Neutral Citation Number: **[2023] EWHC 2270 (Ch)**

Case No: **BL-2021-000461**

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

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

Date: **12 September 2023**

Before :

Mr Justice Trower

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Between :

(1) South Tees Development Corporation	**Claimant**
(2) South Tees Developments Limited	
- and -	
PD Teesport Limited	**Defendant**
- and -	
Teesworks Limited	

- -
- -

Daniel Patrides (instructed by **Forsters LLP**) for the **Claimants**
Andrew Walker KC and Olivier Kalfon (instructed by **DWF Law LLP**) for the **Defendant**
Katharine Holland KC and Admas Habteslasie (instructed by **Taylor Wessing LLP**) for the **Third Party**

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Approved Judgment on Costs

This judgment was handed down remotely at 3pm on 12 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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THE HONOURABLE MR JUSTICE TROWER

Mr Justice Trower

1. This judgment is concerned with the costs of the defendant's appeal against the decision of Master Brightwell dated 11 August 2023, by which, amongst other matters, the master granted the applications of the claimants and the third party for permission to amend their statements of case to plead the LR amendments. For the reasons I outlined in my judgment dated 1 September 2023 ([2023] EWHC 2229 (Ch)), delivered after a one day rolled-up hearing, I granted permission to appeal and allowed the appeal. The hearing had been fixed on an urgent basis in light of the fact that there is an expedited trial of the proceedings listed to begin on 2 October 2023.

2. It is also concerned with the costs of the defendant's application to adjourn the trial, which was made to cover the eventuality that permission to appeal was refused or the appeal itself was dismissed. In light of my decision on the appeal, it was agreed that that application should be dismissed.

Costs of the appeal

3. The defendant submits that the general rule for which CPR 44.2(2)(a) provides should apply. It was the successful party on the appeal. The claimants and the third party both argued against the appeal and were the unsuccessful parties. Costs should therefore follow the event in the normal way. It also sought a payment on account of its costs in accordance with CPR 44.2(8) on the grounds that there was no good reason not to do so. It claimed £33,092, being 50% of the amount on its schedule, as a reasonable sum.

4. The principal argument made by the third party (but not the claimants) for not making an order for costs of the appeal in favour of the defendant was that, although a costs management order ("CMO") has been made, the costs of the appeal were not included in the defendant's costs budget. It was said that the defendant should have made a variation to its costs budget to reflect the costs of the appeal but did not do so despite being aware since at least 11 August 2023 that it would be bringing the appeal. It was said to follow that the defendant was not therefore entitled to recover any costs in relation to the appeal.

5. In support of this argument, the third party submitted that the effect of making a CMO is that the court thereafter controls the parties' budgets in respect of recoverable costs (CPR 3.15(3)). It went on to submit that CPR 3.18 be applied. The relevant parts of this rule provide that "when assessing costs on the standard basis, the court will (a) have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings; (b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so". This means that there is what Davis LJ in *Harrison v University Hospitals Coventry and Warwickshire NHS Trust* [2017] 1 WLR 4456 (CA) at [44] called "a significant fetter on the court having an unrestricted discretion" in relation to costs.

6. It was also submitted that CPR 3.15A imposes obligations on a party subject to a CMO to revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions, a rule which records the desirability of reflecting significant developments in the litigation in costs budgets. It was said that no steps were taken by the

defendant to reflect its costs of the appeal in its costs budget and its failure to do so was "a glaring one". In particular, it was said that the defendant had been aware since 11 August 2023 that it was intending to pursue its appeal but it took no steps to vary the costs budget and there was no good reason to depart from it. The third party said that the position was all the more striking because the defendant's costs were said to be £67,000 for the appeal alone, which amounted to a very significant departure from the budgeted costs.

7. In my judgment these submission are misconceived for the reasons explained in the defendant's written submissions. Unless the court otherwise orders, a costs budget is required to be in the form of Precedent H as annexed to CPR PD 3D (see PD 3D para 4(a)). Precedent H provides for estimated costs for a number of different headings such as disclosure, witness statements and experts reports, but makes no provision for the costs of any appeals. The form anticipates the inclusion of an estimated figure for unidentified categories of contingent cost (in so far as they can be anticipated at the relevant time), as to which CPR PD 3D para 9 and the guidance notes both give examples such as the trial of preliminary issues and applications for permission to amend, but do not refer to the costs of any appeal.

8. The omission of the costs of any appeal from the categories of anticipated contingent cost contemplated by precedent H is confirmed by the wording of precedent H itself which specifically provides, by reference to the aggregate amount of the estimated costs, that "This estimate excludes VAT (if applicable), success fees and ATE insurance premiums (if applicable), costs of detailed assessment, costs of any appeals, costs of enforcing any judgment and [complete as appropriate]". Likewise, Precedent T, which is required to be used in the event of variation of a budget pursuant to rule 3.15A (see CPR PD 3D para 3(b)), makes no provision for the costs of any appeal and contains the same exclusionary language as appears in precedent H.

9. In *Various Claimants v. MGN Ltd* [2016] EWHC 1894 (Ch) (a case concerned with success fees and an ATE premium), Mann J at [18] concluded that this exclusionary form of words amounted to a clear direction as to what is not to be included as part of the budgeted costs. He pointed out that the form is mandated by PD 3D and so its express contents as to what the form should not include has the force of the practice direction. I agree with this reasoning. It follows that, like success fees, the costs of any appeals are not to be included as part of the budgeted costs within precedent H. Nor, as it seems to me, are they to be included within precedent T in the event of a significant development in the litigation within the meaning of CPR 3.15A.

10. As the costs of any appeal are not to be included in the form of costs budget mandated by the CPR, I disagree with the third party's submission that the defendant was under any obligation to vary its precedent H to reflect the costs of the appeal or that the fact it did not do so has any effect on the way in which the court's discretion ought to be exercised when considering the appropriate cost order to be made in relation to the appeal.

11. The third party made another argument in support of its submission that the general rule should not apply in relation to the costs of the appeal. It said that the just order was for costs in the case, alternatively costs reserved, on the basis that the appeal was finely balanced and that two judges had come to different conclusions on the merits of the application to amend. It is said that the issue of liability for costs could be more justly exercised by the trial judge in light of the outcome of the trial. These submissions were also supported by the claimants

who made the additional point that it was premature to deal with the costs of the appeal, because the costs of the application to amend before the master have not yet been determined (see paragraph 15 of the master's order dated 15 August 2023).

12. I do not agree with either of these ways of putting the case for an order that costs of the appeal should be in the case or reserved. In my view the appeal against the decision of the master to permit the LR amendments was an appeal in respect of which the defendant is the successful party and the claimants and the third party are the unsuccessful parties. I have determined that the claimants and the third party were not entitled to the relief they sought. Even if I had thought that the appeal was finely balanced (and I do not think that is a fair reflection of what I said), I do not think that is a factor of any real relevance in the present case, and certainly not to the extent of ousting the general rule.

13. It follows that, so far as the appeal is concerned, the claimants and the third party are to pay the defendants costs to be assessed on the standard basis.

Costs of the adjournment application

14. The adjournment application was dismissed and the claimants and the third party, both of whom opposed it, submitted that they were therefore successful while the defendant was unsuccessful. They sought their costs of the application, submitting that there was no good reason for the general rule not to be applied.

15. The third party rejected the suggestion that the adjournment application should be treated as an adjunct to the appeal, relied on the fact that the application was made pursuant to what it described as a belated decision, was made in addition to the appeal and was clearly distinct in a number of respects. In particular, it argued that the evidence on prejudice only went to the application (not the appeal) and it pointed out that Mr Smith's eight witness statement was only adduced on the application and significantly expanded the evidence on prejudice adduced on the appeal.

16. Quite apart from the identity of the successful party, the third party (but not the claimants) also made a similar point about the costs of the application to adjourn not being included in the defendant's costs budget as it made in relation to the costs of the appeal. It submitted that the fact that the defendant's costs budget does not reflect the costs of the adjournment application meant that come what may no order for costs of the application should be made in its favour – it relied on the fact that the defendant was in breach of CPR 3.15A by failing to apply to vary its costs budget. It submitted that this followed from the fact that there was no good reason to depart from the approved costs budget (CPR 3.18(b)) and it was not reasonable for the costs of the application not to have been included in the budget so as to be capable of being treated as additional to the approved budget in accordance with CPR 3.17(4) which provides:

> "if an interim application is made but is not included in a budget, the court may, if it considers it reasonable not to have included the application in the budget, treat the costs of such interim application as additional to the approved budgets".

17. The defendant submitted that, in all the circumstances, it is wrong to describe the claimants and the third parties as the successful parties in relation to the adjournment application, because it was dismissed in light of the defendant's success on the appeal, not on its merits. Therefore, it said that it was the successful party, that the claimants and the third party were the unsuccessful parties, and that the general rule should be applied accordingly.

18. In support of this submission, the defendant said that the adjournment application was only made consequential upon the amendment applications. It said that, in light of the clear intention by the claimants and third party to oppose the appeal, it was put in a position of having to apply for an adjournment of the trial to cater for the possibility of the appeal being unsuccessful. It also said that the court should look at the hearing as a whole, both because the application to adjourn was explicitly made as an alternative to the appeal and because the relief sought was opposed by the claimants and the third party on the same grounds as they advanced in opposition to the appeal. The defendant pointed in particular to their allegations that the reason for the late amendments were the delay by the defendant in clarifying its case and the lack of credibility in the defendant's evidence of the prejudice it faced in having to deal with the late amendments, arguments on which the claimants and the third party failed.

19. As to the costs management point, the costs of an application for an adjournment of the trial (unlike the costs of an appeal) are not within the categories of cost which are expressly excluded from inclusion in precedents H and T. However, I do not accept the third party's submissions on the significance of CPR Part 3. The issue which matters is whether CPR 3.17(4) applies, i.e. whether it is reasonable for the costs of the adjournment application not to have been included in the costs budgets. I have concluded that it was. In my view, in light of the urgency of the application due to the imminence of the trial, I think it was reasonable for the defendant not to have included the costs of the application in the budget. No party took that step and, in all the circumstances the justice of the case requires the court to treat the costs of the adjournment application as additional to the approved budgets.

20. More broadly, I think that the defendant is correct in its approach to the costs of the adjournment application for two main reasons.

21. The first is that the appellant's notice in the appeal and the application notice seeking an adjournment were both issued at the same time, seven days after the date of the master's order). It was clear from both notices that the adjournment application was made as an alternative to the appeal, but was required to be heard at the same time because of the proximity of the trial date. This was a reasonable and proportionate approach and I am satisfied that it was made necessary by the delay in making the amendment application for which I have already concluded that there was no good reason advanced by the claimants and the third party.

22. The second is that there was a very close interrelationship between the appeal and the adjournment application which makes it reasonable for costs purposes to look at the question of success by reference to the hearing as a whole, rather than by reference to the separate outcomes of the appeal and the adjournment application. I do not accept the third party's submission in its costs skeleton that the defendant's arguments on prejudice formed a minor and irrelevant aspect of its arguments on the appeal. The inter-connected nature of the two applications was recognised by all parties, including the third party who submitted that the overarching reason for refusing both the application for permission to appeal (and the appeal

itself) and the adjournment application were the same and who relied on an argument that the defendant's case on prejudice lacked credibility because it had not actually applied for an adjournment before the master, limiting itself to an argument that a fair trial would be imperilled if the amendments were to be allowed.

23. In my judgment therefore, justice requires the court to look at the result of the hearing as a whole at which the defendant was plainly the successful party. In all the circumstances, the right order is that the claimant and the third party should pay the defendant's costs of the adjournment application as well as the costs of the appeal.

Payment on account

24. The appeal and the adjournment application took a full day of oral argument. Taking into account pre-reading and the judgment (delivered orally two days later), it falls outside the category of case in respect of which summary assessment would normally be considered appropriate (CPR PD 44 para 9.1). The defendant does not ask for a summary assessment, but instead seeks a detailed assessment with a payment on account. In all the circumstances, I think that a detailed assessment is the just order to make.

25. Where the court orders a detailed assessment, it is required by CPR 44.2(8) to order the paying parties to pay a reasonable sum on account of costs unless there is good reason not to do so. The claimants submitted that I should not make such an order because "an overinflated statement of costs on which it is difficult to place any reliance" provides a good reason not to do so (per Joanna Smith J in *FCA v Papdimitrakopoulos* [2022] EWHC 3048 (Ch)) and this is one such case.

26. I agree with Joanna Smith J that, where the court cannot place any reliance on the costs statement (I pause to note that in *Papdimitrakopoulos* the amounts claimed for a one day hearing were of a wholly different order from the amounts claimed by the defendant in this case), there will be good reason not make an interim order. One reason for this is that the court will normally seek to identify a reasonable sum by make an estimate based on the likely level of recovery subject to an appropriate margin to allow for error in the estimation (*Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm) at [23]-[24]. This is an exercise that the court will have great difficulty in carrying out where no reliance can be placed on the statement as the only material on which it can base that estimate.

27. The defendant's costs statement is substantial, but I do not think that this principle applies in the present case. Although I have no doubt that the amounts certified by the defendant's solicitors will be cut down materially on a detailed assessment, the amounts come nowhere near the "enormous" and "staggering" figures referred to by Joanna Smith J.

28. The total sums certified in the defendant's statements are £66,184 for the appeal and £31,728 for the adjournment application This is to be compared to the claimants' statements certifying £24,762 for the appeal and £28,287 for the adjournment application and the third party's statement certifying £21,032.24 for the appeal and £36,644.16 for the adjournment application. Taken individually, each statement was materially less than the defendant's, but taken together they exceeded the defendant's statement by more than £10,000, a factor of

some relevance given the fact that their arguments on both appeal and application were in substance the same and their positions in the litigation generally appear to be closely aligned.

29. The most significant difference between the parties' statements relates to counsel's fees which were described by both the claimant and the third party as excessive and duplicative. I agree that there is likely to be a significant reduction in the aggregate amount to which the defendant will be entitled on a detailed assessment. Doing the best I can based on the principles explained in *Excalibur*, I think that a reduction of a little in excess of 50% leads to the right figure. I will therefore direct an interim payment of £45,000 in aggregate, to be apportioned if necessary as to £30,000 for the appeal and £15,000 for the adjournment application.