Neutral Citation Number: [2022] EWHC 1814 (TCC)

Case No: HT-2021-000478

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

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

Date:14/07/2022

Before :

VERONIQUE BUEHRLEN Q.C.
(Sitting as a Deputy High Court Judge)

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Between :

INNOVATE PHARMACEUTICALS LIMITED	**Claimant**
- and –	
UNIVERSITY OF PORTSMOUTH HIGHER EDUCATION CORPORATION	**Defendant**

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Thomas Roe Q.C. and Katharine Bailey (instructed by JMW Solicitors LLP) for the **Claimant**
Clare Dixon Q.C. (instructed by Eversheds Sutherland (International) LLP) for the **Defendant**
Hearing date: 14 June 2022

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JUDGMENT ON COSTS

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment will be 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 Thursday 14 July 2022 at 10.30am

<u>VERONIQUE BUEHRLEN Q.C.</u> (Sitting as a Deputy High Court Judge)

1. On 1 July 2022 the Court handed down judgment dismissing the Defendant's application for security for costs dated 18 November 2021 made pursuant to CPR rule 25.13 ("the Application"). In short, the Defendant lost the Application because I found that the Claimant had a high probability of success in relation to certain of its claims arising out of the publication of the Cancer Letters Paper. That said, the Claimant failed to make good its case that the ATE Policy it had obtained was an answer to the Application. As part of that judgment I invited the parties to provide short written submissions on costs.

2. The Defendant filed its submissions on costs on 6 July to which the Claimant responded on 8 July 2022. Although the Defendant did not have permission to do so, the Defendant filed a further short response to the Claimant's submissions on costs on 11 July 2022. I have allowed those submissions given their brevity and the fact that had the issue of costs been dealt with orally rather than on paper, Ms Dixon Q.C. would have had the opportunity to respond to Mr Roe Q.C.'s submissions.

The incidence of costs

3. In summary, it is the Claimant's case that the costs should follow the event in accordance with the general rule as to costs (under CPR Rule 44.2(2)(a)) and that, accordingly, the Claimant should pay the Claimant's costs of the Application.

4. The Defendant, on the other hand, asks the Court to make an order that:

   (i) The Claimant do pay the Defendant's costs of the Application up to and including the hearing on 24 May 2022; and

   (ii) The Defendant do pay the Claimant's costs of the Application from 25 May 2022.

5. In support of its proposed order, the Defendant submits that:

   (i) Absent any amendment to the Particulars of Claim, and the Claimant's reliance on its amended case for the purpose of defending the Application, the Application would have succeeded;

   (ii) The Defendant was, therefore, initially right to make the Application and pursue it; and

   (iii) The Defendant only became wrong to pursue the Application when it should reasonably have appreciated that it would lose the Application. This was, at the earliest, when the Claimant relied upon the new case pleaded in the Amended Particulars of Claim in order to oppose the Application on merits grounds.

6. The appropriate date on which the incidence of costs should change is said by the Defendant to be 24 May 2022, that being the date of the Costs and Case Management hearing at which the Application was originally due to be heard and a few days after the Claimant filed its evidence in response to the Application (on 18 May 2022).

7. The Defendant also points to the fact that the Claimant lost on the issue of the ATE Policy and submits that the Claimant's conduct of the Application has been "at best, unhelpful and, at worst obstructive". As to the latter submission, the Defendant points to the history of the Application, to the Claimant's failure to engage, prior to or following the issue of proceedings, with the Defendant's requests for information in respect of security for costs, repeated promises regarding the submission of evidence in response to the Application which it failed to adhere to and reliance on an ATE Policy which it did not obtain until the eleventh hour.

8. In response, the Claimant submits that:

   (i) The Application was not decided on the basis of an amendment to the Particulars of Claim and that it is incorrect to contend that the Application would have succeeded but for the proposed amendments;

   (ii) The ATE Policy was produced as soon as it was obtained and the criticisms that the policy should have been obtained sooner have already been given effect to in the Court's costs order made at the CCMC.

9. The Claimant further submits that the appropriate order for costs is for the Defendant to pay the Claimant's costs of the Application on the basis that:

   (i) The Claimant was wholly successful, and CPR Rule 44.2(4)(b) ought therefore to apply;

   (ii) It was not reasonable for the Defendant to contest the issue of whether the Claimant was highly likely to succeed at trial;

   (iii) The conduct of the Defendant included "a steadfast and unreasonable failure to attempt mediation" constituting unreasonable conduct within the meaning of CPR rule 44.2(4)(a); and

   (iv) The Defendant acted unreasonably in not disclosing its own investigation report, a report that played an important part in the Defendant's failure to make good the Application.

10. The Court has a broad discretion as to costs as to which CPR Rules 44.2(1), (2) and (4) to (7) provide as follows:

44.2—(1) The court has discretion as to—
(a) whether costs are payable by one party to another;
(b) the amount of those costs; and
(c) when they are to be paid.

(2) If the court decides to make an order about costs—
(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
(b) the court may make a different order.

…

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes—

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction—Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

(6) The orders which the court may make under this rule include an order that a party must pay—

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment.

(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.

11. As is expressly provided for by CPR Rule 44.2(2) whilst the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, it is open to the Court to make a different order. I have come to the conclusion that the circumstances of this particular application are such as to justify the making of a different order.

12. Ms Dixon Q.C. is correct that the Defendant lost the Application because I found that the Claimant had a high probability of success in relation to the Claimant's causes of action based on the Cancer Letters Paper but that those causes of action did not form part of the Claimant's Particulars of Claim and only came to the fore with the Claimant's application to amend. As is submitted by Ms Dixon Q.C. the Particulars of Claim relied solely upon representations made by Dr Hill to the Claimant in August 2018 for which the Defendant was said to be liable in deceit, negligent misstatement and/or breach of contract. References made to the Cancer Letters Paper in the

Particulars of Claim were made for the purposes of evidencing the falsity of the August 2018 representations complained about and not to found a separate cause of action. The claim to the effect that Dr Hill had misrepresented the results of the Research Programme upon the publication of the Cancer Letters Paper on 28 August 2019, which was at the heart of the reasons why I dismissed the Application was not introduced into the proceedings until the Claimant's Application to amend its Particulars of Claim dated 11 May 2022.

13. Mr Dixon Q.C. is also correct in submitting that but for the Claimant's amended case, the Defendant would most likely have succeeded in its Application and that it was reasonable for the Defendant to make the Application and pursue it until it had a proper opportunity to assess and review the Claimant's amended case. Further, I also accept Ms Dixon Q.C.'s submission to the effect that the Claimant's conduct did not assist in resolving the matter. Notably, prior to making the Application, the Defendant repeatedly sought financial information from the Claimant which the Claimant did not provide. Not surprisingly, the Defendant therefore issued the Application on 18 November 2021. The Claimant then failed to file its evidence in reply to the Application until 18 May 2021 a matter of days prior to the CCMC at which the Application was originally due to be heard and leaving little time to avoid a hearing of the Application. Further, although the Claimant referred to obtaining an ATE policy in September 2021, the Claimant then failed to provide a copy of a policy to the Defendant until 8 June 2022. The delays on the part of the Claimant in properly addressing the Application will undoubtedly have contributed to increased costs. Contrary to the Claimant's submission, the costs order made at the CCMC did not address those costs since it did not address the costs of the Application. Further, a significant proportion of both parties' costs will have been incurred in connection with the issues surrounding the existence and scope of cover provided by the ATE Policy – matters on which the Claimant failed.

14. I therefore agree with Ms Dixon Q.C. that account should be taken of the fact that the Defendant was reasonably pursuing a meritorious application until the introduction of the Claimant's amended claim, of the Claimant's conduct of the Application and of the fact that the Claimant failed on the issues arising out of the ATE Policy. However, I do not consider, taking all those circumstances into account, that the appropriate date on which the incidence of costs should change is 24 May 2022. That would result in a situation in which the Defendant recovered the majority of its costs of the Application including all its hearing costs despite the fact that it was aware of the Claimant's amended case based on the Cancer Letters Paper from 11 May 2022 onwards. Further, in my judgment where factors such as the Claimant's conduct and its failure to make good its case in respect of the ATE Policy are also factors it would be somewhat arbitrary to seek to pick a point in time when the incidence of costs falls to be reversed.

15. Mr Roe Q.C. also sought to rely on the fact that the Defendant refused to mediate prior to the hearing of the Application. Mediation was proposed by the Claimant on 6 December 2021. The Defendant responded on 20 December 2021 refusing to mediate

until after the CCMC at which the Application was due to be heard. The Claimant proposed mediation again in a letter dated 26 May 2022, that is post the CCMC but again that was refused by the Defendant in its letter dated 6 June 2022. The Claimant submits that this was unreasonable conduct on the part of the Defendant. I do not think that the Defendant's refusal to mediate prior to the hearing of the Application can be categorised as unreasonable conduct. All sorts of factors are relevant to a party's decision to mediate and when to do so with the best chance of a successful outcome. Moreover, it is not because a mediation might have taken place that the costs of the Application would have been avoided.

16. Similarly Mr Roe Q.C. sought to rely on the Defendant's failure to disclose the Disciplinary Panel's report into the conduct of Dr Hill as evidence of unreasonable conduct on the part of the Defendant. I think there is some force in that submission. Whilst I would not go so far as to conclude that the Defendant's conduct in not disclosing the report was unreasonable, I consider that a proper consideration of the report might well have caused the Defendant to reconsider the merits of the Application. However, in the event it was only because a draft of the report was provided by Dr Hill to the Claimant that this key evidence came to be before the Court at the hearing of the Application on 14 June 2022.

17. Further and significantly, the fact remains that the Claimant was successful in resisting the Application on the merits. Taking all the above factors into account and keeping well in mind the fact that the Claimant was ultimately successful on the Application, I have come to the conclusion that the fair outcome looking at the matter in the round is that there should be no order as to costs and that accordingly each party should bear its own costs of the Application.

18. The order ought therefore to record that the Application is dismissed with no order as to costs. I would be grateful if counsel for the Defendant could draw up the order accordingly.