Neutral Citation Number: [2022] EWHC 3374 (Ch)

Claim No: BL-2020-000569

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Friday, 23 December 2022

Before:

ROBIN VOS
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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Between:

(1) MS MELISSA VON WESTENHOLZ (Personal Representative of the Estate of Mr Michael Sanders, Deceased) **(2) MRS THALIA SANDERS** **(3) MR RUPERT SANDERS** **(4) MS MELISSA VON WESTENHOLZ**	**Claimant**
- and -	
(1) MR MARCUS GREGSON **(2) MR DANIEL EVANS**	**Defendant**

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PATRICK GREEN KC AND BEN NORTON (instructed by Croft Solicitors) appeared for the **Claimant**
PAUL SINCLAIR KC (instructed by Keystone Law) appeared for the **Defendant**

Hearing dates: 3-7 October 2022

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Approved Judgment

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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 Friday 23 December at 9:30am

DEPUTY JUDGE ROBIN VOS:

Introduction

1. This judgment is supplemental to a judgment which I handed down on 21 November 2022 and should be read alongside that judgment as far as the background and use of defined terms is concerned.

2. In that judgment, I found the Defendants liable to account to the second, third and fourth Claimants in the sum of £400,000 by way of equitable compensation as a result of failing to ensure that a dividend of £400,000 was received by them in their capacity as trustees at a time when they knew that the Claimants claimed an interest in certain shares held by them (based on what is referred to in my previous judgment as the *Guardian Trust* principle) and also on the basis of a breach of fiduciary duties owed to the Claimants.

3. The parties have been unable to agree the form of the order which should be made consequential upon that judgment. This supplemental judgment explains the reasons for the order which I have decided to make. The main areas of dispute relate to costs and interest.

4. I invited the parties to make written submissions in relation to these matters, which both have done. Mr Green KC and Mr Norton in their submissions on behalf of the Claimants have suggested that there should be an oral hearing before any decisions are made in relation to consequential matters. The Defendants object to this on the basis that it is unnecessary and disproportionate, particularly bearing in mind the costs which have already been incurred in relation to the claim. I am satisfied that the parties have had an adequate opportunity to put forward their respective points of view (the submissions on behalf of the Claimants running to 27 pages). I also agree that a further hearing would be disproportionate particularly bearing in mind that the Claimants' budgeted costs are already in excess of the amount which they have successfully claimed.

5. I have been provided with a draft order which highlights the differences between the parties. The main areas of dispute are as follows:

5.1 The Claimants claim costs on the indemnity basis both as a result of the way in which the Defendants have conducted their defence and also as a result of Part 36 offers made by them in October 2018 and July 2020. The Defendants say the costs should be assessed on the standard basis.

5.2 The Defendants also say that the Claimants should only recover 50 per cent of their costs as a result of the fact that they put forward numerous causes of action, many of which failed.

5.3 As far as interest on the equitable compensation is concerned, the Claimants seek compound interest at 4 per cent from the date of the payment of the dividend up to date for acceptance of the first Part 36 offer. Thereafter, they claim compound interest at 13 per cent (base rate plus 10 per cent) as a result of the Part 36 offer. The Defendants argue that simple interest at a rate of 1 per cent should be payable for the entire period up to judgment. Both parties accept that the normal judgment rate should apply thereafter.

5.4 The story is similar in relation to interests on costs. The Defendants offer simple interest at 1 per cent from the date the costs were paid up to the date of the order with interest at the normal judgment rate thereafter. The Claimants seek compound interest at 4 per cent up to the date of the first Part 36 offer, then at 13 per cent from that date up to the date of the order and at the judgment rate thereafter.

5.5 As far as a payment on account of costs is concerned, the Claimants suggest approximately £430,000 (being 80 per cent of their budgeted costs). The Defendants offer just over £110,000, being 75% of the amount claimed taking into account their proposed 50 per cent reduction, the exclusion of budgeted costs relating to stages which did not occur and also taking into account costs of approximately £13,000 which are due from the Claimants to the Defendants in relation to an application by the Claimants to amend their particulars of claim.

5.6 Finally, the Defendants seek a stay of the order until 1 April 2023 to allow time to raise funds to meet their liabilities by selling a property owned by Mr Gregson.

Indemnity costs prior to any Part 36 offer

6. CPR Rule 44.4 does of course permit the court to award costs on the indemnity basis. As is well known, the court will only do so if the conduct of the relevant party is "out of the norm" (*Excelsior Commercial and Industrial Holdings Limited* [2002] C.P.Rep.67 at [31]) meaning "something outside the ordinary and reasonable conduct of proceedings" (*Esure Services Limited v Quarcoo* [2009] EWCA Civ 595). The Claimants have referred to the explanation of the principles to be applied given by Sir Anthony Colman in *National Westminster Bank plc v Rabobank Nederland* [2007] EWHC 1742 (Comm) at [13] – [30]. Mr Green in particular emphasises that there is no need for conduct attracting moral condemnation. Instead, unreasonableness (depending on its extent) is sufficient.

7. Mr Green identifies the following factors as constituting the required level of unreasonableness:

   7.1 The Defendants denied various allegations which, at trial, were found in favour of the Claimants and some of which were conceded by the Defendants in closing submissions.

   7.2 The Defendants unreasonably refused to mediate or engage in meaningful settlement negotiations.

   7.3 The Defendants failed to disclose adverse documents (the bank statements of ASLG) until May 2022 in circumstances where (the Claimants say) the documents should have been disclosed as part of initial disclosure or extended disclosure.

8. In my view, none of these matters, either individually or collectively, demonstrate a sufficient degree of unreasonableness to justify an award of costs on the indemnity basis.

9. Looking first at the denials, there are five particular issues which are identified. The first three relate to Mr Sanders' investments into ASL and ASLG and the extent to which the Claimants may have had a beneficial interest in the Disputed Shares. As Mr Green notes, the Defendants were not involved at the time Mr Sanders made his investments. There was very little in the way of documentary evidence supporting

those investments. It was not in my view unreasonable for the Defendants to require the Claimants to prove their case in relation to this aspect.

10. I reach this conclusion taking account of the fact that Mr Gregson accepted during cross examination that he believed that Mr Sanders had agreed to subscribe for shares. It was however clear that both Mr Gregson and Mr Evans had serious concerns as to what actually happened to any money which Mr Sanders might have paid given the evidence which had emerged of Mark's misappropriation of company funds.

11. The same is true of the payment of £30,000 received into ASLG's bank account at around the time of the final investment by Mr Sanders. It is clear that Mr Gregson suspected that this may well represent Mr Sanders' subscription monies but it was still not in my view unreasonable for the Defendants to require the Claimants to make good their case in relation to the investments which they said had been made by Mr Sanders.

12. The Claimants also refer to the question as to whether the Disputed Shares were held in trust pending the resolution of the dispute with the Sanders family. Mr Gregson and Mr Evans effectively conceded in cross examination that they considered that they were holding the shares pending resolution of the dispute. This was not however what the relevant declaration of trust recorded. The terms of the defence reflected the terms of the declaration of trust.

13. This was, in my judgment, a point which was rather more nuanced than is suggested by the Claimants. The shares were of course held on the terms of the declaration of trust. Mr Gregson and Mr Evans may well have considered that part of the purpose of this was to retain the shares pending resolution of the dispute with the Sanders family. Indeed, this is the basis for the finding that they owe fiduciary duties to the Claimants. However, the Defendants were not actually holding the shares on trust for the Claimants. Whilst some complaint could be made about the clarity with which they put forward their defence, I do not consider that this gives rise to a sufficient level of unreasonableness which would make it appropriate to award costs on the indemnity basis.

14. A third aspect highlighted by the Claimants is that the Defendants denied being aware that the Sanders family were making a claim to have an interest in the shares in March

2018, shortly before the dividend was paid. In the light of the contemporaneous correspondence, it was accepted by Mr Gregson that there had been a change of approach on the part of the Sanders family, albeit that it was one that he did not agree with. There is no doubt that the claim made by the Sanders family changed over time. It is clear that, for a significant period, all they wanted was a return of the £150,000 which Mr Sanders said he had invested and that they did not actually want the shares. With this background, Mr Gregson's position was perhaps not as unreasonable as Mr Green might suggest although I accept it was certainly misguided.

15. The final point which Mr Green draws attention to is the question as to whether or not the Defendants were aware in 2014 that the Sanders family may have had a beneficial interest in some of the shares held by Mark. It became clear from the documentary evidence that they were aware of this possibility. This was inconsistent with what Mr Gregson said in his witness statement. This was in my view a clear misrepresentation of the position. It is the sort of conduct which could in principle justify an award of costs on the indemnity basis. However, taking into account the other factors which I shall refer to, it does not in my view do so in the circumstances of this particular case.

16. As far as the failure to mediate is concerned, it is clear that the Claimants suggested mediation/negotiation on a number of occasions. These were all rejected by the Defendants on the basis that the parties were so far apart in their view of the claim that there would be no point in having such discussions. It would only delay matters and add to the costs. Whilst the court encourages mediation and negotiation in order to resolve disputes, given the nature of the claims being made against the Defendants (including allegations of malice and potential dishonesty), the failure to agree to such discussions in this case was not in my view so unreasonable as to justify an award of costs on the indemnity basis.

17. The final point put forward by the Claimants in support of their application for indemnity costs is that the ASLG bank statements were not disclosed to the Claimants until a very late stage. There is no doubt that this was the case and I accept that they should have been disclosed much earlier. However, I do note that bank statements disclosing the key receipt by ASLG of £30,000 in August 2008 were disclosed in 2018 and so it is not the case that the Claimants were in the dark about this until May

2022 when the full set of records were disclosed. The significance of this is therefore much less than Mr Green suggests and cannot in my view justify indemnity costs.

18. Overall, this is not in my view a situation where the conduct of the Defendants was sufficiently outside the ordinary and reasonable conduct of the proceedings to lead to an award of costs on the indemnity basis. I accept that there are some areas in which their defence and their witness evidence went too far but, for the most part, the points they put forward were reasonable. It should not be forgotten that they successfully defended the allegations of dishonesty, malice and conspiracy. Although certain matters were conceded in closing submissions, it was right that they should do so in the light of the evidence at trial. It does not follow from this that it was unreasonable for them not to have conceded these points before the trial.

19. Leaving aside the impact of any Part 36 offers, I therefore award costs on the standard basis rather than the indemnity basis.

Reduction for issues on which the Claimants failed

20. The Defendants suggest that the Claimants' costs should be reduced by 50 per cent to reflect the fact that the Claimants pleaded a number causes of action in respect of which they failed, including:

    20.1 Procuring a breach of contract.

    20.2 Deceit.

    20.3 Unlawful means conspiracy.

    20.4 Lawful means conspiracy.

    20.5 Causing loss by unlawful means.

    20.6 Dishonest assistance.

21. The starting point of course is that the Claimants should receive their costs as they were the successful parties. The fact that they have not been successful on all points does not inevitably mean that they should be deprived of part of their costs. Nonetheless the court has the power to make a different order taking into account all

of the relevant considerations set out in CPR Rule 44.2 and 44.4. One of the reasons for this is to encourage Claimants to be selective about the issues which they pursue.

22. In this case, the Claimants put forward no less than eight separate causes of action and failed in respect of six of those causes of action. This is in my view a classic case where the Claimants have not been sufficiently selective in the way in which they have framed their case. For example, the claim based on inconsistent dealing in reality added nothing to the claim based on the *Guardian Trust* principle. In addition, the claims based on four separate economic torts contain significant overlap. On top of this, as the Defendants pointed out, the Claimants have been wholly unsuccessful in their claims based on dishonesty and malice.

23. It is in my view appropriate that both of these factors should be reflected in the order as to costs, subject to the impact of the Part 36 offers which I will come on to. It is of course only possible to take a broad brush approach in order to reflect these various factors. In my view it would be appropriate to reduce the Claimants' costs by 25 per cent in recognition of these points. I consider that the suggested 50 per cent reduction on the part of the Defendants is much too high taking account of the fact that the Claimants have been successful in their claim.

The first Part 36 offer

24. On 25 October 2018, a Part 36 offer was made on behalf of Mr Sanders in respect of proceedings which it was proposed should be brought against ASL, ASLG and the Defendants. The offer was to settle for £150,000.

25. The present proceedings were commenced in March 2020. The Claimants acknowledged that the 2018 Part 36 offer was made before the proceedings were commenced but point out that there was nothing in Part 36 which prevents such an offer.

26. The Defendants however say that the proceedings which were contemplated in 2018 were different proceedings. Not only were the parties different (the sole Claimant being Mr Sanders and the Defendants including the companies as well as Mr Gregson and Mr Evans) but the claims were also materially different to the proceedings which were ultimately issued in 2020.

27. I accept the Defendants' points in relation to the 2018 Part 36 offer. The offer was made on behalf of different parties to a potentially different claim. It cannot be said to be an offer to settle the claim that was made in the current proceedings. In particular, the draft 2018 particulars of claim did not make any mention of the *Guardian Trust* principle. As far as breach of fiduciary duties were concerned, the only reference to this related to a potential breach of fiduciary duties said to arise as a result of the Defendants denying that Mr Sanders made the investments which he claimed to have made. There was no mention of breach of fiduciary duties in relation to the circumstances surrounding the payment of the dividend itself in 2018.

28. My conclusion therefore is that the 2018 Part 36 offer has no impact on these proceedings.

The second Part 36 offer

29. A further Part 36 offer was made on 28 July 2020. The offer was to accept £120,000 in full and final settlement of the claim and was made shortly after the claim form and the particulars of claim were served and before the Defendants filed their defence.

30. This was clearly a valid Part 36 offer in relation to the present proceedings and should therefore in principle give rise to the consequences set out in CPR Rule 36.17 given that the judgment against the Defendants was more advantageous to the Claimants than the proposals contained in the Part 36 offer (CPR Rule 36.17(1)(b)). Those consequences follow unless the court considers that it is unjust for them to do so.

31. The Defendants say that it would be unjust to give effect to the consequences set out in CPR Rule 36.17 since, at the time the offer was made, the *Guardian Trust* claim had not been pleaded and the focus of the claim was on the claims based on the economic torts which all failed.

32. Whilst it is of course true that the *Guardian Trust* claim had not been pleaded at the time the Part 36 offer was made, the court also found against the Defendants on the basis of a breach of their fiduciary duties towards the Claimants. This was part of the original pleaded claim. In my view, the normal consequences of the Part 36 offer should therefore follow. However, the fact that the *Guardian Trust* claim had not

been pleaded is a factor which I should take into account in deciding the extent of those consequences.

33. As far as costs are concerned, the first consequence is that the Claimants are entitled to all of their costs from the expiry of the relevant period (in this case from 18 August 2020) on the indemnity basis. In principle this means the whole of the costs without considering any reduction resulting from CPR Rule 44 (*Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365). Instead, the Defendants must show that requiring the payment of all costs on the indemnity basis is unjust.

34. As Briggs J noted in *Smith v Trafford Housing Trust* [2012] EWA 3320 Ch at [13], the burden of showing injustice is a "formidable obstacle to the obtaining of a different costs order" in the light of the purpose of Part 36 to promote compromise and avoid unnecessary expenditure of costs and court time.

35. In this case, the fact that the *Guardian Trust* claim had not been pleaded at the time of the Part 36 offer is not a reason for denying the Claimants all of their costs on the indemnity basis after the expiry of the relevant time given that the Claimants would have been successful even if that claim had not been pleaded.

36. The second consequence in relation to costs is that the court should order interest on the costs at a rate not exceeding 10 per cent of that base rate. It is clear that the maximum is not the default position either in relation to interest on damages or on costs (see for example *BXB v Watch Tower and Bible Tax Society of Pennsylvania* [2020] EWHC 656). Instead, any award must be proportionate taking into account all relevant circumstances.

37. This is not a case where the Defendants have acted in any way fraudulently or dishonestly and have not benefited personally. In addition, the *Guardian Trust* claim had not been pleaded at the time the offer was made which might have made a difference to whether the offer was accepted. Whilst I accept that the Defendants had all the information available to them in order to make a decision at the relevant time whether to accept the offer based on the claim as it was then pleaded and that the offer was made at a relatively early stage, this is not a case in my view where the maximum interest should be awarded. Instead, I will award interest on costs at 4 per cent above base rate (from time to time) from the 18 August 2020 up to the date of this order.

38. The next consequence is that the Claimants are entitled to interest on the equitable compensation at a rate which is again not to exceed 10 per cent above base rate. For the reasons I have set out above, the appropriate rate is in my view 4 per cent above base rate from time to time, reflecting the fact that the award of interest is not purely compensatory (*OMV Petrom SSA v Glencore International AG* [2017] EWCA Civ 195) but which takes account of the mitigating factors I have mentioned.

39. In both cases, the interest should be simple interest and not compounded. Although the Claimants have suggested that the interest on the equitable compensation should be compounded, the Defendants have referred to the decision of the court of appeal in *Wallersteiner v Moir* (2) [1975] QB 373 in which Buckley LJ explains at [397E] that a defaulting trustee is normally charged with simple interest only but that compound interest may be charged if it is shown that they have used the money in some way which benefits themself as part of their business operations.

40. In this case there has clearly been no benefit to either of the Defendants and no use by them of the funds representing the dividends which should have been received by them in respect of the Disputed Shares. It is for this reason that simple interest rather than compound interest is appropriate.

41. The final consequence provided for in Rule 36.17 is the payment of an additional amount which, in this case, is 10 per cent of the amount awarded. The Claimants seek £40,000, being 10 per cent of the equitable compensation (accepted by the Claimants to be £400,000 – i.e. not including any interest for the period up to the expiry of the relevant period). For the same reasons I have concluded that it would not be unjust to award indemnity costs, there is in my view no reason why, taking into account all of the circumstances, it would be unjust to require the Defendants to pay this additional amount, having failed to beat the Part 36 offer made by the Claimants.

Interest prior to 18 August 2018

42. As I have said, the Claimants are seeking interest on the £400,000 equitable compensation and on the costs prior to the date when the Part 36 consequences take effect at a rate of 4 per cent. The Defendants offer 1 per cent.

43. Although there is no evidence as to whether or not the Claimants have borrowed in order to fund their costs, it is in my view appropriate to set the rate of interest by reference to an assumed cost of borrowing (see for example *Secretary of State for the Department of Energy and Climate Change v Jones* [2014] EWCA Civ 363 at [17]) given that the Claimants have been deprived of the use of the money. In my view, an appropriate rate in respect of an individual would be simple interest at 2.5 per cent over base rate from time to time. The award is made under CPR Rule 44.2 (6)(g). Interest should run from the date the costs in question are paid up to 18 August 2018 (after which, interest runs at the rate set out above).

44. Similar principles apply to the award of interest in respect of the equitable compensation. As I have set out, the interest should be simple interest. In my view a rate of 2.5 per cent above the base rate from time to time would be appropriate based on the fact that the Claimants have been deprived of the use of this money.

Payment on account

45. The Claimants seeks a payment on account of costs equal to 80 per cent of their budgeted costs (including incurred costs of almost £240,000) which amounts to approximately £430,000. The Defendants are offering rather less than this, being approximately £112,500 taking into account their proposed 50 per cent discount, an argument that the Claimants' incurred costs are excessive, a discount to 75 per cent rather than 80 per cent and allowance for estimated costs due to the Defendants in relation to the Claimants' application to amend their particulars of claim.

46. Although some of the costs are to be assessed on the standard basis and will, in accordance of what I have said above, be reduced to 75 per cent of the actual costs, the bulk of the costs were incurred after the Part 36 offer was made and so will be assessed on the indemnity basis and will not be subject to any reduction. I do however note the disparity between the Claimants' incurred costs at the date of the costs and case management conference as compared to the Defendants' incurred costs at that date and agree that an allowance should be made for this. I also agree that an allowance should be made for the costs which will be due to be paid by the Claimants to the Defendants estimated at approximately £13,000.

47. Taking all of this into account, the payment on account should in my view be 65 per cent of the Claimants' budgeted costs (including incurred costs) but after deducting the estimated costs payable by the Claimants to the Defendants.

Application for the terms of the order to be stayed

48. The Defendants asked that the terms of the order be stayed until 1 April 2013 in order to allow them time to realise assets to satisfy the terms of the order. Both Mr Gregson and Mr Evans have provided brief witness statements in relation to their assets.

49. It seems clear that Mr Evans does not have significant assets and will be unable to satisfy the terms of the order.

50. Mr Gregson anticipates being able to meet the terms of the order but says that most of his assets are illiquid, including a property in London valued at approximately £1.5m. Mr Gregson mentions other long term investments which it appears consists of a portfolio of shares worth approximately £190,000 and interest in four open-ended investment companies together worth approximately £154,000. He says that, if he had to realise those investments, he would have to pay capital gains tax and disrupt the investments strategy in respect of the investments.

51. Mr Gregson has a debt of £100,000 due to HSBC which was taken out to fund legal fees. There is no information as to the terms of this debt; for example whether it is secured over any of Mr Gregson's assets nor when the debt is due to be repaid.

52. Given that Mr Gregson does have some liquid assets available and there is no suggestion that he will be required to repay his debt to HSBC before 1 April 2023, it would not in my view be appropriate to keep the Claimants waiting until that date before they receive any of the amounts to which they are entitled.

53. The order should therefore provide that the payment on account of costs is to be made within 14 days of the date of the order (this amount being approximately equal to the liquid investments which Mr Gregson holds). In the circumstances, I do however consider it appropriate to grant a stay of the other provisions of the order until 1 April 2023 to allow Mr Gregson time to sell the property, the proceeds of which will allow

him to meet the remaining liabilities but on the basis that interest at the judgment rate will continue to run until payment is made.

Summary

54. The terms of the order are stayed until 1 April 2023 other than the requirement to make a payment on account of costs within 14 days of the date of the order. Interest at the judgment rate will run on any amounts unpaid as set out below.

55. The payment on account of costs is 65 per cent of the Claimants' budgeted costs including incurred costs, less a deduction for the estimated costs due from the Claimants to the Defendants of £12,859.99 (for the avoidance of doubt, the deduction of the estimated costs due to the Defendants should be made first so that the payment on account is 65 per cent of the net figure).

56. Simple interest is payable on the award of equitable compensation at a rate of 2.5 per cent over base rate from time to time from 25 May 2018 to 18 August 2020. Thereafter interest will run at 4 per cent over the base rate from time to time until 21 November 2022. After that, interest will run at the judgment rate.

57. The Claimants are entitled to 75 per cent of their costs up to 18 August 2020 assessed on the standard basis. They are entitled to the whole of their costs after that date assessed on the indemnity basis.

58. Simple interest will be payable on the costs at a rate of 2.5 per cent over base rate from time to time from the date the costs are paid up to 18 August 2020. After that date and until the date of this order, interest will run at 4 per cent over base rate from time to time. Thereafter interest will run at the judgment rate.