a figure between £3.5m and £3.95m. So far as historic costs are concerned, the approach adopted by the SFO in arriving at this figure is explained in paragraphs 17 and 18 of that further witness statement:

> "*17. For the above reasons, the SFO believes that the only appropriate approach is to (a) apportion 50% of the total costs to date to the RT Actions, and (b) then approach the costs of the RT Actions on a joint and several basis between RT and R20. This is because it is impossible to attribute costs to either of the RT Claimants solely so to do otherwise would ignore the reality of the conduct of this litigation to date. This is save for the expert costs, in relation to which, out of the £190,000 estimated*

to relate to the RT Claimants (see paragraph 11(d) above), the experts estimate that £38,000 is attributable to R20 alone.

18. Applying this approach to the costs in the Schedule ...:

(a) Costs to end February 2014 are £8.130m.
(b) Given the de minimis amount of expert costs attributable to R20 alone (£38,000), for present purposes I have excluded the entirety of the expert costs (£0.501m), giving £7.629m.
(c) I have then deducted the costs received to date (£59,286.75) as set out in Part 3 of the Costs Schedule. This gives a total of £7.569m as between both the RT and VT Claimants.
(d) Of this, 50% is attributable to the RT Claimants. This gives a figure of £3.785m.
(e) If 65% is awarded by way of security, this gives a figure of £2.460m, which with VAT at 20% gives a total of £2.952m, which the SFO believes is properly attributable to the RT Claimants on a joint and several basis for the reasons set out above.

For the avoidance of doubt, the Costs Schedule is not a complete analysis of the SFO's past costs, since some additional costs have been incurred by the SFO directly and, therefore, have not been reflected in my firm's bills. The SFO does not seek security in relation to those costs, but reserves all its rights to recover in relation to them at the appropriate time."

11. As to future costs estimate, the approach of the SFO is set out in paragraphs 19 to 28 of that witness statement. I do not propose to set out what is there stated save to say that the SFO is prepared to accept that given that R20's claim is now worth only around £264,000, proportionality arguments may justify a smaller sum by way of security for future costs and that, on that basis, the SFO would be prepared to accept that the sum of between £500,000 and £1m is the appropriate amount that should be attributed to future costs.

12. Notwithstanding, Mr Smouha maintained his position that the amount of security claim was disproportionate and excessive. He submitted that, at most, the amount of security should be no more than £300,000.

13. I do not accept that submission for the following reasons.

14. First, so far as historic costs are concerned, it is right that the pecuniary claims originally advanced on behalf of R20 were much smaller than the other claims advanced by the other claimants and were, as I have stated, limited to about £1.5m. However, as already noted, included in its Amended Particulars of Claim, R20 brought claims for damages to its reputation and loss of goodwill in relation to which it was stated at paragraph 19(4) that "*R20 suffered extremely serious injury to its trading reputation, enormous loss of goodwill and very substantial loss and damage* ...". In addition, the SFO's so-called "hypothetical briefing" defence at paragraph 19

of its Defence raises the same or similar factual issues in relation to the trespass claims as it does in relation to the false imprisonment claim which is advanced by Robert Tchenguiz alone. As emphasised by Mr Cotton in paragraph 15 of his latest witness statement, this is indeed clear from paragraph 14(1) of the Reply which responds to paragraph 19 and 36(6)(a) of the SFO's Defence by averring that "*for the reasons given in paragraph 13 above, the SFO had no basis for reasonable suspicion that RT had committed any offence. Accordingly even if the SFO had presented a fair and accurate picture of the evidence to (a) HHJ Worsley; and (b) the arresting officer, they could not lawfully have obtained the Warrant or procured the arrest*". On this basis, I agree that the same or similar "hypothetical briefing" issues arise in the context of the trespass claim as arise in respect of false imprisonment.

15. In response, Mr Smouha submitted the foregoing was of little, if any, weight because it ignored his "proportionality" argument. Despite the various points identified in Mr Cotton's latest witness statement to the effect that it is simply impossible to split the costs incurred in relation to the work done with regard to pleadings, disclosure, witnesses and experts and that even if the R20 claims had stood alone the SFO would have incurred historic costs similar to those which have been incurred in defending all the claims, it seems to me that there is substantial force in Mr Smouha's "proportionality" argument. In particular, in considering what order the Court might ultimately make about costs in exercising its discretion under CPR 44.2, it seems to me right to bear in mind that the Court will have regard to all the circumstances including the amount of the claim: see CPR 44.4(3). I also bear in mind Mr Smouha's discrete submission that there is at least an argument that the costs of the disclosure exercise performed by the SFO has been "excessive".

16. As it seems to me, the main difficulty in the present case is precisely how such factors are to be applied. At this stage of course, I am not carrying out a detailed assessment and it is important to emphasise that nothing that I say at this stage should necessarily affect the exercise of the Court's discretion with regard to costs at the end of the trial.

17. In truth, the exercise that I have to perform at this stage is neither precise nor scientific. Even accepting Mr Smouha's proportionality argument at face value, I remain wholly unpersuaded that the figure that he suggested of £300,000 by way of security is the appropriate figure. In my view, it ignores not only the fact that the pecuniary claims were, at least until 7 April 2014, approximately £1.5m but also the additional claims that I have already referred to above. Moreover, it seems to me that the allegations raised against the SFO even on the limited basis advanced by R20 raised very substantial and serious issues such that even if the R20 claims had been advanced on a stand alone basis, it is very likely that the SFO would have incurred very substantial costs in any event and that a large proportion of those costs would, in any event, have been recoverable notwithstanding the points raised by Mr Smouha. On any view this is an extraordinary and perhaps unique claim.

18. Having regard to all of the above, it seems to me that the amount of security in respect of historic costs should be fixed at £2m. I fully recognise that this figure is not the result of any precise calculation. In the circumstances of the present exercise I do not consider that this would be possible. However, it represents my best assessment of what a Court is likely to award against R20 in respect of historic costs (on a joint and several basis) if R20 fails in its claims at trial having regard to the claims originally advanced and the circumstances described above. For the avoidance of doubt, I should

make plain that, in my view, that is also the figure that a Court is likely to have awarded against R20 if R20 had pursued its claims on a stand-alone basis.

19. With regard to costs going forward, having regard to all the circumstances including the abandonment of a large element of its pecuniary claims and the other claims referred to above, it seems to me that an appropriate figure is £500,000. Again, I fully recognise that this figure is not the result of any precise calculation; but it represents my best estimate of what a Court is likely to award against R20 in respect of such costs.

20. For all these reasons, it is my conclusion that the amount of security should be fixed in the total sum of £2.5m. It will be necessary to consider with Counsel the time period within which such security should be provided.