Neutral Citation Number: [2024] EWHC 1481 (KB)

Case No: KB-2022-004857

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2024

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

(1) INVENIA TECHNICAL COMPUTING CORPORATION

(2) INVENIA LABS LIMITED

Claimants/ Respondents

- and –

MATTHEW HUDSON

Defendant/ Applicant

- -
- -

The Applicant appeared in person via CVP
Ram Lakshman (instructed by **Mishcon de Reya LLP**) for the **Respondents**

Hearing dates: 07 February 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 14 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Introduction

1. This is an application by Matthew Hudson, the Applicant, for a payment on account of costs pursuant to CPR r 44.2(8). The Respondents are Invenia Technical Computing Corporation and Invenia Labs Limited. I will refer to the Respondents collectively as Invenia, for convenience.

2. The application relates to the Applicant's claimed costs in responding to Invenia's application dated 21 June 2023 to vary the terms of an electronic imaging order (EIO) made against him earlier in the litigation to which they are parties. He was awarded his costs. The question for me is how much if anything, I should order by way of a payment on account.

3. I am also asked to determine the costs of Invenia's application dated 11 January 2024 for an extension of time for service of its evidence in response to the Applicant's payment on account application because of the Christmas/New Year break which was granted by Master Gidden. The costs of that application were reserved to this hearing.

4. In support of his application the Applicant has submitted two costs schedules and a substantial quantity of evidence, running to thousands of pages. Invenia have also filed a substantial quantity of material. In total, there are well over 5000 pages of material. Although the issues are in some senses fairly narrow, the large quantity of material filed by the parties (some only very shortly before the hearing) has taken time to consider.

5. The amount the Applicant claims by way of costs based on his costs schedules is around £407,900. On any view, this is a huge amount for a limited interlocutory application to vary an order, especially as it ended up being uncontested. The Applicant himself said to me that the variation sought by Invenia was 'narrow'. But he asserts the costs he claims were properly and reasonably incurred, and that there is no good reason why Invenia should not be ordered to make a substantial payment on account.

6. At the core of his costs claim is the assertion that, by having to work on Invenia's variation application, he was unable to work as a business consultant, for which he would have been paid the equivalent of £800 per hour, and that he is entitled to recover that hourly rate for the 'lost' hours he claims (CPR r 46.5(4)).

7. As explained in his ninth witness statement at [46] (hereafter HudsonWS9), the Applicant took advice from a costs lawyer, a Mr Nethercott, who advised that a lawyer would recover between £315,000 and £360,000 on detailed assessment. As I shall explain, the CPR provide that a litigant in person cannot recover more than two-thirds of what a lawyer would recover, giving a range between £210,000 and £240,000. Added to this, says the Applicant, should be added £20,000 by way of a disbursement for an expert's fees (which under the CPR can in principle be recovered in full), giving a range of between £230,000 and £260,000. It is upon the basis of these figures that the Applicant asks me to order a payment on account.

8. If I grant his application, the Applicant accepts that any such payment should operate by way of a set-off against the very considerable sums he owes Invenia by way of costs from earlier litigation in which they were successful. In correspondence leading up to

his application, he sought a 'net payment' of £27,043.25 after the set off. Invenia declined to make any payment.

9. Invenia's position is this. They accept that the Applicant is entitled to an interim payment on account of costs *unless* there is a good reason not to grant one. They say there is such a good reason in this case. They say that the sum claimed by the Applicant bears no resemblance to the sum that he would be likely to recover on a detailed assessment. The hours he has claimed are 'exaggerated and unbelievable, and clearly not reasonable' (fourth witness statement of Mr Persad, Invenia's solicitor, [75] (hereafter PersadWS4)). By way of comparison, they point out the costs owed by the Applicant to them are very considerably less than the sum now claimed by him. As of 13 January 2024, the amount owed by the Applicant including interest was £232,785.04 (PersadWS4, [64]). None of this has been paid. They also say the Applicant's claimed loss of earning capacity caused by him having to respond to the EIO variation application is unsupported by any credible or reliable evidence.

10. They say that the *maximum* sum that the Applicant would be likely to recover on a detailed assessment is £1,900 (and the true figure might be substantially lower). That is made up of 100 hours at £19 per hour, which is the default prescribed rate for litigants in person in the CPR, as I shall explain.

11. Hence, they submit that I should either dismiss the Applicant's application entirely on the basis that his costs schedules are not credible, and consequently any attempt to assess the costs that he would be likely to recover on detailed assessment would be no more than 'a stab in the dark', a phrase used in one of the cases I will discuss later. They say I should leave the matter for a detailed assessment at the conclusion of the litigation. Alternatively, I should limit any payment on account to a proportion of £1,900.

12. As for the costs of their January extension of time application, Invenia say that the extension it sought was granted by Master Gidden and was unreasonably opposed by the Applicant. Thus, they seek an order that he should pay its costs of that application in any event.

Background

13. The First Respondent is a Canadian company that designed and developed software to optimise the efficiency of electricity grids. The Second Respondent is a wholly-owned English subsidiary, and provided research and development services. The Applicant is the former CEO and a director of both Respondents.

14. Taking matters briefly, Invenia's case is that in 2022, following an internal investigation, they concluded that the Applicant had committed various acts of dishonesty as CEO, and had benefitted personally from them. His employment was terminated (although that termination is contested) and he resigned his directorships. Invenia then began civil proceedings against him for breach of fiduciary duty in December 2022.

15. The Applicant firmly denies all allegations of wrongdoing including the matters referred to in the previous paragraph. Suffice it to say, the litigation is strongly contested.

16. By an application dated 15 December 2022, Invenia sought an EIO for the purposes of preserving and preventing the destruction of evidence. The same day, following a without notice hearing, Cotter J granted the application.

17. In broad outline, the EIO required the Applicant to provide named computer specialists with access to his electronic devices and online accounts for the purposes of making copies of them, following which the devices would be returned to him.

18. In his judgment ([2022] EWHC 3459 (KB)), Cotter J found that: (a) there was a strong *prima facie* case that the Applicant had breached the fiduciary duties he owed to Invenia; (b) there was a real possibility that he would destroy evidence if he was notified of the proceedings; and (c) after considering 'carefully the very detailed examples' of his previous destruction or manipulation of documents, such conduct was 'likely to be replicated in the future if the Applicant felt that there was a further likelihood of incriminating documentation worsening his position'.

19. The EIO was to be served on the Applicant by a supervising solicitor. In due course, for reasons I need not go into, Invenia applied for, and were granted, an order for alternative service and a passport order. They claimed the Applicant had evaded service. These were granted by an order of Cotter J following a without notice hearing on 16 December 2022.

20. Invenia say the Applicant continued to fail to comply, and consequently they were forced to apply for a bench warrant, although the Applicant complied with the EIO prior to that application being heard. Invenia allege that during the period in which the Applicant was evading service, he sent remote instructions using an app on his iPhone to erase all of the data on two laptops, which instruction was executed the following day.

21. On 21 December 2022, the Applicant applied to discharge the passport order. That application was dismissed by Bennathan J on the same day and the costs were reserved.

22. On 13 January 2023, the Applicant applied to discharge the EIO based on allegations that Invenia had not properly authorised their solicitors to bring the application and/or that they had failed to comply with their duties of full and frank disclosure.

23. Following a contested two-day hearing on 1-2 February 2023 at which both sides were represented by leading counsel, Adrian Williamson KC (sitting as a deputy High Court judge) dismissed the Applicant's application. He made costs orders in favour of Invenia in relation to the passport discharge application and the EIO discharge application and ordered the Applicant to make a payment of £152,274.75 on account of costs by 4pm on 16 February 2023. This remains unpaid.

24. I now come to the application which has led to the matters before me.

25. By an application dated 21 June 2023, Invenia sought to vary [7] of the EIO so that two of the laptops would be returned to them, rather than to the Applicant, after they had been imaged. Paragraph 7 in its original form stated:

> "If the Independent Computer Specialists remove any Electronic Data Storage Device from the Premises with the Supervising Solicitor's permission, it will be retained safely in the Independent Computer Specialists' custody until the
> requisite Electronic Copies are made. Any Electronic Data Storage Devices shall thereafter be returned to the Respondent [ie. Mr Hudson] as soon as reasonably practicable."

26. The variation sought was as follows:

> "An order that paragraph 7 of the Electronic Imaging Order of Mr Justice Cotter dated 15 December 2022 (EIO) be varied to provide that the Independent Computer Specialists are to release two specified Electronic Data Storage Devices (as defined in the EIO) which they currently hold to the Claimants, who own those devices, rather than to the Defendant, after certain pre-conditions have been met."

27. The basis on which the application was made was, essentially, a contention that the laptops were owned by Invenia rather than the Applicant. On any view, it was a modest proposed variation.

28. On 22 June 2023, Constable J gave directions on the application and ordered the Applicant to file and serve any evidence in response by 4pm on 12 July 2023**.**

29. On 17 July 2023, the Applicant filed and served five witness statements in response to Invenia's application, comprising two witness statements from himself; and three witness statements from, respectively, Sascha McDonald (a former employee of Invenia Labs Limited); Oksana Koval, who helped found Invenia Technical Computing Corporation; and Nicholas Curry, former CFO of Invenia Technical Computing Corporation**.**

30. Despite its modest nature, Invenia took no further steps to progress its application. Consequently, on 15 September 2023, Hill J ordered that unless Invenia confirmed to the Court by 4pm on 29 September 2023 that the application was pursued, it would be struck out.

31. Following that, Invenia initially indicated on 29 September 2023 that they would be pursuing the application**.** However, on 6 October 2023, Invenia informed the Court and the Applicant that they intended to withdraw it.

32. On 10 October 2023, the Applicant filed and served a statement of costs (the first costs statement) which claimed that he had incurred costs of £379,900 in responding to Invenia's EIO variation application. The Applicant also filed and served further witness statements from himself; Mr McDonald; and Ms Koval in support of the costs he said he had incurred and earnings he had lost. For example, [4]-[5] of Mr McDonald's statement (dated 10 October 2023) said:

> "4. As the CEO of Test Tune Limited, I am aware that my firm has sought to engage the Respondent as a sub-contracted consultant over the course of 2023. The Respondent's hourly rate is $1,000 United States Dollars, which we had agreed to round to £800 pounds sterling. With respect to costs of and incidental to the June Application, the Respondent has been unable to accept consulting work due to the time requirements. As such, the financial loss suffered by the Respondent is at minimum £800 pounds sterling per hour.
>
> 5. Having reviewed the schedule of costs, and related hours, over nine months, and given my consulting experience, and experience with Mr Hudson as an upstanding and trustworthy individual, notwithstanding baseless and defamatory comments to the contrary, I can certify that the hours appear reasonable, and the cost calculations appear to be correct."

33. I observe that I do not really think it was for Mr McDonald to 'certify' whether the Applicant's hours were 'reasonable'. This is a point I shall return to later in respect of other evidence filed by the Applicant.

34. On 20 December 2023, Soole J made an order which recorded that: Invenia had withdrawn their application; that he had dismissed it; and that he ordered that the costs of the application were to be paid by Invenia to the Applicant on the standard basis to be assessed if not agreed. The Applicant did not raise the issue of a payment on account of costs at the hearing.

35. On 22 December 2023, the Applicant filed his application for a payment on account (the matter before me). The total costs claimed were £407,900. This was made up of the £379,900 in his first costs statement, and a further £28,000 in a second costs statement. This second figure was stated to comprise costs incurred from 11 October 2023 (ie, after Invenia had confirmed that they were withdrawing their variation application). As I have mentioned, in prior correspondence the Applicant had sought a payment from Invenia, to be set off against the costs he owed, which they had declined to pay.

36. In relation to Invenia's claim for costs arising from its application in January 2024 for an extension of time, this arose when Master Stevens made an order on 28 December 2023 following the filing of the Applicant's payment on account application. He ordered Invenia to file its evidence in response by 11 January 2024.

37. On 9 January 2024, Invenia's solicitors wrote to the Applicant requesting a short, seven-day extension of the deadline from 11 January 2024 to 18 January 2024. The reason was the Christmas/New Year break. which they said had adversely impacted Invenia's ability to prepare their responsive evidence.

38. The Applicant refused to agree to this request, but said he would agree to an extension to 16 January 2024 but only if Invenia agreed to his payment on account application being dealt with on the papers. Invenia declined this suggestion, and made an application to the court. Master Gidden granted the order sought and extended the deadline to 24 January 2024.

Submissions

39. I granted an application by the Applicant, who is a Canadian citizen, to address me via CVP from Canada, where he presently lives. In summary, he submitted as follows.

40. He had not applied for a payment on account when before Soole J because at that time he was unaware of CPR r 44.2(8). When he became aware of it, he made the application.

41. His case in support of his application is predominantly set out in his eighth and ninth witness statements (HudsonWS8 and HudsonWS9), and in other evidence.

42. He said that I should:

    a. determine that there is a good reason to make an order for payment on account of costs in his favour subject to detailed assessment, as he prevailed on Invenia's EIO variation application. Invenia have failed to put forward any good reason why such an order should not be made, and such reasons as they have advanced generally rely on assertions and not on evidence of any probative value. In the alternative, if I do not order payment on account of costs, I should order that the detailed assessment of the costs be commenced forthwith, in order to ensure that he is not prejudiced;

    b. make an order for a payment on account of costs in the range of £230,000 to £260,000, that range being the cap imposed by CPR r 46.5, and taking into account Invenia's failure to engage in ADR and the mediation openly offered by him, as well as their general conduct of the matter, and in particular the serious and prejudicial delays they had introduced. In the alternative, I am invited to ensure the balance of justice considers both the reasonableness of the amount ordered in terms of avoiding an overpayment, with the prejudice which would be suffered by the Applicant were he to be kept out of pocket prior to detailed assessment, and so if a lower amount is ordered to be paid, I am invited to order that the detailed assessment of the costs be commenced forthwith;

    c. order that Invenia pay his costs of and incidental to the payment on his payment on account application, and in the alternative to make no order as to costs on the basis of Invenia's failure to engage in ADR or accept the Applicant's open offer or mediation, and in the further alternative to make any order on the standard basis;

    d. make no order as to costs with respect to the costs of the Invenia's January extension application, based on the evidence provided in HudsonWS9, and Invenia's failure to engage in ADR or accept the Applicant's open offer or mediation, and in the alternative to make any order on the standard basis.

43. He said his hours had been fastidiously recorded on time sheets (to the nearest 15 minutes) and properly evidenced. He referred to 'voluminous' correspondence sent by

Invenia which he said he had had to respond to. He also said that although the EIO variation sought was narrow, his basis for responding to it (and resisting it) was (or would have been, had the application been proceeded with) to set aside the EIO entirely, thus necessitating the very extensive work he was now claiming for. He also said that his claim for lost earnings by way of consultancy fees at an equivalent rate of £800 per hour was properly evidenced and, in particular, supported by witnesses, for example, Mr McDonald. Overall, he said his claim was not fanciful, but is the natural consequence of what happened.

44. On behalf of Invenia, Mr Lakshman submitted as follows. He did not invite me to make any findings of dishonesty (and I clearly said that I could not in any event, without hearing from witnesses who had had the matter put to them). He said the 'real question' was whether I can rely on the Applicant's costs schedules and evidence at this stage, or whether it is better to leave it for detailed assessment. He said that the latter course was clearly right given what he said were obvious question marks over the Applicant's claimed costs.

45. The costs claimed by the Applicant can be broken down into three parts:

    a. £314,600, made up of £286,000 in his first costs statement and £28,000 in his second statement, ie, just over 393 hours at his claimed hourly rate of £800;

    b. £73,300 in fees allegedly owed to a Robyn O'Reilly in relation to 'Consultation & Advisory' services 'including Reading Drafting and Preparation of Documents' and 'Legal Administration Services' as set out in an invoice apparently issued by her on 10 October 2023 and payable on the same date. She is described as 'Lawyer and Accredited Mediator'.

    c. £20,000 in relation to an alleged disbursement made by Ms O'Reilly to an expert, as set out in her invoice**.**

46. In relation to the Applicant's own costs of £314,600, Mr Lakshman said that sum was 'fanciful'. He said it bears no relation to the sum which the Applicant would be likely to recover on a detailed assessment, either in terms of the hourly rate or the hours spent. In particular, in relation to hours, the Applicant has claimed that he spent a total of 393 hours in responding to Invenia's variation application Mr Lakshman said that these figures were unjustifiable. He made the point that work done by the Applicant responding to the variation application by seeking to have it discharged was not reasonable. He made other points about the Applicant's schedules, including, for example, that the claimed number of hours dealing with correspondence (156 hours) could not be justified, when Invenia's solicitors had only written a handful of letters about the variation application. He also pointed to the limited nature of the evidence his clients had filed in support which would have necessitated work by the Applicant.

47. He also said that the Applicant's evidence did not establish that he had suffered financial loss by reason of lost earning opportunities through having to work on the EIO variation application, and not at his claimed hourly rate of £800 per hour. He made some forensic points about the Applicant's evidence on this, which I will return to later.

48. As to the O'Reilly costs (as I will call them), these are not recoverable as she is not (on her own evidence) a solicitor regulated by the SRA, or authorised to conduct litigation, and the work her fees relate to are those which a legal representative would be expected to perform themselves, rather than incurring the costs as a disbursement. Furthermore, and in any event, the sums contained in Ms O'Reilly's invoice are not credible, reasonable or proportionate.

49. As to the expert costs of £20,000 on Ms O'Reilly's invoice, despite the point having been repeatedly raised by Invenia, the Applicant and Ms O'Reilly failed to provide details as to the identity of the expert or what the advice related to. Given these doubts, this amount would be unlikely to be recoverable on a detailed assessment.

50. Hence, he said I should not order any interim payment because any attempt to assess what the Applicant would be likely to recover on a detailed assessment would be mere guesswork. However, if I were minded to make an interim payment order, the order should operate by way of a (modest) set-off against the substantial unpaid costs which the Applicant owes Invenia.

51. As to the costs of the January 2024 extension application, this had been unreasonably opposed by the Applicant but granted by the Master and hence the Applicant should pay the costs of it.

Legal principles

52. I have taken these from Invenia's Skeleton Argument. They are not reasonably in dispute.

53. Where a costs order is made subject to detailed assessment, the court *will* (my emphasis) order a payment of a reasonable sum on account of costs 'unless there is good reason not to do so': CPR r 44.2(8). The principal question before me is whether that exception applies here.

54. Relevant factors that should inform the Court's discretion as to whether to order a payment on account under CPR r 44.2(8) include: (a) the likelihood of the applicant being awarded the costs that it seeks; (b) the difficulty, if any, that may be faced in recovering those costs; (c) the likelihood of a successful appeal; (d) the means of the parties; (e) the imminence of any assessment; (f) any relevant delay; and (g) whether the other party will have any difficulty in recovery in the case of any overpayment: *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), [24].

55. Where the figures claimed in support of a payment on account are lacking in credibility – and as I have said this is Invenia's main argument - then that can provide a good reason for not ordering a payment on account.

56. For example, in *Financial Conduct Authority v Papadimitrakopoulos* [2022] EWHC 3048 (Ch), the court declined to order a payment on account of costs. The judge said at [27]-[31]:

> "27. The First Defendant's Costs Schedule, which I was taken through in some detail, identifies a total figure for the

costs of this one day application as being £518,915.29. I consider that to be an extraordinarily high figure for an application that was made in circumstances where there had been two previous hearings before this court, at which, on each occasion, skeleton arguments were submitted by counsel which dealt with the main issues arising on the strike out application, those issues were issues of law and they were well understood.

28. Mr George identified various aspects of the Costs Schedule which he said simply had no credibility, and I am bound to say that I agree with him. There is an enormous amount of work charged by the senior associate involved (something in the region of 54 working days or 11 working weeks – a staggering amount of time for a one day hearing), which includes a number of conferences taking place in Greece (in respect of which travel and accommodation is charged), where the First Defendant is based. At a number of those conferences, both leading and junior counsel also appear to have been present. I find that extraordinary in circumstances where this application was, as I have said, primarily dealing with a question of law. I do not see why any issues that needed the involvement of, and instructions from, the First Defendant himself could not have been dealt with via a remote platform, at least by some members of the legal team.

29. I also note, as Mr George pointed out, that the fees of counsel for today's hearing, which is a consequentials hearing in respect of which I received a skeleton argument from the First Defendant running to four pages, amount to something in the region of £42,000, and indeed approximately £48,000 has been charged by counsel since the Judgment. That is to be compared with a figure of something in the region of £8,500 for counsel for the Second Defendant, who provided a far more detailed skeleton argument for this hearing. I also note that the rates identified on behalf of the solicitors for the First Defendant are higher than the guideline hourly rates, without any attempt to justify why that is so.

30. All in all, I do not consider that I can sensibly or properly place any reliance on the First Defendant's Cost Schedule, notwithstanding that Mr Brodie has told me that the Costs Schedule was prepared with the assistance of a costs draftsman.

31. In circumstances where I do not consider that I can properly place any reliance on it, I am not prepared to make any award for interim payment based on the Costs

> Schedule. Instead, the First Defendant's costs will go off for a detailed assessment in due course."

57. In *Dyson Limited v Hoover Limited* [2003] EWHC 624 (Pat), the judge declined to order a payment on account. He said at [34]-[36] that such an order 'would be likely to achieve little because the gap left between the parties is so great, and my order would be so clearly a stab in the dark' that it would 'look more like playing roulette, than making an informed and reasoned assessment'. He observed that the costs judge who would carry out the detailed assessment would be in a better position to evaluate the evidence.

58. As to quantum, the amount of a payment on account should be 'a reasonable sum being an estimate of the likely level of recovery, subject to an appropriate margin to allow for error': *Verlox International Ltd v Antoshin* [2022] EWHC 3182 (Comm), [29].

59. In this case, involving as it does a litigant in person, in determining the likely level of recovery, I have to have regard to the principles contained in CPR r 46.5.

60. CPR r 46.5(1) and (2) provide:

> "(1) This rule applies where the court orders (whether by summary assessment or detailed assessment) that the costs of a litigant in person are to be paid by any other person.
>
> (2) The costs allowed under this rule will not exceed, except in the case of a disbursement, two-thirds of the amount which would have been allowed if the litigant in person had been represented by a legal representative."

61. CPR r 46.5(2) therefore operates as an absolute cap on the amount recoverable by a litigant in person: *White Book 2024* at [46.5.1].

62. Under CPR r 46.5(3), a litigant in person may recover:

> "(a) costs for the same categories of (i) work and (ii) disbursements that would have been allowed if the work had been done, or the disbursements had been made, by a legal representative;
>
> (b) payments reasonably made by the litigant in person for legal services relating to the conduct of the proceedings; and
>
> (c) the costs of obtaining expert assistance in assessing the costs claim."

63. As I have already said, the Applicant is claiming costs in relation to: (a) his own work; (b) sums invoiced to Ms O'Reilly for the provision of legal services in connection with the proceedings; and (c) a disbursement in the form of a payment said by Ms O'Reilly to have been for an expert.

64. So far as the amount claimed for work said to have been done by the Applicant himself is concerned, CPR r 46.5(4) provides:

> "(4) The amount of costs to be allowed to the litigant in person for any item of work claimed will be –
>
> (a) where the litigant can prove financial loss, the amount that the litigant can prove to have been lost for time reasonably spent on doing the work; or
>
> (b) where the litigant cannot prove financial loss, an amount for the time reasonably spent on doing the work at the rate set out in Practice Direction 46."

65. The onus is on the litigant in person to prove financial loss. CPR PD 46, [3.2] provides:

> "3.2 Where a self-represented litigant wishes to prove that the litigant has suffered financial loss, the litigant should produce to the court any written evidence relied on to support that claim, and serve a copy of that evidence on any party against whom the litigant seeks costs at least 24 hours before the hearing at which the question may be decided."

66. Where the litigant cannot prove financial loss, s/he is allowed an amount for the time reasonably spent on doing the work at the rate set out in CPR PD 46, [3.4], namely, £19 per hour.

67. In either case, the litigant in person can only claim for time 'reasonably spent on doing the work'. In *Greville v Sprake* [2001] EWCA Civ 234, [38], the Court of Appeal held that a litigant in person's claim for the costs of any piece of work is 'limited to the time which would reasonably have been spent by a solicitor on the preparation of his or her case'.

68. A litigant in person can recover payments reasonably made for legal services relating to the conduct of the proceedings (CPR 46.5(3)(b)). The 'legal services' referred to have to be 'provided by or under the supervision of a lawyer', and a lawyer has to be someone who could be expected to be competent to supply legal services 'relating to the conduct of the proceedings': *Campbell v Campbell* [2018] EWCA Civ 80, [11]. It follows, as Invenia submitted, that a litigant in person is not entitled to recover the costs of legal services obtained from a person who is not qualified to conduct litigation in this jurisdiction, the conduct of litigation being a reserved legal activity under s 12(1)(b) of the Legal Services Act 2007.

69. Hence, where a person who is not qualified to conduct litigation gives legal assistance to a litigant in person, the court has no jurisdiction to award their costs: *White Book 2024*, [4.5.3]. In particular, a litigant in person cannot recover such costs as a disbursement pursuant to CPR r 46.5(3)(a)(ii) because a legal representative could not themselves recover such costs as a disbursement: see *United Building and Plumbing Contractors v*

Kajla [2002] CP Rep 53, [14]; *Agassi v Robinson (Inspector of Taxes)* [2006] 2 Costs LR 283, [73].

70. In relation to disbursements for expert advice, CPR r 46.5(3)(a) allows a litigant in person to recover disbursements 'which would have been allowed if … the disbursements had been made by a legal representative on the litigant in person's behalf'. The recoverability of disbursements claimed by a litigant in person in relation to expert advice is subject to the same restrictions as the recovery of such disbursements by a legal representative. In the case of a costs order on the standard basis, those disbursements must be reasonably and proportionately incurred and reasonable in amount, with any doubt being resolved in favour of the paying party: CPR r 44.3(2).

Discussion

71. I approach the matter on the basis that it is for Invenia to show that there is a good reason not to order a payment on account in this case; in other words, the Applicant is entitled to a presumption that such an order will be made. It is not necessary for me to find dishonesty before deciding that there is such a good reason, as the Applicant submitted.

72. I find that Invenia has shown there is a good reason in this case. The matter can properly be left to a detailed assessment at the conclusion of the litigation. The Applicant will not, therefore, lose out, but will in due course be awarded that which he is properly entitled to. My reasons for reaching this conclusion is as follows.

73. The amount claimed by the Applicant for a simple and (in the event) uncontested variation to the EIO is very high indeed, and that in and of itself provides a reason for leaving the matter to an experienced costs judge to be decided on detailed evidence. It follows that I agree with Invenia that the Applicant's claim for £314,600 for his own costs is unlikely to bear any reasonable relationship to the sum which he will be likely to recover on a detailed assessment, either in terms of the hours spent, or his claimed hourly rate.

74. In terms of the number of hours he asserts he spent, I do not find the figure of 393 hours to be credible. For the avoidance of doubt, I leave aside that the case against the Applicant in the civil proceedings includes allegations of dishonesty, as to which Cotter J found there to be a 'strong *prima facie* case'.

75. Invenia's application was a reasonably limited one, as I have explained. Its evidence in support was comparatively limited (less than 200 pages). The essential contention made by Invenia was merely that two laptops were owned by them rather than by the Applicant and so should be returned to them and not him. Invenia communicated an intention to withdraw the application on 8 October 2023, prior to filing any reply evidence and prior to the application being heard. Whatever the rights and wrongs, the issue was simple.

76. Under these circumstances, as I have said, I find the Applicant's contention that he spent 393 hours responding to the application to lack reality, let alone proportionality or reasonableness, certainly on the basis of the high-level assessment that I am undertaking. I might be wrong, but if so it will be remedied on detailed assessment. The breakdown of the hours claimed, eg, 156 hours on inter-partes correspondence; 62 hours on attendance on others; and 86 hours in reviewing material, comprised of 34 hours under

the heading 'Review of Appellants material' and 52 hours in 'Review of EIO & Related material', only reinforces that conclusion.

77. Take, for example, the hours said to have been spent on inter-partes correspondence. That represents, by itself, nearly four weeks of full time work (at 40 hours a week). As I remarked during the hearing, I would have expected some cogent evidence or explanation about how and why such a large amount of time could have been spent on correspondence, but there is little beyond general assertions. My expectation arises chiefly because Invenia (through Mishcon de Reya) were the only counter-party; they know what they did by way of correspondence with the Applicant on their variation application; they say there were only a few letters ('limited correspondence'); and hence that the hours claimed are 'impossible' (Skeleton Argument, [53.1]). Whilst they do not know what exactly the Applicant did (for example) by way of reviewing documents, they *do* know how much inter-partes correspondence there was, and so can make a reasonable 'guestimate' of what time would have been needed to deal with it.

78. The Applicant attempted to justify in reply his hours by showing me, eg, correspondence from March 2023 onwards about the laptops, three months before Invenia's application was filed, which he said he could properly claim for. I remain unconvinced, and the matter will have to go to detailed assessment. My doubts about these claimed hours naturally lead me to be sceptical about the other claimed hours. For example, he clarified in his response that the 62 hours of 'attendance on others' was just Ms O'Reilly.

79. In addition, the Applicant's second costs statement suggests that he spent a further 35 hours *after* Invenia had communicated that they were intending to withdraw their application (although they did not actually do so until December). Again, I find it hard to understand how the Applicant could have spent that number of hours in relation to an application which Invenia had said they were going to withdraw or that, if indeed he did, it was time which was reasonably and proportionately spent.

80. I understand the Applicant's case that narrow though Invenia's application was, he was planning a 'root and branch' attack (my words) on the EIO by way of response, and would have sought its discharge entirely. That may be so, but I am bound to observe – as Mr Lakshman emphasised - that earlier in 2023 the Applicant had tried and failed to have the EIO discharged at the two day hearing before Mr Williamson KC when he was represented by leading counsel. There must therefore be a question as to what he said he did by way of responding to the variation application was reasonable and proportionate in light of that history. Mr Lakshman said the Applicant was entitled to 'have another go' at discharging the EIO, but it had no bearing on his clients' modest variation application. That may or may not be so but, again, it must be left for detailed assessment.

81. Both sides have served evidence derived from costs experts to justify their respective positions. For example, the Applicant has referred in his reply evidence to advice he has received from Ben Nethercott, a director at NMH Costs Lawyers Limited, that the recoverable costs for a legal representative would be £315,000-£360,000**.** If Ms O'Reilly's claimed costs are included, then this figure is, itself, much less than the Applicant is claiming. Invenia has served evidence suggesting a much lower figure, based upon advice from George McDonald, specialist costs counsel in Lincoln's Inn (see PersadWS4, [104]). That is that the Applicant, if legally represented, would not recover more than £20,000 (excluding VAT) on detailed assessment, meaning that the Applicant

himself (because of the costs cap) could not recover more than two-thirds of this, or a maximum of £13,333.33 (excluding VAT).

82. I did not find this evidence especially helpful, save to the extent that it demonstrates just how wide a gulf there is between both sides (as in the *Dyson* case I cited earlier). I am not in a position to assess who is correct. That can and must be left to the costs judge.

83. It follows overall that on the broad brush approach I have to take, I am not persuaded that the Applicant's claimed hours provide a proper basis for me to make an assessment for the purposes of ordering a payment on account, and that provides a good reason not to order such a payment, or certainly not one of the magnitude that the Applicant is seeking.

84. I am also not satisfied that the Applicant is entitled to the costs he claims because he lost work (my phrase) due to the time he had to spent on this case, which he would otherwise have spent on paid work. As I have explained, the Applicant would only be able to recover his costs in relation to time spent at a rate in excess of £19 an hour if he can prove financial loss. This means he would have to prove: (a) the time he spent in responding to Invenia's EIO variation application would otherwise have been spent on consultancy work; and (b) that consultancy work would have been paid in US dollars at an equivalent rate of £800 per hour.

85. I am sure that Invenia has shown that the Applicant's evidence does not satisfy these requirements.

86. Firstly, although the Applicant's two witnesses other than himself, Mr McDonald and Ms Koval, each referred to his hourly rate, there are reasons to be sceptical of whether their companies could in reality have afforded his fees (see Invenia's Skeleton Argument at [44]). The company's assets seem to have been very limited indeed.

87. There are other reasons to have reservations about this evidence. For example, in his third witness statement of 2 February 2024, Mr McDonald said at [15]-[16]:

> "15. In further support of the Respondent's hourly rate, I can confirm that my company contracted for Mr Hudson's consulting services in February 2023, for which his hourly rate was £800 per hour, exclusive of VAT as I understand his services are not subject to VAT given his Canadian residency. I can also confirm that Mr Hudson billed and was fully paid for his time at the agreed £800 per hour rate …
>
> 16. In further support of Mr Hudson's financial losses suffered as a result of his time which was required for and incidental to the June Application and the Payment Application:
>
> a. I can confirm my understanding that, but for his unavailability due to his commitments related to the June Application and the Payment Application, Mr Hudson would have made £800 per hour through contracts with my firm over the relevant periods. Specifically, I had brief but regular check-ins with Mr Hudson from the spring of 2023 through to this year, including the time

> between 21 June 2023, and 10 October 2023 where the bulk of the costs incurred. During that period I regularly enquired as to whether Mr Hudson was available to work under our previous terms and rates. Throughout that period Mr Hudson confirmed to me that he was unavailable to do this work due to the time required of him related to these legal proceedings and the June Application and subsequently the Payment Application specifically. The hours billed in the Statements of Costs for the June Application and the Payment Application accurately reflect the financial losses suffered by the Respondent.
> …"

88. The assertion by Mr McDonald that his company 'contracted for Mr Hudson's consulting services', and actually paid him the equivalent of £800 per hour, is to be contrasted with the extract from his October 2023 witness statement that I quoted earlier where he merely said his company had 'sought to engage' the Applicant but had been unable to do so. No reference was then made to an actual contract, or actual payment.

89. I observe that these two pieces of evidence do not, on their face, sit easily together. No details of the Applicant's engagement are given, nor any documentation, produced for example, a contract or consultancy agreement. The hourly rate of USD1000 (or £800) is really quite high, so these omissions are striking. There are other forensic points that can be made, such as how Mr McDonald would be in a position to know whether the amounts claimed by the Applicant 'accurately reflect' his financial losses.

90. Taking matters together I therefore find that there are good reasons not to order a payment on account in respect of the Applicant's own claimed costs. To do so would be simply be a 'stab in the dark'. I cannot set any store by the Applicant's hours, or his claim for loss of work.

91. I turn to the claimed costs for Ms O'Reilly's services. She is described on her invoice as 'a lawyer' however she herself makes clear that she is not a solicitor and not registered with the SRA, and does not claim to be authorised to perform reserved legal activities, such as the conduct of litigation: see her first witness statement, [7] ('… I am not a solicitor, nor am I registered with the Solicitors Regulation Authority, nor do I need to be … I reiterate that I am not Mr Hudson's solicitor, nor am I instructed to act as such or otherwise on his behalf.')

92. As I have explained, a litigant in person can only recover (a) the legal costs of instructing a lawyer competent to conduct the litigation; and/or (b) disbursements which would be recoverable by a legal representative. I therefore accept Invenia's submission that the Applicant will almost certainly not recover Ms O'Reilly's costs, given that: (a) she is not a lawyer authorised to carry out reserved legal activities; and (b) her fees as claimed appear to relate to the provision of legal services (described on her invoice as 'Consultation & Advisory – including Reading Drafting & Preparation of Documents'), and a legal representative would be expected to perform such legal services themselves rather than incurring the costs as a disbursement.

93. But even if I am wrong about that, Invenia also put forward other reasons for doubting the credibility, reasonableness and proportionality of Ms O'Reilly's claimed costs, which

I accept. I do not need to go into all of these reasons, but I do note the point that Ms O'Reilly's invoice for £93,300 was issued on 10 October 2023 for payment on the same day. The Applicant told me that Ms O'Reilly has not actually been paid, and there is a contingency arrangement for which he has 'a liability'. That liability is for a very large sum, especially because in July 2023 the Applicant said in a witness statement that he had 'depleted [his] financial resources, to the extent of effective destitution within these proceedings' (HudsonWS2, [7(i)]) (although, as I said earlier, Mr McDonald said that his company had been paying the Applicant £800 per hour earlier in the year). I also regard the claimed number of hours Ms O'Reilly spent (146) is also very high indeed, for the same reasons as given earlier about the limited nature of the EIO variation application. These hours are not further broken down on the invoice and I do not consider I can properly place any reliance upon them.

94. Further, as I remarked during the hearing, some of the tone and content of Ms O'Reilly's witness statement strikes me as unusual, given her asserted role as *not* acting for the Applicant (see above). I asked him whether he had written Ms O'Reilly's statement and he said he had not, and I accept that. He did say, however, that she had used his statements as a 'template'. I bear in mind I have not heard from her. However, a lot of what is in her witness statement does seem to me to smack of advocacy on his behalf, and so to go beyond the bounds of what is properly admissible.

95. At [8] she said (and this is relatively unobjectionable, although given she is unregulated, I do not know, nor did Mr Lakshman, what 'regulations' she is referring to):

> "With respect to my work of and incidental to the June Application, I confirm that the hours and rates as indicated on my invoice of 10 October 2023 [RO-WS1-5] are correct, and in line with relevant regulations and standards, and that the costs stated do not exceed the costs which the Respondent is liable to pay in respect of the work which the statement, and my related invoice, covers. Other expenses and disbursements have been incurred in the amounts stated to be paid to the relevant persons as applicable."

96. However, she then goes on at [14]-[15]:

> "14. The Respondent, acting as a Litigant in Person has had to work diligently as his own legal agent in respect of the June Application. As such, and upon my own review of matters presented herein, related material appropriate for consideration a the detailed assessment stage, and relevant Witness Statements (Notably, of Mr Sascha McDonald), the financial loss suffered by the Respondent as will be proven in detailed assessment if not agreed, is £800.00 pounds sterling per hour for the purposes of CPR 46.5. Further, based on review of the 10 October 2023 and 27 December 2023 Statement of Costs, and related hours of and incidental to the June Application, the hours are accounted reasonably; the cost calculations are correct and the costs are unlikely to be higher than two thirds of what a

> full service firm would have charged - where Mr Hudson is a Litigant in Person - given the multi-jurisdictional and complicated nature of the matter. As such the total amounts contained in those Statements of Costs for the Respondent's time should be generally allowable under CPR 44.5. Without waiving privilege, I also understand that Mr Ben Nethercott, a director and costs lawyer of NMH Cost Lawyers of Silverstream House, 45 Fitzroy Street, Fitzrovia, in London, has been appropriately briefed on the June Application and the detail of the related costs, and his parallel view will be the subject of Mr Hudson's related evidence. [Hudson9]
>
> 15. With respect to the Respondent's costs of and incidental to "the June Application" being reasonable and proportionate (while a matter for detailed assessment if not agreed between the parties); in my observation, the Claimants' conduct related to the June Application has been extraordinarily unusual, and resulted in the Respondent reasonably incurring significant costs dealing with voluminous correspondence, and an assault of heavy-handed legal tactics which rely less on evidence and more on allusory innuendo and unsubstantiated allegations from Mr Persad's team."

97. Further at [18]-[19]:

> "18. As Costs are to be examined in this matter, one might be minded to regard the legal time on fee-earning hours of Mr Persad and his team; while failing to advance this case appropriately or proportionately in regard of mounting costs of fruitless and baseless applications in what currently amounts to no more than a smoke-screen and a litigation by defamation with no corroborative or evidenced basis in fact to date. Mr Hudson's position in being forced to defend himself from the Claimants applications is, in any case, no less valuable for the loss of hi valuable time and opportunities elsewhere (as evidenced); and allowing for the relevant rules to apply.
>
> 19. The Statement of Costs dated 10 October 2023 and 27 December 2023 are therein straightforward, involving the Respondent's time, my time, and one disbursement. To my knowledge, the discount which would reasonably be applied for the purposes of CPR 44.6(8) would not generally exceed 20-30%, as there is limited complexity and uncertainty in the Statement of Costs. For example, despite unsubstantiated suggestions by Mr Persad, I have carefully considered my time and can confirm to the Court that there has been no material and/or disallowable 'duplication' of work between

> myself and Mr Hudson. Further, as evidenced by the Claimants' own statement of costs for related matters, it is clear that the Court that MdR's cost were on the order of £445,000 for similar work. [RO-WS1-12] It should therefore be reasonable for the Court to order a payment on account of costs subject to detailed assessment to be made by the Claimants to the Respondent on the order of 75% of the statements of cost. In that case, Mr Hudson's payment would be c. 48% of what solicitors have submitted for similar work in these proceedings. I understand that Hudson9 will discuss the ⅔ cap dictated by CPR 44.5(2), but I note that CPR 44.5(2) does not provide for any discount the £20,000 disbursement element of my invoice on account of Mr Hudson's status as a litigant in person. While a further discount might be appropriate in circumstances with numerous fee-earners above the guideline rates concurrently working on other elements of the case, I do not believe it would be reasonable in this case."

98. Her criticisms of Invenia's lawyers are curious, given her stated role. I also cannot easily see how Ms O'Reilly could be in a position to say whether the Applicant's costs are 'accounted reasonably'. That is not for her to say.

99. Ms O'Reilly's invoice makes provision for a disbursement of £20,000 for 'expert advice'. The Applicant told me that this was for research on Canadian law, but that he did not know the name of the expert. He said it was Ms O'Reilly who had engaged the expert and written his instructions and paid him (so the Applicant 'understood'). He said he had agreed the expert's fee via Ms O'Reilly, but without knowing who it was. I found all of this to be very curious.

100. I am not persuaded on the material before that this claimed disbursement would be likely to be recoverable, given all these question marks about it.

101. I therefore decline to order a payment on account based on Ms O'Reilly's invoice. There is a good reason not to do so, for the reasons I have explained.

102. I have considered whether I should order a payment on account based upon the litigant in person rate of £19 per hour. I consider that I should not. I do not consider I am in a position to make a sensible assessment of the number of hours upon which such a payment should be based given all the doubts I have outlined. Further and in any event, as Mr Lakshman said, to do so would serve little or no purpose given the huge outstanding costs the Applicant owes and the set-off, which he accepts.

103. For these reasons I decline to make any payment on account and the matter will go off for a detailed assessment at the conclusion of the litigation in the normal way. As for the Applicant's points about what he says was Invenia's conduct, and (for example) its failure to engage in ADR or mediation, if this is relevant to the payment on account application, suffice it to say I consider given the huge figures being claimed by the Applicant that it was entitled to take the stance it did. I decline the Applicant's invitation that I should order a detailed assessment now. Matters can take their normal

course. There will no doubt be much further litigation and costs orders made, and they should be dealt with together at the end.

104. I turn, finally, to the costs of Invenia's January application for an extension of time. I can deal with this more briefly.

105. The Applicant refused to agree to Invenia's request for a modest extension of time for the service of its evidence in response to his application for a payment on account, the period in question having encompassed the Christmas/New Year break. They wrote in a letter dated 9 January 2024:

> "4 As outlined in paragraph 5(1)(e) of Our Letter [of 13 December 2023], several members of our firm, as well as members of Invenia, including Invenia's interim CEO from whom we take instructions, were on leave during the period from 25 December 2023 to 5 January 2024. This has impacted the Claimants' ability to prepare their evidence in reply.
>
> 5. In light of the above, the Claimants request your agreement to a short seven- day extension for the filing of any evidence in reply to 4pm on Thursday, 18 January 2024."

106. As I said earlier, the Applicant refused to consent.

107. That refusal necessitated an application to the court for an extension, which was granted by Master Gidden (in fact until later than the period sought by Invenia). In these circumstances I consider that the Applicant should pay Invenia's costs of the application, for the following reasons.

108. In *Denton v TH White Ltd* [2014] 1 WLR 3926, [43], the Court emphasised that an unreasonable refusal to agree to an extension of time should be punished in costs. I consider that the Applicant's refusal was unreasonable. He said it was not, but I disagree. He was prepared to agree a short extension, but only if Invenia agreed his payment on account application be dealt with on the papers. They refused. They were entitled to do so, given what was at stake. Even if they had agreed, it is highly unlikely that any judge would have dealt with the application without a hearing, given the sums of money being claimed.

109. I understand that this litigation is hotly contested. But as I said during the hearing, civil litigation in the modern era requires parties to behave reasonably and that may include, on occasion, agreeing to requests for short extensions of time by the other side even if they are not especially happy to do so. Fighting a war of attrition over every inch of ground is unreasonable and not the way civil litigation should be conducted. The extension sought in this case related to a minor sub-branch of the litigation. The extension sought was modest; good reasons had been put forward; there was no prejudice to the Applicant; and Master Gidden granted it in any event. Costs should therefore follow the event.

Conclusion

110. I will deal with costs (and any other consequential matters) by way of written submissions. Invenia must file and serve their submissions and a draft order within seven days of receiving this judgment in draft. The Applicant must file and serve submissions in reply, and any observations on the draft order seven days thereafter. I will then deal with the matter on the papers.