Neutral Citation Number: [2022] EWHC 242 (Ch)

Case No: IL-2021-000019

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

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

Date: 9 February 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

CRYPTO OPEN PATENT ALLIANCE	**Claimant**
- and -	
CRAIG STEVEN WRIGHT	**Defendant**

- -
- -

Jonathan Moss (instructed by **Bird & Bird LLP**) for the **Claimant**
Michael Hicks (instructed by **ONTIER LLP**) for the **Defendant**

Costs application dealt with on paper

- -

Approved Judgment

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.

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HHJ Paul Matthews :

Introduction

1. On 22 December 2021 I handed down my judgment on the applications which were argued before me on 10 December 2021. I directed that written submissions on consequential matters be filed by 14 January 2022, and reply submissions by 17 January 2022. I duly received and considered the various submissions. This is therefore my judgment on the question of costs.

2. The first of the two applications before me was one by the defendant by notice dated 28 September 2021, for orders (i) to strike out parts of the claimant's Amended Particulars of Claim and (ii) to exclude certain evidence at the trial of the claim, as well as ancillary orders. The second application was one by the claimant by notice dated 26 November 2021 for an order permitting the claimant to amend the Amended Particulars of Claim and for consequential directions. It will be seen that the first application sought two orders of quite different kinds, which I have distinguished as (i) and (ii).

3. In my judgment of 22 December 2021, the first (defendant's) application was partly successful under (i) and partly unsuccessful, but wholly unsuccessful under (ii). The successful part under (i) was to strike out paragraphs 63 to 65 of the Amended Particulars of Claim. But in fact one of the purposes of the second (claimant's) application was to delete those paragraphs, so that by the time of the hearing the defendant was pushing at an open door so far as that was concerned. The unsuccessful part under part (i) of the first application concerned an attempt to delete paragraphs 66 and 67. The application under (ii) (for an order excluding certain evidence at trial) was wholly unsuccessful.

4. The second (claimant's) application was wholly successful. This application was to delete paragraphs 63 to 65, and to insert a new paragraph 66A and additional sentences in paragraphs 66 and 67. This application dovetailed in with the first application under (i), because as to paragraphs 63 to 65 the claimant was seeking to do the same as the defendant wanted, and therefore the parties agreed, and, as to the rest, whatever the claimant wanted to insert the defendant wished to exclude.

5. The claimant seeks its costs of both applications. The defendant resists this.

The rules on costs

6. The rules relating to costs are well known. Under the general law, costs are in the discretion of the court (CPR rule 44.2(1)), but, if the court decides to make an order about costs, the general rule is that the unsuccessful party in the proceedings pays the costs of the successful party: CPR rule 44.2(2)(a). However, the court may make a different order: CPR rule 44.2(2)(b). In deciding whether to make an order and if so what, the court will have regard to all the circumstances, including conduct of all the parties and any admissible offer to settle the case (not under CPR part 36) which is drawn to the court's attention: CPR rule 44.2(4).

7. In particular, the court may make an order (amongst others) that a party must pay a proportion of another party's costs, an order that costs be paid from or until a certain date only, and an order for costs relating only to a distinct part of the proceedings: CPR rule 44.2(6)(a), (c) and (f). But before making an order of the last type, the court must first consider whether it is practicable to make one of the first two types: CPR rule 44.2(7). So, an issues-based order is possible, but the rules require the court first to consider making a proportion of costs order or a time limited order.

The "successful party"

8. The general rule requires the court to ascertain which is the "successful party". In *Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd* [2004] 2 Lloyd's Rep 119, Rix LJ (giving the judgment of the Court of Appeal) said (at [143]) that the words "successful party" mean "successful party in the litigation", not "successful party on any particular issue".

9. In the present case, as I have said, the only part of the defendant's application that was successful was the only part that did not need to be argued, because the claimant was seeking permission to delete the very paragraphs that the defendant wished to strike out. Every matter that was actually disputed between the parties at the hearing was won by the claimant. Standing back and looking back at the hearing as a whole, or even as two separate applications, overall the successful party on the day was the claimant.

10. Nevertheless, the defendant still submits that the court should dissect the case into its various (and, in some respects, minute) component parts and allocate different costs orders to those different parts. He also submits that it would be appropriate in this case to direct a detailed assessment of costs rather than a summary assessment.

Costs arguments today

11. It is a recurring, but highly undesirable, feature of modern litigation that litigants are willing to argue costs issues: not only the principle (usually the unsuccessful party), but the basis of assessment (usually the successful), and also the actual assessment itself (both sides), as if they were the main issue itself. This frequently creates satellite litigation that consumes even more time and emotional energy, and costs even more money on top of the vast sums that have already been spent on the substantive issues.

12. I am sorry to be old-fashioned, but, when I started in practice, this kind of thing just did not happen. The losing party accepted liability for the costs, and the receiving party only rarely argued for indemnity costs. (Summary assessment had not then been introduced.) Nowadays, it seems, losing parties nearly always argue that they should not pay the costs at all (I do not know when was the last time I heard counsel use the phrase "I cannot resist that"), and winning parties nearly always argue that costs should be on the indemnity basis.

13. This modern kind of satellite litigation is pernicious. In my view it has the effect of diminishing overall justice, and thus gives English civil procedure a bad name. Costs decisions (other than detailed assessment of the actual amounts involved) are supposed to reflect the broad justice of the case. They are therefore intended to be merely the tail to the dog, and not the dog itself.

Summary assessment

14. The concept of summary assessment is an example. This is intended to save both time and costs by enabling the judge who dealt with the substantive issues summarily to assess the costs of the hearing which he or she conducted. This has the advantage of leaving the assessment of costs in the hands of the judge who had the conduct of the hearing (an advantage which *ex hypothesi* cannot be given to the costs judge who conducts a detailed assessment), and the advantage of speed, meaning that an order can be made in favour of the receiving party for the payment of costs which have been incurred by that party far sooner than the conclusion of the proceedings, and at enormously lower cost.

15. This therefore means that a party who has incurred costs which in the opinion of the court he or she should not have had to incur will be reimbursed much sooner than otherwise, repairing the loss much sooner than would otherwise be the case. Make no mistake: in practice, these advantages are significant in terms of rendering simple justice, even if they come at the cost of precision. It may be impossible for a huge, state-run justice system that is necessarily bureaucratic, and has to take account of many points of view, ever to render perfect justice, but it is surely always desirable to move closer to the ideal.

16. Yet parties (particularly the unsuccessful, but even the successful, on occasions) persist in arguing minor costs assessment issues, seeking to claw back this or that fraction of costs or small expenditure. This is not cost effective. It is merely disruptive. The costs of the argument must often outweigh even the value of what is in issue.

The allocation of costs in this case

17. In the present case, the defendant argues that the application of CPR rule 44.2 should result in the following decisions:

(1) As to his application,

(i) he should have his costs in relation to paragraphs 63 to 65 of the amended particulars of claim;

(ii) the claimant should have its costs in relation to other matters.

(2) As to the claimant's application,

(i) the defendant should have his costs occasioned by the re-amendments to the particulars of claim;

(ii) otherwise they should be costs in the case to reflect

> (a) the claimant's late amendment,
>
> (b) the deletion of paragraph 63 to 65 which the defendant had originally invited but the claimant refused, and
>
> (c) the (asserted) fact that the particulars of claim could have been served in the re-amended form in the first place.

The defendant also argues that, because of the substantial sums involved and in the context of the case, detailed assessment of costs should be directed.

Discussion

18. In my judgment, this kind of multi-issue-based order is to be avoided as far as possible, as indeed CPR rule 44.2(7) indicates. It creates complexity, and has a significant cost in time and therefore money to be worked out. In my judgment it is better to make any allowances which are necessary for the fact that the successful party overall did not win on every point, by making an order allowing a percentage of costs: see *eg R (Viridor Waste Management Ltd) v HMRC* [2016] 4 WLR 165.

19. There was no argument at the hearing about paragraphs 63 to 65. Most of it concerned the defendant's unsuccessful objections to paragraphs 66 and 67 and his unsuccessful application for an evidence exclusion order. A small part concerned the claimant's successful application to add paragraph 66A and a couple of sentences to other paragraphs. The only points which could fairly be placed at the claimant's door were the failure to react sooner to the (justified) criticisms of paragraphs 63-65 and the lateness of the application to amend.

20. In my judgment the justice of the case requires that I should make a percentage costs order in favour of the claimant as the successful party overall. This is that the defendant will pay 95% of the claimant's costs of both applications. This is calculated to reflect my view that, although the defendant was in the wrong more or less throughout, the claimant made a false step in originally including paragraphs 63-65, and was slow to correct it.

Basis of assessment

21. I turn now to consider the basis of assessment. The claimant asks for costs to be awarded on the indemnity basis. The defendant resists that. In *Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspen and Johnson* [2002] EWCA Civ 67, Lord Woolf CJ said:

> "32. … before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement."

Waller LJ agreed, saying:

> "39. The question will always be: is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?"

Laws LJ agreed with both judgments.

22. The claimant refers me to the decision of Teare J in *Suez Fortune Investments v Talbot Underwriting Ltd* [2019] Costs LR 2019, which referred to the *Excelsior* case. The judge said

> "2. The court's power to order costs on the indemnity basis stems from CPR Part 44.3 which provides that costs may be assessed on the standard basis or on the indemnity basis. Whereas costs on the standard basis must be proportionate and any doubt as to whether the costs were reasonably and proportionately incurred must be resolved in favour of the paying party, costs on the indemnity basis are not subject to the requirement of proportionality and any doubt as to whether costs were reasonably incurred must be resolved in favour of the receiving party. In deciding what order to make about costs the court will have regard to all the circumstances of the case including the conduct of the parties; see CPR Part 44.2(4) and (5) … "

23. The judge went on to say this:

> "5. Very recently, on 3 October 2019, *Excelsior* was described by Sir Bernard Rix as 'the leading modern authority' and that litigants were discouraged from citation of authority on what is 'a well-travelled road'; see *Ford v Bennett* [2019] Costs LR 1473 at paragraphs 26-29.
>
> 6. Notwithstanding that discouragement the court was presented with 16 pages of submissions on the law relating to indemnity costs and with no less than 31 authorities. There appeared to be a dispute as to the manner in which the court's discretion should be exercised. The oral submissions of counsel for the Underwriters suggested that the dispute concerned a number of matters but, in reality, the dispute concerned one question, namely, whether, when conduct is relied upon to justify an order for indemnity costs, the conduct had to be unreasonable to a high degree."

24. Teare J concluded that:

> "11. In the light of the wide nature of the discretion to order costs on the indemnity basis I accept the submission made by counsel for the Underwriters that there may be an "aggregation of factors" which justify an order for costs on the indemnity basis, one of which may be unreasonable conduct though not to a high degree. What matters is whether, looking at all the circumstances of the case as a whole, the case is out of the norm in such a way as to make it just to order costs on the indemnity basis. … "

The claimant's submissions

25. The claimant relies on a number of factors in the present case. The first is an apparent change in the breadth of the evidence exclusion order sought. According to the first witness statement of the defendant's solicitor Mr Cohen (dated 28 September 2021), the defendant's application sought prospective admissibility rulings that arguably would have effectively prevented any reference to the Kleiman Litigation in *any* context, including in cross-examination.

26. On any view, that was too broad. The terms of the draft order actually *filed*, however, were not so broad as this. In particular, there was no reference to cross-examination. The second witness statement of Mr Cohen (dated 2 December 2021) accordingly took a narrower view, seeking an order only in terms of the draft order. And indeed that was the basis upon which the matter was argued before me.

27. The claimant describes this as a "*volte-face*". I do not think that it was. In the first statement it may simply have been an over-aggressive (and possibly wishful thinking) description of what the order sought. But the draft order itself was the draft order. In its terms, it did not seek to prevent cross-examination. And that was what was argued. That does not of course excuse the excessive (and wrong) explanation of it in the witness statement. And the second witness statement should have expressly rowed back from the breadth of the first (but it did not).

28. Yet equally it does not justify the over-indignant response which followed, or the accusation that the second witness statement of Mr Cohen (restricting the application to the draft order) amounted to a "*volte-face*". Since the order sought was identical under both witness statements, the position taken by the defendant on the application was in fact the same, and *not* diametrically opposite. It was simply not a *volte-face*. It was a correction (albeit unadmitted). Yet neither side can take any comfort from this. Each was at fault.

29. The problem is that this case is an example of what I would (unhappily) call *bad-tempered litigation*, which is regrettably becoming more and more prevalent in the English courts. It somehow seems to have become acceptable for solicitors to become mere mouthpieces for their clients to vent their anger at their opponents. It is not enough for *the clients* to dislike or even hate each other: *the solicitors must do so too*. I simply do not understand why in 2022 professional, trained lawyers, who should know how to stand up to their clients, and concentrate instead on what is important in the litigation, think it is appropriate to behave like schoolchildren in the playground.

30. The second point taken by the claimant is that the defendant's conduct of the litigation "points to an aggregation of factors which make [the defendant's] entire course of conduct unreasonable". This repeats the point about the alleged "*volte-face*", adds in arguments in correspondence about the listing of the application, and also an alleged hypocrisy by the defendant is demanding an explanation for alleged failures by the claimant whilst not responding to requests for explanations for alleged failures by themselves. All this "*et tu quoque*" argument is deeply unattractive. Judges hate it.

31. The third point taken by the claimant is that the defendant is pursuing a "speculative claim involving a high risk of failure". This apparently refers to the application for the evidence exclusion order, as evidenced by the breadth of Mr Cohen's first witness statement. I have already noted that the order sought in the draft order has not changed. What has changed is Mr Cohen's explanation, which would have been better cast in the more sensible terms of his second statement than his first, but which (as a draft order) has remained constant (if unsuccessful) throughout.

32. The problem is that, in modern times, the conduct of business relations has become so legalised, that many business-people see litigation, not as a means of resolving disputes (which is after all what the state provides it as), but as one of obtaining leverage in further negotiations. It is thus simply a modern aspect of doing business. To mangle Von Clausewitz, litigation has become the continuation of business by other means. This is highly regrettable, not least because there are many other litigants who play by the rules, and are disadvantaged as a result.

Decision

33. I am bound to say that, as an application for costs to be awarded on the indemnity basis, I find all this mud-slinging (on both sides) not only unedifying, but also somewhat underwhelming. Whatever the position forty years ago, the conduct of this litigation is, most regrettably, not out of the norm for these days. Both sides are behaving in an ultra-aggressive and unco-operative way towards each other, which is certainly not conducive to the efficient conduct of the litigation. In all the circumstances of this case, I do not think that it is appropriate to award indemnity costs to one of these two sides against the other. To do so would be to encourage similar behaviour in future.

Assessment of costs

34. I turn finally to the question of assessment. This was the hearing of an application lasting less than one day. In principle, it is appropriate that I summarily assess the costs, unless there is good reason not to: CPR PD 44 para 9.2(b). The claimant asks me to. The defendant does not. I do not consider that there is any good reason not to do so. The size of the amounts claimed is certainly not a good reason in itself. Indeed, I consider that the least service I can do to the parties in the present case is to deal with the assessment of costs now, not allowing the litigation to drag out, and saving them time and further costs later.

35. The claimant served two costs schedules, because as a secondary position it sought indemnity costs as from a certain date, and so served schedules up to and after a certain point in time. The second schedule was revised after judgment was handed down, and served on the defendant on 14 January 2022. The defendant complains (correctly) that this is not within the time limit set out in CPR PD 44, paragraph 9.5. However, whether or not the claimant was justified in producing a revised schedule in the circumstances, the fact is that the defendant *has* had an opportunity to make submissions on it, and *has* done

so, and I have taken these into account. Accordingly, the defendant is not prejudiced by the claimant's failure to serve the revised version in time.

36. The claimant's two costs schedules seek a total of £122,834.78, VAT not being claimed. I should also record that nothing is claimed in respect of the deletion of paragraphs 63 to 65. Nevertheless, for a one-day hearing this total strikes me as extraordinarily high. I notice that the defendant's own costs schedule also claims a (smaller) six-figure sum, but frankly that is of little weight. The court is applying an objective test, which does not vary according to how much the other side spends. Two wrongs do not make a right, after all.

37. The defendant does not attack the hourly rates applied, even though all those in the second schedule exceed the guidelines. He does however make six main submissions, all of which I consider have force. In summary, these are as follows:

(1) There has been excessive use of Grade A fee-earners, and insufficient delegation to less expensive fee-earners;

(2) In circumstances where specialist counsel was instructed, excessive time was spent on the evidence (15.8 hours);

(3) In circumstances where specialist counsel was instructed, excessive time was spent on preparing the skeleton argument (14.7 hours);

(4) In circumstances where specialist counsel was instructed, excessive time was spent on research and investigation (32.4 hours);

(5) In circumstances where specialist counsel was instructed, there should only have been one fee-earner at the hearing (instead of five);

(6) Excessive time was spent on preparing the costs schedules (21.1 hours).

38. I accept of course that this is a large-scale dispute, drawn over a large and active canvas, and highly valuable to whichever side wins. I also accept that the defendant was seeking an unusual order at a very early stage. The game was considered by both sides to be worth the candle. Hence the highly-paid City lawyers involved. And each side apparently has a lot of money to spend. I also accept that the "bad-tempered" way in which it has been conducted has led to extra work being done in order to counter what is perceived as the other side's wrong-headed approach.

39. But at the end of the day I have to reach an *objective* decision based on the rules that apply to *everyone's* disputes, from prince to pauper, and whether conducted by City mega-firm or High Street sole practitioner. And the test derived from the rules (see CPR rule 44.3(1), (2)(a)) is whether the costs claimed are not only *proportionate*, but also both *reasonably incurred*, and in a *reasonable amount*. Whether or not the costs claimed here are proportionate (and as I have said this is a large-scale and valuable dispute), I am bound to say that neither of the latter two limbs is satisfied here.

40. First there has been insufficient delegation of work down to less expensive fee-earners. The grade A fee-earners have done far too much of the solicitors' work, especially since specialist counsel was instructed, who has charged appropriately for his input. Secondly too much time was spent on the evidence. Where counsel is instructed, reviewing the evidence is primarily counsel's function. I will allow 10 hours. The skeleton argument is a fortiori., as it is a matter largely for the advocate. Of course, the solicitors must review it, but that is a modest part of the job. I will allow 5 hours.

41. Next, I really do not understand how the solicitors can have thought it appropriate to spend as much as 32.4 hours on research and investigation. There can no doubt be cases where a large amount of time is required, for example because counsel delegates some part of it to the solicitors, but it needs to be justified, and the claimant here does not justify it. I will allow 5 hours. Plainly there did not need to be five fee-earners at the hearing. One would have done. And the preparation of the costs schedules, albeit extensive in this case, cannot reasonably justify 21.1. hours. Something must have gone seriously wrong there. I will allow 5 hours.

Conclusion

42. In the result, I consider that the solicitors' costs claimed are way out of the norm. I will not attempt to rewrite the costs line by line. Taking a broad brush approach, I will deduct £10,000 for lack of delegation, £24,000 for excessive time spent (59 hours at a blended rate of say £400), and £20,000 for excessive attendance at the hearing. Looking at the matter overall, it seems to me that the criticisms made by the defendant and upheld by me require that I therefore summarily assess the costs at £70,000 (no VAT), to be paid within the usual 14 days from today. I should be grateful for a minute of order for approval.