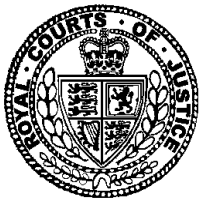

Neutral Citation Number: [2022] EWHC 1719 (Ch)

Case No: FL-2019-000007
FL-2020-000035
FL-2021-000022

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

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

Date: 05/07/2022

Before :

MR JUSTICE MILES

- -

Between :

Allianz Global Investors GmbH & Others

Claimants

- and -

G4S PLC

Defendant

- -
- -

Andrew Onslow QC, Shail Patel and Calum Mulderrig (instructed by **Morgan, Lewis & Bockius UK LLP**) for the **Claimants**
Simon Colton QC and Emma Jones (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

Written submissions filed 14 June 2022 and 17 June 2022

- -

Approved Judgment

I direct that 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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This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 5 July 2022 at 10:30am.

Mr Justice Miles :

Introduction

1. I gave judgment on 10 May 2022 on the defendant's strike out/summary judgment application. I shall adopt the definitions used in that judgment. The parties have now submitted written submissions on costs.

2. The claimants' position is that they should have their costs of the application. They say they won: the court did not strike out the case in respect of the relevant PDMRs and the application was dismissed. Costs should follow the event in the ordinary way. They contend that it would not be appropriate to make a different costs order on the basis of my determination regarding the definition of PDMR under FSMA. If there is to be any deduction it should be modest.

3. The defendant's position is that costs should be in the case: the defendant succeeded on the point of law arising in the application; although the claimants' factual case was allowed to proceed to trial, meaning that the allegations in respect of the alleged PDMRs were not struck out, as part of this conclusion the court criticised the lack of clarity in the claimants' pleadings. There is therefore no overall winner. Moreover the court's decision on the pure legal point will assist the parties in the future litigation and the court's comments have led to more clarity in the pleadings. Alternatively there should be a proportionate order.

4. The claimants reiterate in response their submission they were the winners: the application was to strike out or for summary judgment and that failed. They submit that it is commonplace for parties to lose on some issues but to win overall and they say that the court should not too readily depart from the general rule that costs follow the event.

Legal principles

5. These were not disputed.

   i) The court has a discretion under CPR 44.2.

   ii) CPR 44.2(2)(a) contains the general rule that the unsuccessful party will be ordered to pay the costs of the successful party. But by CPR 44.2(b) the court may make a different order.

   iii) By CPR 44.2(4) in deciding what order (if any) to make about costs the court will have regard to all the circumstances including those specifically set out in the rule (which I shall not repeat here). These include whether a party has succeeded on part of its case even if that party has not been wholly successful.

   iv) CPR 44.2(6) is an inclusive list of the orders the court may make. These include an order that a party must pay a proportion of the other party's costs.

   v) To determine the successful party, the court asks "who as a matter of substance and reality has won?": *Roache v News Group Newspapers Ltd* [1998] EMLR 161 at [3].

vi) It is commonplace for the overall successful party to lose on some issues but win overall. The court should not too readily depart from the general rule simply because a party has not entirely succeeded.

The issues decided in the judgment

6. I decided the application by reference to three issues: (i) whether the term PDMR within s 90A and/or Schedule 10A was restricted to de jure, de facto and (arguably) shadow directors, or whether it included a wider definition advanced by the claimants (Issue 1); (ii) whether the claimants had a real prospect of establishing at trial that P1-P4 were de jure, de facto or (arguably) shadow directors of the defendant, and therefore PDMRs (Issue 2); and (iii) if the claimants failed on Issue 1 or Issue 2, whether there was any other good reason to allow the allegations that P1-P4 were PDMRs to go trial (Issue 3).

7. I decided Issue 1 in favour of the defendant, Issue 2 in favour of the claimants, and I did not need to address Issue 3 but would have found for the defendant.

8. The larger part of the time at the hearing was spent on Issue 1, though Issue 2 also took up a reasonable part. I was taken through the legislative framework (both domestic and European) in some detail. Issue 1 also took up the larger part of the parties' skeleton arguments.

9. Very little time was devoted to Issue 3.

10. As to the witness statements and exhibits, the defendant did not serve substantial evidence. On the other hand much of the claimants' evidence was devoted to Issue 2, being largely derived from public information. The claimants also served a statement from a solicitor concerning the way that listed companies are run and governed. That went to Issue 1.

11. At one point in the hearing of the application counsel for the claimants suggested that if the court was with the claimants on Issue 2 it was not strictly necessary for it to answer Issue 1. I was not attracted by that course for three reasons. It appeared to me, first, that it would assist the parties in the further conduct of this case to have an answer to the legal issue. They would then know the target being aimed at. There was second a preliminary passage in the claimants' further information which set out the claimants' more expansive case as to the definition of PDMR. The claimants were presumably intending to run that more expansive case. The judgment ruled against that expansive definition. There is a third justification for grappling with Issue 1 which was not mentioned in the main judgment. It appears to me that knowing the answer to the legal question posed in Issue 1 will probably help in any settlement negotiations by setting out the parameters of the dispute more clearly.

12. It should also be noted that, while I decided that the claimants had advanced a case of de facto directorship, the pleadings were in some respects ambiguous or insufficiently clear. Though I did not strike out the pleadings I did indicate the respects in which further clarification should be given. In that regard I was influenced by the comments of counsel for the claimants that if the court concluded that the pleadings could be improved the claimants should have a further opportunity to do so. I understand that since the hearing the claimants have served a sixteen page draft annex to the Particulars

of Claim setting out their case on de facto directorships and that this has been agreed. That document clarifies the claimants' case on de facto directorships and assists the defendant in understanding the case it has to meet.

Decision under CPR 44.2

13. In my judgment the claimants were the successful party as a matter of substance and reality. The application was for the striking out or dismissal of (most of) the claims. The application was dismissed and the claimants are entitled to continue with the claims.

14. But a departure from the general rule is justified.

15. First, the defendant succeeded on Issue 1 and the court's decision on that point will have a significant impact on the future conduct of the case. It will also improve the prospects of settlement. The claimants, in their pleadings and in response to the application, contended for a more expansive interpretation of PDMR, to include senior management - at a level below that of director. The decision on Issue 1 will assist in narrowing the issues. It was of course open to the claimants to agree with the defendants on the definition of PDMR and stake their ground on Issue 2. But they sought to persuade the court of the broader view and lost. As I have said the larger part of the hearing and the skeletons were devoted to Issue 1. It seems to me that the defendants won an important battle though they lost the war and this should be reflected in the costs order. I also consider that Issue 1 was a major plank of the arguments on both sides and cannot be regarded as minor or incidental. As so little time was spent on Issue 3 I do not give it material weight.

16. Secondly, in my judgment the costs order should reflect the court's comments about the state of the claimants' pleadings at the time of the application. The judgment recorded that those pleadings were insufficiently clear and that they contained passages which could not stand in the light of my decision on Issue 1. It is of some significance that the claimants have served a new annex setting out their case on de facto directorships. This clarification should have been provided earlier and I think there is force in the defendant's submission that the annex was prompted by the judgment and probably would not have occurred had the application not been made. I consider that the clarification of the case has assisted the defendant in understanding the case against it.

17. These features of the case justify a departure from the general rule.

18. But when deciding to depart from the general rule and what other order to make, the court should nonetheless continue to reflect the fact that the claimants were the overall winners.

19. The exercise is by necessity a somewhat broad-brush one. The ultimate goal is to arrive at a just order in light of all the circumstances. I have decided that the defendant should pay 50 per cent of the claimants' costs of the application, to be assessed if not agreed.

Payment on account

20. There is no dispute that if there is an order for costs to be paid there should also be an interim payment.

21. The principles are not disputed: see *Excalibur Ventures v Texas Keystone Inc* [2015] EWHC 566 (Comm).

22. The claimants seek a payment on account of 70 per cent of the total of £383,115.71 set out in their Statement of Costs (SoC).

23. The defendant contends, first, that the total amount of time spent is excessive. The claimants' solicitors spent 156 hours preparing two witness statements, which comprised extracts from publicly-available material and opinion evidence. The SoC refers to an additional 90 hours spent investigating the defendant's corporate structure and the alleged PDMRs. The defendant suggests that most of this work appears to have been used by the claimants to prepare their amendments on de facto directorship to address the deficiencies the Court identified in their pleadings which they would have had to do in any event. There is good reason to consider that much of this will be assessed down.

24. The defendant says next that the SoC includes costs for work that is arguably unrelated to the application. For example, substantial fees were paid to a forensic accountant and an investigative consultant, and time was spent by the claimants' solicitors considering their work product, but the claimants did not serve any expert evidence nor even seek permission to do so. Similarly, Counsel's fees include draft pleadings when these formed no part of the application.

25. The SoC also contains significant amounts incurred in relation to consequential matters. The defendant says this may be unreasonable, given the level of agreement between the parties, as are counsel's fees for advising in relation to any appeal, given that the defendant confirmed it was not appealing and the claimants contend that they fully succeeded on the Application.

26. The defendant also observes that most of the hourly rates claimed far exceed the guideline rates, even for heavy commercial and corporate work in central London.

27. I consider that there is force in the defendant's observations. It seems to me that the amount recovered on a detailed assessment may well be much less than the total claimed. I cannot confidently predict that the claimants will recover more than 50 per cent of the costs set out in the SoC on a detailed assessment.

28. I shall therefore order the defendant to make a payment on account of £97,000, being 25 per cent of the costs claimed in the SoC.