Neutral Citation Number: [2021] EWHC 1252 (Ch)

Case No: BL-2018-001656

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Remotely at:
The Royal Courts of Justice
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL
Date: 18 May 2021

Before:

DEPUTY MASTER RAEBURN

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Between:

PETER JOHN TRIBE	**Claimant**
- and -	
ELBORNE MITCHELL LLP	**Defendant**

- -
- -

James Mather (instructed by **CM Murray LLP**) for the Claimant
Sarah Harman (instructed by **Elborne Mitchell LLP**) for the Defendant

Hearing dates: 25 February and 19 March 2021

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APPROVED JUDGMENT

I direct that this approved judgment, sent to the parties by email on 18 May 2021, shall deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

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Deputy Master Raeburn:

1. This is my decision on costs following directions hearings before me on 25 February and 19 March 2021. The Claimant seeks its costs of those hearings on an indemnity basis. The Defendant resists the Claimant's application on the basis that: (i) the Claimant failed to produce its statement of costs prior to the 19 March 2021 hearing; and (ii) my judgment at the 19 March 2021 hearing represented the outcome of an ordinary directions hearing and that costs should follow the usual course of being "costs in the claim".

2. The underlying proceedings are brought by the Claimant, a retired solicitor, against the city firm of which he was a member. The dispute concerns, in broad terms, his closing entitlements. By his claims the Claimant:

    i) sought payment of a sum of over £100,000 (the "**Acknowledged Sum Claim**") for which judgment has been entered for the Claimant;

    ii) challenges the validity of a division of discretionary profits between members of the firm (the "**Profit Share Claim**"); and

    iii) seeks the settlement under the court's supervision of the partners' non-statutory accounts for 2015/16 (the "**Account Claim**").

3. A trial of the Profit Share Claim with a time estimate of 3.5 days (including 1 day pre-reading) is listed to take place in a window commencing on 17 May 2021 (the "**Profit Share Trial**").

4. The hearing before me concerned directions with respect to the progression of the Account Claim at which I heard argument from Mr. Mather for the

Claimant and Ms. Harman for the Defendant, which centred principally upon the questions of whether:

i) the Account Claim should be heard together with the Profit Share Claim; and

ii) the proper formulation of "the issue" to be tried in the Account Claim.

5. At the 19 March 2021 hearing I found:

i) that it was unrealistic and undesirable to combine the Account Claim with the Profit Share Claim;

ii) the Claimant's formulation of the issue to be tried in the Account Claim was to be preferred and was appropriately articulated; and

iii) that the proper course would be to order a further directions hearing in respect of the Account Claim to take place on the first available date following the trial of the Profit Share Claim.

6. Given the constraints of time at the 19 March 2021 hearing, I directed the parties to provide written submissions on costs, together with a copy of the approved judgment of Deputy Master Hansen of 28 September 2020 (on which the Claimant sought to rely for the purposes of costs). Neither party resisted or otherwise took issue with this approach.

Costs

7. I have considered the written submissions of both parties and here give reasons for my decision, beginning with the question of costs:

The Claimant's entitlement to rely on its Statement of Costs

8. As a preliminary point, the Defendant contends that the Claimant is not entitled to rely on its statement of costs; it having been produced by the Claimant at this stage (i.e. after the relevant hearing) as it should have been served 24 hours prior to the hearing itself.

9. It would appear that the Defendant's argument is based upon CPR PD 44, paragraph 9.5(4) and 9.6 which requires a statement of costs to be filed at court and served on the opposing party, not less than 24 hours prior to the hearing.

10. It is clear that the Claimant did not comply with that Practice Direction. A form N260 statement of costs has been filed at court together with the Claimant's written submissions some days after the date of the hearing as there was insufficient time to hear argument on costs at the hearing itself. The fact that costs submissions were to be dealt with in this manner could not have been known or otherwise anticipated by the parties and there is no suggestion from the Claimant that there was a reasonable excuse for its failure to comply. I therefore proceed on the basis that paragraph 9.6 applies and that such failure must be taken into account by the court.

11. I am however mindful of the guidance given by Neuberger J (as he then was) in *MacDonald v Taree Holdings [2001] 1 Costs L.R. 147* on the correct approach to be adopted by the court when it is faced with a failure of compliance of this nature and in particular that the court's reaction should be "proportionate". The correct approach where there has been a mere failure to comply without aggravating factors is to first consider:

"*what, if any, prejudice has that failure to comply caused to the other party? If no prejudice, then the court should go on and assess the costs in the normal way. If satisfied it has caused prejudice, the next question is: how should that prejudice best be dealt with?."*

12. As to whether there are any aggravating factors in this case, none have been submitted as being present by the Defendant's Counsel and in all the circumstances I do not find any to be relevant to the Claimant's failure to serve its statement of costs in accordance with the Practice Direction.

13. In its written submissions in reply, no prejudice has been argued by the Defendant as having been suffered by it as a result of the Claimant's failure. The Defendant has been able to make submissions on the Claimant's statement of costs and submits that "*it is in any event manifestly excessive in a number of respects*". I am therefore satisfied that the Defendant has indeed had an opportunity to make out its case in opposition to the statement of costs and that it has not suffered prejudice in the manner contemplated in *MacDonald v Taree Holdings*. Given my finding as to the lack of prejudice, I shall therefore proceed to determine and assess costs in the normal way.

Entitlement to an order as to costs

14. I have a wide discretion as to costs; the general rule in CPR 44.2 is that the unsuccessful party will be ordered to pay the costs of the successful party but the court may make a different order. The Claimant seeks an order that the Defendant pay its costs. The Defendant argues that the hearings and my resulting judgment represented the outcome of an ordinary directions hearing

and that costs should follow the usual course of being "costs in the claim". I must therefore determine whether in reality it is possible to identify a successful and unsuccessful party, or whether such characterisations are otherwise inappropriate in this case on the basis that the court has been making a routine case management decision in which it will commonly defer entitlement to costs to the end of the proceedings by ordering costs in the case.

15. In reality, the hearing proceeded as that of a contested application, with Counsel for the respective parties taking very different positions as to their approach to the formulation of the issue to be tried. The Claimant contended that its formulation of the issue was appropriate whereas the Defendant rejected the Claimant's formulation as unsatisfactory and an untenable basis upon which to progress the proceedings. The issue was ultimately resolved in favour of the Claimant.

16. Having had regard to all of the circumstances of this case, including the factors listed at CPR 44.2(4), I do not consider this to be a case in which I should depart from the general rule. Therefore, in my judgment, although the hearings before me were originally listed as directions hearings, for the purposes of its costs application the Claimant is clearly the overall successful party and it is appropriate to make a costs order in the present case following the general rule. I order the Defendant to pay the Claimant's costs.

Basis of Assessment

17. The Claimant seeks an assessment of its costs on the indemnity basis. The principles governing the court's discretion to order costs on that basis are well-known and ultimately turn upon the question of whether there is something in

the conduct of the action or the circumstances of the case which takes it "out of the norm" in a way which justifies such an order.

18. The Claimant says that this is now the fourth time that the Defendant has run the very same argument which has been determined (yet again) against it. The Claimant submits that the court has now endorsed the very formulation of the issue to be tried in the Account Claim that the Claimant had proposed as long ago as October 2020 and against the context of similar conduct by the Defendant at earlier directions hearings, costs should be awarded on an indemnity basis.

19. The Defendant resists the Claimant's application on the basis that the Claimant's allegations are unjustified, that this was not a matter that had been addressed at earlier hearings and was not "another bite at the cherry".

20. I accept the Claimant's submissions. For the reasons given by the Claimant, those costs should fall to be assessed on the indemnity basis. The Defendant has contested the same point (in substance) numerous times before the court and been unsuccessful which is reflected in the judgments of Deputy Master Hansen of 24 June 2020 who dismissed the Defendant's application for summary judgment, the decision of Deputy Judge Mr. Robin Vos of 31 January 2020 who dismissed an appeal against that judgment and the judgment of Deputy Master Hansen of 21 October 2020 who dismissed the Defendant's application for an order to "dismiss" the Account Claim.

21. The Defendant's position as to the proper articulation of the issue to be tried has been pursued in such a manner as to exhaust significant court resources and to slow the progression of the Account Claim. Following the judgments to

which I refer above, there was no proper foundation for the Defendant maintaining its position and it would have become clear that any further challenges to the Claimant's formulation of the issue could not possibly succeed. In those circumstances, the Defendant should not have persisted with further challenge to the articulation of the issue to be tried in the Account Claim at the immediate hearing before me. Argument on this issue assumed such a prominent part of the hearing of 25 February 2021 that I consider that the conduct of the Defendant and the circumstances of the case are such as to take the situation "out of the norm" in a manner making an order for indemnity costs appropriate. I order the Defendant to pay the Claimant's costs on an indemnity basis.

Method of Assessment

22. I now proceed to summarily assess costs. Turning to the statement of costs, the overall amount claimed is £10,852.50 together with VAT bringing the grand total to £13,023. There is a broadly equal split between counsel fees amounting to £5,250 and solicitors' fees of £5,602.50. The overarching point made by the Defendant in its written submissions is that the statement of costs are manifestly excessive in a number of respects, but does not provide any further specificity as to the aspects to which it takes issue.

23. The statement of costs contains a proposed hourly rate of a Grade A fee earner of £600 and of a Grade C fee earner of £295 of solicitors from a specialist employment law firm based in London. It seems to me that given the context of the litigation and what may involve matters of some complexity of financial and employment law analysis, it has been appropriate for the Claimant to

instruct specialist solicitors and the rates do not seem to be unreasonable, which is the test to apply on an indemnity costs assessment. Time spent on letters out/emails (attendance on client) and attendance on opponents amounts to 0.5 and 0.6 hours of Grade A fee earner time, costs of £300 and £360 respectively, with letters out/emails and telephone calls (attendance on others (including Counsel)) amounting to 3.0 hours and 0.9 hours of Grade A fee earner time, some £1,800 and £540. Work on documents has been reasonable, with 1.0 hour of Grade A fee earner time spent on skeleton and submissions and 0.5 hours on draft directions (amounting to £600 and £300) together with bundle preparation delegated to a Grade C fee earner amounting to 1.5 hours, some £442.50. It seems to me that, looking at things in the round, those amounts and number of hours spent are reasonably incurred as well as reasonable in amount and I do not think in the circumstances any deduction is appropriate. I do not think that counsel's fees can be regarded as unreasonable in a case of this kind.

24. Having looked at all of those matters, I think it is appropriate to assess the costs at the sum of £10,852.50 plus VAT. I order those costs to be paid within 14 days.

The Claimant's application to revisit the March Judgment

25. In its written submissions on costs, Counsel for the Claimant invited me to revisit part of my ex tempore judgment given on 19 March 2021 (the "**March Judgment**"); this being possible on the basis that the order has not yet been drawn up. The Claimant reminds me that the power of a judge to reverse his or her decision at any time before an order is drawn up and perfected by being

sealed by the court is not limited to exceptional circumstances: *Re L (Children) [2013] UKSC 8*. I remind myself that this power must be exercised in accordance with the overriding objective of dealing with cases justly.

26. In the March Judgment I decided to list a further directions hearing in the Account Claim on the first available date following the Profit Share Claim which would occur in 2 months' time. Counsel for the Claimant asks me to revisit that decision, and as a minimum, asks that I make an order for disclosure now, rather than have the matter considered at the further directions hearing.

27. The Claimant relies upon the contents of the judgment of Deputy Master Hansen dated 28 September 2020 in which the Defendant's application for summary judgment and/or strike out of the Account Claim was dismissed; a copy of which was not included in the bundle at either hearing before me.

28. The Claimant further submits that the effect of the March Judgment is to compound the injustice the Claimant has suffered by being deprived in his retirement of the money he claims to be owed for a further period of time. The Claimant goes on to say that the adjournment will reduce the prospect of an overall settlement, because the Claimant will conclude that the disclosure which the Defendant is "apparently intent on avoiding" will have a strong impact on the merits of the claim when eventually given.

29. I do not accept those submissions. Whilst it is clear that the Defendant's conduct delayed the progression of the Account Claim, having balanced the potential prejudice to the Claimant in experiencing further delay to the resolution of the Account Claim, against the opportunity for settlement that

sequence of case management would bring, I found that the balance weighed in favour of encouraging settlement through the directions given in the March Judgment. In addition, I do not regard it as appropriate to revisit the March Judgment to make an order for disclosure in these circumstances. To re-open my decision and make such an order would result in further costs being incurred by the parties which would run counter to the abovementioned benefits that this manner of case management would bring as there would be less financial incentive for the parties to settle the Account Claim.

30. In any event, I find that there is no fresh material or issues raised in the Deputy Master's judgment of 28 September 2020 which were not otherwise in play in the hearings before me which would persuade me as a matter of discretion to justify revisiting the March Judgment. The fact that the Defendant has made repeated applications which delayed the progress of the claim was before the court. The fact that the Defendant had applied for and failed in its challenge to the Account Claim before Deputy Master Hansen as reflected in his judgment of 28 September 2020 was also before the court. To exercise my discretion to revisit the March Judgment in the present context would not accord with the overriding objective to deal with cases justly and at proportionate cost, particularly with regard to avoiding unnecessary expense and dealing with cases expeditiously. Indeed, such an approach would be contrary to the clear public interest in the finality of judgments.

31. For the reasons given, I do not therefore consider that this is a case in which the circumstances are such as to justify the court exercising its discretion to revisit its judgment.