Neutral Citation Number: [2023] EWHC 2160 (Comm)

Case No: CL-2023-000133

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, WC4A 1NL

Date: 25 August 2023

Before :

MR JUSTICE BRIGHT

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Between :

Viking Trading OU

Claimant

- and -

Louis Dreyfus Company Suisse SA

Defendant

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- -

Michael Nolan KC (instructed by W Legal Limited) for the Claimants
Jason Robinson (instructed by Hill Dickinson LLP) for the Defendants

Decided on documents, without a hearing

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 25 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE BRIGHT

Mr Justice Bright:

Introduction

1. This judgment arises from an arbitration claim, which arose from arbitration proceedings, which themselves arose from a contract for the sale and purchase of 25,000 mt Ukrainian yellow feed maize.

2. Under the contract, the Defendant ("LDC") was the Seller and the Claimant ("Viking") was the Buyer. The contract was not performed. Arbitration proceedings were commenced by LDC. The ultimate outcome of the arbitration was that LDC's claim against Viking succeeded.

Viking's application of 8 March 2023 for s. 69 permission to appeal

3. Viking sought to appeal on the basis that the arbitrators' decision was affected by various errors of law. On 8 March 2023, Viking issued an arbitration claim form seeking permission to appeal pursuant to s. 69(2) and (3) of the Arbitration Act 1996 and costs, supported by a witness statement from Mr James Sleightholme of its solicitors, W Legal Limited ("W Legal") and a skeleton argument.

4. LDC opposed Viking's application for permission. On 27 April 2023, it served and filed a Respondent's Notice, a witness statement from Ms Amy Glover of its solicitors Hill Dickinson LLC ("Hill Dickinson") and a skeleton argument.

5. Viking served and filed a reply skeleton on 10 May 2023.

6. As is usual, Viking's application for permission was dealt with on documents. I refused the application by an order dated 15 June 2023. That order was sealed on 20 June 2023.

7. Nowhere in its Respondent's Notice, witness statement or skeleton argument did LDC state that it sought to recover its costs. My experience is that most respondents to arbitration claims of this kind indicate that they want costs to be ordered in their favour. Some do not; in those cases, my experience has been that, if the claim is dismissed on documents, that is the end of the matter.

8. My ruling on Viking's application for permission to appeal ordered that the application was dismissed and gave brief reasons, but it gave no other relief. It said nothing about costs. This was deliberate. I was conscious that LDC had not asked for costs and I therefore did not address costs in my order.

LDC's ex post facto costs application

9. Following my order of 15 June 2023, on 4 July 2023, Hill Dickinson wrote to Viking and to W Legal requesting the payment by Viking of damages, interest and arbitral fees, etc. Their letter also sought the costs incurred by LDC in resisting the application for permission to appeal, in the sum of £24,608.50, and attached a schedule of these costs. It stated that if Viking did not pay LDC's costs, LDC would apply to the court.

10. W Legal did not respond to this letter. Viking did respond, by an email of 13 July 2023. In relation to the costs of the application for permission to appeal, Viking noted that my order had not ordered costs in LDC's favour and referred to CPR 44.10(1), stating that

where the court makes an order which does not mention costs, no party is entitled to costs. The email said nothing about the quantum of the costs set out in Hill Dickinson's schedule.

11. On 18 July 2023, LDC made the application to this court that had been presaged by Hill Dickinson's letter of 4 July 2023. This application was made on notice, by a letter from Hill Dickinson, attaching the exchanges of 4 and 13 July 2023 and the schedule of costs, and citing the decision of the Court of Appeal in *Timokhina v Timokhin* [2019] 1 WLR 5458. I was asked to deal with the application on paper, without a hearing.

12. I should add, for completeness, that I was not asked to deal with the costs of this further application, and that the schedule of costs only included costs incurred on dates up to 20 June 2023 – i.e., LDC once again did not appear to be seeking the costs of the instant application.

13. Nothing more having been said by Viking or W Legal, I dealt with that application on 25 July 2023. There were two aspects. The first was whether I had jurisdiction to or should make an order for costs in LDC's favour, having already made my final order on the substantive matter without mentioning costs. The second was quantum.

14. On jurisdiction, I noted that Viking had referred to CPR 44.10(1) and that LDC's answer to this was its citation of *Timokhina v Timokhin*. On quantum, I had less to go on, because Viking's email of 13 July 2023 had been silent on this topic.

15. I made an order for costs in LDC's favour of £20,000. However, as is usual where applications like this are disposed of on documents alone, the order stipulated:

> "This Order having been made without hearing the parties in person or giving them an opportunity to make representations in person, any party affected may apply to vary or set aside this order providing any such application is issued by no later than 4 pm 7 days after service of this order on the party making the application."

16. This order was sealed and sent to Viking on 26 July 2023.

Viking's application of 2 August 2023 to vary my costs order

17. Viking responded within the permitted 7 days, by a letter from W Legal of 2 August 2023 which sought to set aside the order of 25 July 2023. This letter was reasonably long and considered. It proceeded as follows:

    i) Viking's primary position was that my order of 15 June 2023 was a final order which disposed of the arbitration claim in its entirety, so that there were no longer any proceedings before the court and the court was functus officio. I therefore had no jurisdiction to making an order of costs in LDC's favour on 25 July 2023. In this regard, Viking referred to *Daniel Terry v BCS Corporate Acceptances Ltd* [2018] EWCA Civ 2422 per Hamblen LJ at [54] and *Anan Kasei Co. Ltd v Neo Chemicals & Oxides (Europe) Ltd* [2022] EWHC 1643 (Ch), per Bacon J at [7].

ii) Viking further relied on CPR 44.10(1), providing that, subject to paragraphs (2) and (3) (which do not apply) where a court has made an order which does not mention costs, "the general rule is that no party is entitled (i) to costs… in relation to that order".

iii) Viking said that *Timokhina v Timokhin* was distinguishable because (1) the case was still ongoing, (2) the order was made following an urgent application and, while the relevant application was not part-heard, there were related matters that were listed to be heard subsequently, at a hearing where the application for costs was then made, and (3) this was a case under the Family Procedure Rules, which provide that the court may make an order for costs "at any time".

iv) There are various provisions of the CPR pursuant to which a court can re-open an order, but none of them applies here. Viking referred to (a) CPR 52.20; (b) CPR 3.1(7); and (c) CPR 40.12(1).

v) Next, Viking said that Hill Dickinson's costs schedule had not been prepared properly, that the hourly rates were excessive, that the time spent on the case by various fee earners was excessive and that counsel's fees were excessive. Viking said that the costs allowable should be no more than £12,355.60, but this should be reduced again because of the additional work Viking had to undertake because of the deficiencies in Hill Dickinson's schedule.

vi) Viking sought its own costs and indicated that a schedule would be produced. Viking's draft order included provision for costs in its favour, summarily assessed.

vii) The court was asked to deal with the application on documents.

18. LDC responded by a letter from Hill Dickinson of 8 August 2023.

i) The one point of agreement was that I should deal with Viking's application on documents.

ii) LDC said that the court could not be functus officio following the order of 15 June 2023, because (i) s. 51 of the Senior Courts Act 1981 gives the court a general discretionary power in respect of costs, which continues into CPR 44 and is reflected by *Timokhina v Timokhin*, and (ii) it was still open to Viking to seek permission to appeal from that order under s. 69(6).

iii) Cases such as *Daniel Terry v BCS Corporate Acceptances Ltd* and *Anan Kasei Co. Ltd v Neo Chemicals & Oxides (Europe) Ltd* were not concerned with costs.

iv) CPR 62.12 does not say that a respondent must ask for costs if it wants to recover them.

v) On quantum, Viking's email of 13 July 2023 said nothing about the quantum of the costs claimed by LDC. If Viking had taken a point at that stage about quantum, it would no doubt have been possible to reach a compromise.

vi) The reductions now contended for by Viking were excessive.

vii) The court was invited to refuse Viking's application of 2 August 2023. However, if the court were minded to re-assess LDC's costs and make further reductions, LDC would then want to apply on an indemnity basis for the costs of having to respond to Viking's application of 2 August 2023. Thus, if the court were to reduce LDC's costs, it should reserve the costs of the application of 2 August 2023.

viii) LDC enclosed a schedule updating its previous schedule of costs. This covered LDC's costs from 29 June to 7 August 2023, i.e., it included not only the costs of responding to Viking's letter of 2 August 2023, but also LDC's costs of its own application of 18 July 2023 – which LDC had not previously asked for.

19. Viking filed reply submissions on 18 August 2023, along with its own statement of costs in respect of its application. This essentially repeated the points made in Viking's earlier submissions. It also contended that any respondent to an application for s. 69 permission to appeal knows that the application will be dealt with on paper, and, if it wishes the court to order costs in its favour, it is obvious that it should seek such an order.

Did the court have power to award LDC costs, after the order of 15 June 2023?

20. The decision of the Court of Appeal in *Timokhina v Timokhin* is clear on this. While it is true that this was a family case to which the Family Procedure Rules applied, the judgment of King LJ (with the other members of the court agreed) takes the trouble to explain CPR 44.10 in terms that are applicable to non-family cases, at [47] to [53]. In summary:

i) CPR 44.10(1)(a) is exactly what it says – a general rule.

ii) The three exceptions in CPR 44.10(2) are examples. They were included so as to remove the necessity for a specific ex post facto application in the specified circumstances.

iii) However, the court retains a general residual discretion.

21. I agree with LDC that cases such as *Daniel Terry v BCS Corporate Acceptances Ltd* and *Anan Kasei Co. Ltd v Neo Chemicals & Oxides (Europe) Ltd* were not concerned with costs. They do not derogate from or implicitly overrule *Timokhina v Timokhin*.

22. I also agree with LDC that it is not relevant to the reasoning of King LJ that the case as a whole had not yet ended. The order in question was a final order, which (on its face) wholly disposed of the relevant application. King LJ's judgment states that, in such a case, the court nevertheless retains a residual discretion in relation to costs. The existence of that residual discretion necessarily means that (subject to the general rule in CPR 44.10(1)(a)) the court cannot be functus in respect of the exercise of that residual discretion.

23. It follows that the court had the power to award costs to LDC, after the order of 15 June 2023.

The court's exercise of discretion, upon LDC's application of 18 July 2023

24. Decisions about costs are generally discretionary. *Timokhina v Timokhin* states expressly that an ex post facto application such as LDC made on 18 July 2023 is discretionary. Further, because this necessarily involves an exercise of what the Court of Appeal described as "residual discretion", and because the court is being asked to act by way of an exception to the general rule in CPR 44.10(1)(a), no party that finds itself having to make such an application should assume lightly that the discretion will be exercised in its favour.

25. I decided to do so upon LDC's application of 18 July 2023 (i) because it was clear from what LDC said that it had always intended to seek its costs if it succeeded in opposing Viking's application for permission to appeal under s. 69 of the Arbitration Act 1996, (ii) because I was aware that there is no clear guidance as to when and how the respondent to an application for permission to appeal under s. 69 should seek its costs and (iii) because I was conscious that my decision in LDC's favour would be subject to Viking's right to challenge my order within 7 days, so that if Viking wished to suggest that my exercise of discretion had been inappropriate, it would be open to Viking to do so.

26. Having said that, I hesitated before acceding to LDC's application. I agree with Viking that it should be obvious to any respondent that pauses to think about this that, where a matter will be resolved on documents without a hearing, there will be no consequentials hearing at which costs can be debated. There will just be a decision on documents, covering all the points the court has been asked to resolve; then, goodnight Vienna.

27. The policy objective behind deciding short, simple matters on documents without a hearing is to make the process quick, cheap and decisive. If the initial written determination were to be followed in every case by a further series of exchanges and filings on the subject of costs, the incremental effect of this on the overall cost/benefit analysis would be disproportionate, from the parties' point of view. It would also be a very inefficient use of judicial time. The way that this case has continued since 20 July 2023, and the quantum of the costs incurred since then on both sides, illustrates this all too vividly.

28. I therefore saw my exercise of discretion in this case as a close-run thing. I mention this because I would not want any practitioner or litigant who may read this judgment to assume that every respondent who successfully opposes an application for permission to appeal under s. 69 of the Arbitration Act 1996, but neglects to ask for costs when doing so, will invariably receive the benefit of a similar exercise of discretion. On the contrary, they should assume that they will not.

29. In these circumstances, I expected that, if Viking were to make use of its ability to apply within 7 days, one of the things it would be likely to say was that I should have exercised my discretion differently. In the event, however, Viking contended that I had no discretionary power at all (see above) and made points about quantum (see below), but made no real effort to persuade me that, if I had a discretionary power, it should have been exercised differently.

30. I therefore will not alter my decision to exercise my discretion in LDC's favour.

The quantum of LDC's costs of resisting the application for permission to appeal

31. W Legal's letter of 2 August 2023 contained a much more detailed critique of LDC's costs than I had managed by myself. The letter said that the format of LDC's statement of costs was irregular (it did not follow Form N260), the hourly rates were above the guideline rates, there were too many fee-earners, there was duplication, there were excessive hours and counsel's fees were too high.

32. As to these points:

    i) It is right that some of the hourly rates were somewhat above the guideline for a London 2 case (which this is). This is particularly relevant to the two associates who accrued most of the recorded hours.

    ii) I am not persuaded that there were too many fee-earners. My understanding is that a different partner had to look after the case when the main partner was unavailable. The use of several associates and paralegals may well have been necessary to get work done in time, and it may also have enabled work to be done by fee-earners chargeable at a lower rate.

    iii) There was some unnecessary work done – which could be characterised either as duplication or as excessive hours. In particular, LDC submitted a witness statement made by one of the associates on the case; that associate spent 2.1 hours on the witness statement, the other spent 5.7 hours. Its subject-matter was whether the appeal raised questions of general importance, but it contained no factual evidence (as opposed to submissions, including references to authorities) and said nothing that was not also said in the skeleton argument.

    iv) Hill Dickinson's fee earners accrued 2 hours 28 minutes drafting the skeleton argument, and then a further 12 minutes reviewing and updating the skeleton argument. Counsel's fee was £8,000. 12 minutes for Hill Dickinson to review the skeleton argument, once settled by counsel, seems about right: that is roughly how long it took me. But I do not understand how a skeleton argument can be drafted by solicitors and then give rise to a fee of £8,000 from counsel. I suspect that some initial drafting was done by Hill Dickinson, and counsel then began afresh. I understand the educative value in having junior associates undertake drafting, but this is not something that the other party should subsidise.

33. Looking at the position in the round, rather than reducing LDC's recoverable costs to £20,000, as I originally did, a fairer amount would be £17,500 – if these costs had been applied for in an efficient manner, and if this had been the end of matters.

34. However, it was not the end of matters, nor was it likely to be, because LDC's application for costs was made ex post facto and (therefore) in a manner that was not merely inefficient but was bound to cause further inefficiency.

Costs after 20 June 2023

35. The costs incurred by LDC since 20 June 2023 totalled £6,535. The costs incurred by Viking since 20 June 2023 totalled £12,735.90. These figures fall to be compared with

my assessment of LDC's reasonable costs of opposing the original application for permission to appeal – i.e., £17,500.

36. Neither party has even an arguable case to recover all the costs incurred since 20 June 2023: in LDC's case because none of this would have been necessary if LDC had proceeded differently; in Viking's case because much of the work done must have related to the argument that I had no power to award costs to LDC, having not done so in my order of 15 July 2023 – and I have rejected that argument.

37. If I were to accede to the suggestion in LDC's submissions of 8 August 2023 and reserve the costs of Viking's application of 2 August 2023 so as to enable LDC to make an application for indemnity costs, this would mean yet further costs being incurred; and these additional costs would be incurred in a dispute about costs (the costs of Viking's application of 2 August 2023) that was itself a dispute about costs. I do not see how this could be sensible.

38. Viking's application of 2 August 2023 failed on the point of principle that Viking advanced, but achieved a reasonable degree of success on quantum. In these circumstances I struggle to see how LDC could be entitled to its costs of that application, let alone on the indemnity basis. Furthermore, LDC's costs since 20 June 2023 have only been incurred because LDC failed to ask for costs in the first instance.

39. In my judgment, the right course is for me to reduce the costs claimed by Viking (i) to reflect the limited success that it achieved and (ii) to assess the costs downward in the usual way, and then to apply the resulting figure by netting it off against the £17,500 that I would otherwise have allowed to LDC.

40. Bearing in mind that £7,500 of Viking's total costs are counsel's fees, and on the assumption that those fees were disproportionately weighted to the argument that I had no power to award costs to LDC, rather than to the quantum of LDC's costs, the figure that I would otherwise have awarded to Viking would have been £2,250.

41. Applying that figure as indicated results in the award of costs in favour of LDC in the sum of £15,250.

How a respondent should approach costs, on an application for s. 69 permission

42. I have noted above that there is no clear guidance as to when and how the respondent to an application for permission to appeal under s. 69 should seek its costs. I hope that the observations below may assist in future cases.

43. A respondent wishing to oppose an application for permission to appeal under s. 69 of the Arbitration Act 1996 is obliged to incur costs, because CPR PD62 paragraphs 12.6 and 12.7 require the service of a respondent's notice and a skeleton argument of up to 15 pages. However, such a respondent should be conscious of the need to control the costs incurred:

    i) 15 pages for the skeleton argument is a maximum not a minimum. The respondent's skeleton argument can usually be kept shorter than this. Such skeletons are invariably better if kept succinct.

ii) CPR PD62 paragraph 12.8 allows the respondent to serve a witness statement on the points set out in paragraph 12.4, but the costs will only be recoverable if the witness statement was necessary. Such witness statements very often add nothing: as was the case here.

44. If the respondent wants the court not only to dismiss the application but to award the respondent its costs, it should say so in the respondent's notice.

45. In most cases, it ought to be possible to provide a statement of costs either with the respondent's notice and skeleton or very shortly afterwards – not least because ex hypothesi the sums involved should be modest. The level of detail provided should be proportionate to the amounts sought.

46. If for some reason it is not convenient to provide a costs statement prior to the court's decision on permission to appeal, the respondent should say that the statement will be provided later, if required. But the respondent should have in mind that, if the court takes the view that this has unnecessarily caused further costs to be incurred, this will be reflected in the court's decision: as has happened in the present case.