Neutral Citation Number: [2022] EWHC 1132 (Comm)

Case Nos: CL-2019-000412; CL-2020-000432

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2022

Before :
MR JUSTICE FOXTON

- -

Between :

(1) PJSC NATIONAL BANK TRUST **(2) PJSC BANK OTKRITIE FINANCIAL CORPORATION**	**Claimants/ Applicants**
- and -	
(1) BORIS MINTS **(2) DMITRY MINTS** **(3) ALEXANDER MINTS**	**Defendants/ Respondents**
(4) IGOR MINTS **(5) VADIM BELYAEV** **(6) EVGENY DANKEVICH** **(7) MIKHAIL SHISHKHANOV** **(8) MAPLESFS LTD**	**Defendants**

.....
.....

DAVID DAVIES QC and **BIBEK MUKHERJEE** (instructed by **Steptoe & Johnson UK LLP**) for the **Claimants/Applicants**
PHILIP EDEY QC, **SARAH TRESMAN** and **TETYANA NESTERCHUK** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **First Defendant/Respondent**
LAURENCE RABINOWITZ QC, SIMON PAUL and **NIRANJAN VENKATESAN** (instructed by **Enyo Law LLP**) for the **Second and Third Defendants/Respondents**

.....

Ruling on Costs

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.

.....
THE HONOURABLE MR JUSTICE FOXTON

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 13 May 2022 at 10:30am.

Mr Justice Foxton :

1. On 11 April 2022 I handed down judgment dismissing the Banks' applications for permission to amend the Particulars of Claim to allege that the Respondents were precluded from challenging certain findings made in the LCIA Award and for a summary determination of the issues said to be covered by the arbitral findings in the Banks' favour.

2. I have now received written submissions from the parties on the costs orders which are to be made. I have taken the relatively unusual step of setting out my reasons for my costs orders in a reserved ruling, as the applications raise one issue of wider interest.

3. There is no dispute that the Respondents are the successful parties and are entitled to costs orders in their favour. There are two issues which arise:

   i) whether any deduction should be made from the costs awards in the Respondents' favour to reflect legal arguments on which they did not succeed and/or criticisms made of their evidence; and

   ii) the amount of the interim payments on account of costs.

Should the court make any reduction in the Respondents' costs recovery?

4. CPR 44.2(6) provides that the court may order one party to pay a proportion of the other party's costs. It will sometimes be appropriate to make such an order to reflect particular issues raised or arguments run (*Sharp v Blank* [2020] Costs LR 835, [7]). The applicable principles in this context are well-established. It is a rare litigant who succeeds on every point (see the authorities cited in *R (Viridor Waste Management Ltd) v Revenue and Customs Commissioners* [2016] EWHC 2502 (Admin), [9]). The Court of Appeal has warned first instance judges against too great a readiness to reduce costs orders in favour of successful parties on the basis of arguments which did not succeed, particularly where those arguments were alternative routes to the same end (see for example *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790, [62]). However ultimate success does not provide a blank cheque for advancing arguments where it is not proportionate to do so, or in circumstances in which they will engage significant court and party time and resources but are highly unlikely to be determinative.

5. The Banks point to a number of issues or arguments advanced by the Defendants which were not accepted by the court or did not need to be determined. However, I have concluded that there are only two issues which should be reflected in the costs order.

6. The first concerns the witness statements served by the Respondents, which in the case both of D1 and D2/D3 I found unsatisfactory in both content and status, for reasons set out in the Annex to the judgment. The statements appear to have been prepared with a view to saying as little as possible, with as little specificity as possible, and to avoid what it must have been obvious were the real issues. In the case of D2/D3, some of the gaps identified by the Banks were addressed by a late statement for which there was no provision or permission, and which once again sought to reveal as little as possible. D1 sought generally to adopt the statements served on behalf of D2/D3. Statements prepared in this spirit are of limited utility to the court and have the capacity to generate both unnecessary disputes and unnecessary costs – not least because the process of

working out how to say as little as possible can often be even more consuming of legal resource than the preparation of evidence which is appropriately forthcoming.

7. The second concerns the argument advanced by all three Respondents, but the principal burden of which was assumed by D2 and D3, that *Gleeson v Wippell* had been wrongly decided and should not be followed. However interesting that issue is, it was in my view never realistically open at first instance (it will be for others to determine on an appropriate occasion whether it is realistically open in the Court of Appeal). It was not necessary to argue the point out in order to preserve it for a higher court. The argument consumed a significant amount of resource for the hearing. It was addressed at length in the Banks' and (particularly) D2-D3's skeleton arguments. It was responsible for a very significant proportion of the 150 authorities cited to the court. It occupied a significant portion of D2-D3's oral submissions. It was largely the *Gleeson v Wippell* point which caused the hearing to stray so significantly outside its time estimate and led to so much "extra-curial" judicial reading being required.

8. In a Practice Note issued on 29 March 2022, Mrs Justice Cockerill as Judge in Charge of the Commercial Court drew attention to the proliferation of points being argued and authorities being cited in trials and heavy interim applications in the Commercial Court, and the accompanying (unfounded) assumption that judges could be left to follow up points in their "own time", stating:

> "In particular the number of points and authorities being sought to be raised is often – and increasingly – completely out of step with the hearing time listed. The result is that on a number of occasions counsel have either taken submissions at excessive speed (as noted for example in *Libyan Investment Authority v Credit Suisse International* [2021] EWHC 2684 (Comm) [139-140] where experienced transcribers were unable to keep up with the pace of speech) or have sought to conduct legal argument by simply giving the judge a note of key passages in authorities which they would wish the judge to read and consider in depth after the completion of the hearing.
>
> These practices are unacceptable. The lists are always very busy and judges have very limited time available. The oral hearing is the occasion when arguments must be raised and adequately ventilated by the parties. Judges' judgment writing time is limited and is for writing judgments. It is not sufficient to permit of it standing as an extension of the time allocated for oral argument.
>
> Parties should therefore note that:
>
> - Careful consideration needs to be taken to what is to be covered in the hearing time, the pace at which documents/authorities can be taken and the time needed for oral argument on the issues raised.
>
> - This consideration should tend to the number of issues which can properly be dealt with in oral argument and the authorities by reference to which legal issues will require to be delineated (see here also Guide F12.1, F12.4, J5.3).
>
> - Inaccurate hearing estimates may result in a case being stood out of the list (either before the hearing or part heard) and relisted for a realistic time

> estimate with no expedition of the relisting. There may also be costs consequences.
>
> The Judges of the Court would also urge parties - in the interests of proportionate litigation - to give careful consideration to the number of points which are run, whether peripheral points will realistically lead anywhere if the primary points fail and which legal arguments are realistically open for argument at first instance."

9. The *Gleeson v Wippell* argument in this case is a good example of the type of issue to which Mrs Justice Cockerill was referring in the Practice Note, and I am satisfied that it is appropriate to take into account the unnecessary and disproportionate nature of that argument when making costs orders in the Respondents' favour. All three Respondents took the *Gleeson v Wippell* argument, and for that reason I am satisfied that the decision to take the point must be reflected in the costs orders made in favour of D1 as well as D2/D3. However, the clear impression I formed was that this was very much D2/D3's point, and that the majority of time and cost on the Respondents' side in relation to it would have been incurred by them (although the time incurred by the Banks on this issue is fairly attributable to all three Respondents).

10. In deciding what deductions to make to reflect these factors, I have also taken account of the fact that:

    i) The Respondents were overwhelming successful on the applications.

    ii) So far as the *Gleeson v Wippell* point is concerned, it was the decision to pursue the point in the hearing, rather than the investigation of the point, which should be reflected in the costs order.

11. Accordingly, I have concluded it is appropriate to award:

    i) D1 90% of his costs of the applications; and

    ii) D2 and D3 85% of their costs of the applications.

12. The Banks also invite me to order that the costs of the Russian law expert evidence prepared by D2/D3 should be costs in the case. However, Professor Asoskov's report was prepared specifically for the purpose of addressing the Banks' summary judgment application seeking judgment on liability, and the service of the report led the Banks to narrow the terms of that application. The shape and scope of the Russian law evidence at trial is likely to be significantly different from that prepared for the purposes of this application, and I am not persuaded that the preparation of this report in its immediate litigation context is likely to save significant costs at a later stage of the case. The likelihood is that the costs of preparing this report will be "water under the bridge" by that point.

Applications for payments on account

13. Once again the principles are not in dispute. Under CPR 44.2(8), when the court has ordered one party to pay the costs of another party, it will order the paying party to pay

a reasonable sum on account of those costs unless there is good reason not to do so. No such good reason is put forward in this case.

14. In the post-script to my judgment, I noted that the issues raised in the applications required a great deal more time than the two days set aside to do them justice. Even allowing for the fact, however, the costs incurred by the Respondents in respect of these (important) interim applications are noticeably high.

    i) The incurred costs claimed by D2/D3 are some £1.7m, of which counsel fees comprise £570,000 (ignoring VAT).

    ii) The costs incurred by D1 were £417, 000, some £227,000 of which is made up of counsel fees (ignoring VAT).

    iii) By comparison, I am told that the incurred costs of the Claimants, who were making the application, total £414,000. Of that sum, £230,000 represented counsel fees.

15. This is, undoubtedly, major litigation which raises very important issues for the parties, and this is not the occasion for the onset of judicial amnesia as to the level of costs which litigation of this kind can generate. As between the lawyers and their clients, the rates and amounts payable are a matter for negotiation in a market for legal services which offers litigating parties a wide choice. However, the issue of the level of costs which can be recovered from the other party engages different considerations, and a wider public interest. As Leggatt J noted in *Kazakhstan Kagazy plc and ors v Zhunus and ors* [2015] EWHC 404 (Comm), [13]:

> "In a case such as this where very large amounts of money are at stake, it may be entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings. It does not follow, however, that such expense should be regarded as reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and proportionate in that context must be judged objectively. The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party. This approach is first of all fair. It is fair to distinguish between, on the one hand, costs which are reasonably attributable to the other party's conduct in bringing or contesting the proceeding or otherwise causing costs to be incurred and, on the other hand, costs which are attributable to a party's own choice about how best to advance its interests. There are also good policy reasons for drawing this distinction, which include discouraging waste and seeking to deter the escalation of costs for the overall benefit for litigants".

16. This approach ensures that costs recovery in this jurisdiction remains a realistic reflection of the costs of litigation, while protecting the wider public interest to which Leggatt J referred. In arriving at an appropriate figure, the court has the benefit of

guideline hourly rates for solicitors prepared with input from the legal profession, the most recent version of which was produced in October 2021.

17. In this case I am satisfied that there will be real issues in a detailed assessment as to the extent to which these incurred costs are recoverable:

    i) The hourly rates claimed by D2 and D3 are significantly higher than the guideline rates, those by D1 less so, but still in excess.

    ii) D2/D3's solicitor team comprised 8 fee earners.

    iii) I am satisfied that the level of counsel fees incurred by all three Respondents is significantly higher than "the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances".

18. While the amounts recoverable will be a matter for detailed assessment, I have concluded it is appropriate to proceed on the basis that the recoverable costs before allowing for deductions might be of the order of £700,000-£750,000 for D2/D3 and £300,000-£350,000 for D1. Applying the deductions at [11] above, and taking the lower figures, this would reduce these figures to £540,000 and £285,000. I am satisfied that I should order a substantial proportion of those figures as interim payments, because I have a high level of confidence that sums *at least* in the amounts I intend to order will be recovered. Accordingly:

    i) D2/D3 are entitled to an interim payment of £400,000.

    ii) D1 is entitled to an interim payment of £180,000.

19. I understand that the Banks will need to seek a licence under the Russia (Sanctions) (EU Exit) (Amendment) Regulations 2019 to make these payments, and for that reason I order that these amounts are to be paid within the earlier of:

    i) the date when any licence is granted; or

    ii) 42 days.

20. The Banks are required to make a licence application with 7 days of the order, and to notify the Respondents when this has been done. If no such application is made within that period, the Respondents have liberty to apply in relation to the period for payment. The Banks must also notify the Respondents immediately once the outcome of the licence application is known.

21. The other applications made by D2/D3 in relation to the licence process are refused.