



FSD NO: 88 OF 2019 (RPJ)

RITCHIE CAPITAL MANAGEMENT L.L.C. et al

PLAINTIFFS

AND

DEFENDANTS

(1) LANCELOT INVESTORS FUND, LTD
(2) GENERAL ELECTRIC COMPANY

Before: The Hon. Justice Raj Parker

Heard: On the papers

Draft Ruling Circulated: 12 February 2021

Ruling Delivered: 4 March 2021

HEADNOTE

Indemnity costs - GCR Order 62 r.4 (11)-foreign lawyers fees GCR Order 62 r.18 (1) - Practice Direction No 1 2001 - interim payment GCR Order 62 r.4 (7) (h) - interest on costs GCR Order 62 r.4 (7) (g).

Costs

Introduction

1. By its judgment and subsequent order handed down on 21 December 2020 the court granted GE's application to set aside the order made on 28 June 2019, giving Ritchie leave to serve GE out of the jurisdiction and ordered that Ritchie pays GE's costs of and occasioned by these proceedings.
2. This judgment follows written submissions by Ritchie and GE in response to the application by GE by summons dated 4 January 2021 for an order that:
 - a) Ritchie pays GE's costs on the indemnity basis;
 - b) dispensation (if required) for GE to recover fees paid to foreign lawyers



- not engaged to give an opinion on a point of foreign law;
- c) Ritchie makes an interim payment on account of GE's costs; and
 - d) Ritchie pays interest on GE's costs.

Indemnity costs

3. The court has discretion to order costs on the indemnity basis pursuant to GCR Order 62 rule 4 (11) only if it is satisfied that a party has conducted the proceedings improperly, unreasonably or negligently¹. Unreasonable or improper in this context does not mean merely wrong or misguided in hindsight².
4. The nature of such an order is exceptional, although the jurisdiction to make such an order is wide and flexible, allowing the court to exercise its discretion as the circumstances of the case may require³.
5. The case law on the award of indemnity costs is unsurprisingly fact and case specific.
6. The assessment is not always divorced from the merits, as can be seen where the court has determined that a case has been pursued which is manifestly hopeless⁴, or where it must have been appreciated to be very weak and highly speculative⁵.
7. The court in those cases was looking at a party conducting proceedings in the face of the apparent hopelessness of the case, which was regarded as unreasonable or improper in the circumstances. The focus was however on the party's conduct, not the intrinsic merits of the case.
8. Examples of the conduct of proceedings falling into the exceptional type of case where an award of indemnity costs has been made, include where 'root and branch' opposition is pursued taking "every conceivable argument" especially if the case is an inherently weak one⁶ and where allegations of dishonesty are made, to avoid the "obvious injustice" of being out of pocket by being forced to defend "ill considered and unmeritorious allegations of fraud and conspiracy".⁷
9. The question for the court is whether a party has conducted the proceedings in such a way that takes it out of the norm so that a punitive measure of taxation should be applied⁸. Put another way, was the case conducted improperly,

¹ *Wood v James CICA (Unreported, Appeal No 1 of 2020, 30 July 2020)*

² *AHAB v SAAD [2013] (2) CILR 334 per Smellie CJ § 17*

³ *AHAB v SAAD [2012] (2) CILR 1 §§ 9-12 per Smellie CJ*

⁴ *Bennett v AG [2010] (1) CILR 478 §§6-9 Henderson J*

⁵ *Wood supra per Field JA §80 and Three Rivers District Council v Governor and Company of the Bank of England [2006] 5 Costs LR 715*

⁶ *Re BDO [2018] (1) CILR 187 at § 16 Parker J*

⁷ *Sagicor v Crawford [2008] CILR 482 § 7 Henderson J*

⁸ *Talent Business v China [2015] (2) CILR 113 §§ 35-41*



unreasonably, or negligently to a sufficiently high degree to merit a mark of disapproval by the court⁹?

10. Pursuing a novel claim or one which is not likely to succeed is not enough¹⁰. If that were the case indemnity costs orders would not be exceptional.
11. It is only if it can be properly said that the case was manifestly hopeless and should have been appreciated to be so (not with the benefit of hindsight), or where a party's conduct has been sufficiently unreasonable to a high degree that such an award would be made¹¹.
12. I have carefully examined the reasons GE puts forward as to why it would be appropriate to award indemnity costs in this case and have come to the view that it would not.
13. My short reasons on the points advanced by GE are as follows:

Issue estoppel

14. The issue estoppel case was not in my view manifestly hopeless. It was complex as can be seen from the judgment and from the evidence given by two respected and highly experienced US judges who could not agree. It was not improper or unreasonable for Ritchie to have disputed this issue, even though it had previously litigated its claims against GE to an adverse conclusion in the SDNY proceedings and even though it ultimately lost the argument.

Full and frank disclosure

15. The failures to comply with the duty of full and frank disclosure come much closer to the circumstances in which indemnity costs could be awarded. The failures did in the result cause GE to expend considerable time, effort and cost ascertaining that which should have been presented by Ritchie and having to make the application to set aside. The court recognises that the duty when applying for permission to serve proceedings on a foreign defendant *ex parte* in complex cases like this can be onerous, but there are no excuses, and it must be complied with¹².
16. However whilst these failures to comply with the duty would have resulted in permission being set aside without more, the court came to the conclusion that the breaches were not deliberate.

⁹ *AHAB v SAAD supra §11*

¹⁰ *Sagicor supra §§25-26*

¹¹ *Bennett supra §§6-9*

¹² *Fundo Soberano de Angola v Dos Santos [2018] EWHC 2199 (Comm) § 50 Popplewell J*



17. Notwithstanding GE's argument that had the duty been complied with it would not have had to incur the costs of having permission set aside, I have decided this factor alone does not justify an award for indemnity costs.
18. I have carefully considered whether the breaches in this regard were of a sufficient nature and degree to fairly amount to conduct which is improper, unreasonable or negligent, so as to justify such an award.
19. I am not satisfied that they amount to such conduct.
20. Had they been deliberate this would clearly require a mark of disapproval and an award of indemnity costs would have inevitably followed.

Any one of GE's challenges would have sufficed to set aside permission

21. Ritchie should not be penalised for fighting on the multiple issues presented by GE's case, even if it can now be seen that any one of the grounds of challenge would have sufficed for the order to be set aside. Within those issues presented by GE, although the court decided all of them in GE's favour, none of the challenges by Ritchie can be fairly said to have been manifestly hopeless and should have been appreciated by Ritchie so to be.

Ritchie's litigation conduct was unreasonable and increased costs

22. GE's complaints about manner in which Ritchie litigated the dispute: taking every conceivable point, failing to comply with procedural deadlines without explanation, and deluging the court with vast amounts of factual and expert evidence, in some instances without permission, are not shown to have occurred to the satisfaction of the court so as to warrant an award of indemnity costs.

Serious allegations of dishonesty were made against GE

23. Whilst Ritchie did exhibit material from litigation in which experts concluded that the conduct of GE's employees amounted to fraud, these were not allegations pursued against GE on this application, but was responsive evidence to a challenge to Ritchie's underlying claims.
24. GE's application that Ritchie pay its costs on the indemnity basis is dismissed.

Foreign lawyer legal fees dispensation

25. By GCR Order 62 rule 18 (1) work done by foreign lawyers may be recovered on taxation on the standard basis provided that the foreign lawyer has been temporarily admitted as an attorney and the work was done after he/she was admitted.



26. Whilst the costs of foreign lawyers are in principle recoverable, further limitations on what may in fact be recovered are imposed by subparagraphs (2) – (7).
27. The overriding principle is that a paying party should not be required to pay more because the successful party has engaged a foreign lawyer than he would have been required to pay if the successful party had employed only local attorneys (subparagraph 7).
28. Practice Direction No. 1/2001 ‘Guidelines relating to the Taxation of Costs’ (**the PD**) is also relevant.
29. §6.4 provides that
- "Legal fees paid to foreign lawyers cannot be claimed as disbursements unless the foreign lawyer is engaged to give an opinion on a point of foreign law which is in issue in the proceedings".*
30. §9.4 provides that:
- "Travelling and hotel expenses paid to foreign lawyers shall not be recoverable on taxation".*
31. In *General Shopping*¹³ Kawaley J having reviewed the Practice Direction and *Sagikor*¹⁴ said at § 24:
- "Read in the light of the restrictive terms of the Practice Direction, Sagikor (ibid) supports the following principle. If the receiving party wishes to displace the usual rule of practice that **foreign lawyers' fees (and hotel and travelling expenses) are only recoverable where the lawyer is giving an opinion as to foreign law, not to mention the restrictive policies in GCR Order 62 rule 18 (3) to (7) aimed at avoiding duplication of effort, an application for a dispensation from the usual approach should ordinarily be sought before the costs order is actually made.**" (my emphasis)*
32. Both *Sagikor* and *General Shopping* were dealing with foreign lawyer fees in the context of costs awarded on the indemnity, not the standard basis which will apply in this case.
33. I do not however take Kawaley J to have meant that there is no jurisdiction under Order 62 rule 18 (1) for the court to allow a party to recover costs in respect of work done by foreign lawyers. That power is clearly given by Order 62 rule 18 (1) but may be limited by the practice in the PD.

¹³ Unreported 25 August 2020

¹⁴ [2008] CILR 482 Henderson J



34. As a matter of practice to the extent that dispensation from the usual approach is necessary I am minded to follow Kawaley J's lead and give it, insofar as it relates to foreign lawyer costs.
35. The case involved an enormous factual inquiry going back many years and was of some United States legal complexity. I accept that it was in the circumstances appropriate for GE to engage foreign lawyers as well as local attorneys.
36. The case was closely connected with the United States where there had been considerable litigation over many years concerning the same issues in different courts. It was therefore reasonable for GE to instruct the local attorneys in the Cayman Islands to have recourse to the knowledge of its US attorneys from the prior litigation.
37. Furthermore, complex US expert evidence was given and it was not unreasonable in those circumstances for GE to be represented by local attorneys with some additional input from US lawyers in order to evaluate the US law issues and instruct GE's own expert and review the US law expert evidence put forward by Ritchie's US law expert.

Interim payment on account

38. Under GCR Order 62 rule 4 (7) (h) where the court orders that a party must pay costs subject to taxation, it may order that a reasonable sum on account of costs be paid, such sum to be assessed summarily.
39. The starting assumption is that an interim payment should be made in order that the successful party ought to get it as soon as possible and that it is not a good reason to delay that time is needed to work out the total amount which may be due¹⁵. The matter is in the discretion of the court. For example, it is not appropriate to award an interim payment in circumstances where it would stifle an appeal¹⁶.
40. As to the amount of any interim payment, the court should determine, not the irreducible minimum that is likely to be ordered, but a reasonable estimate of what is likely to be awarded. It should take a conservative approach which allows for reduction on taxation even if the instinctive feeling of the court was that the impugned claim was not unreasonable¹⁷.
41. Although Ritchie is in the process of seeking leave to appeal the judgment, it does not oppose the making of an interim payment. It accepts that its arguments as to

¹⁵ *Mars v Teknowledge* [1999] 2 Costs LR 598 per Jacob J and Al Sadik supra per Kawaley J § 25

¹⁶ *BDO supra per Parker J* §34 and §§37-38 and Al Sadik supra Kawaley J § 25

¹⁷ Al Sadik supra per Kawaley J §26-27

the overall fees (which it says are outrageously high) incurred by GE are a question for taxation, absent agreement.

42. Having reviewed the evidence of Mr Burgess-Shannon and Mr Smith¹⁸, I have come to the view that an interim payment of US\$500,000 is a reasonable sum on account of costs and should be paid within 28 days¹⁹.
43. It will be a matter for the taxation officer as to whether Harneys' fees are recoverable from Ritchie and I make no direction in that regard.

Interest on costs

44. Under GCR Order 62 rule 4 (7) (g) where the court orders the paying party to pay costs subject to taxation, it may further order the payment of interest on costs from or until a certain date, including a date before judgment. Again this is a matter for the discretion of the court²⁰. The guiding principle is that the paying party should normally provide reimbursement of costs incurred which should include a figure for interest on costs already paid. Ritchie does not oppose the making of an award of interest.
45. GE seeks interest at 2.375% on all costs in these proceedings from the earlier of the date on which those costs were paid and the date of this court's order of 21 December 2020. This is a reasonable request in accordance with the Judgment Debts (Rates of Interest) Rules and I grant it.

Extension of time

46. The court is prepared to grant an extension under GCR Order 62 rule 21 (1) of the period in which a party is required to commence proceedings for taxation until Ritchie's application for leave (and if successful any appeal) has been finally determined.

THE HON. RAJ PARKER
JUDGE OF THE GRAND COURT

¹⁸ *Burgess-Shannon 4 and 5 and Smith 1 and 2*

¹⁹ *Burgess-Shannon 4 §13. Total costs incurred by GE up to the end of November 2020 which it would expect to be recoverable on the standard basis is US\$1,534,783.22. GE seeks 60% by way of interim payment of that sum on the basis of a standard costs order.*

²⁰ *Re BDO supra § 39*