Neutral Citation Number: [2024] EWHC 1961 (Ch)

Case No: CH-2023-BRS-000011

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
CHANCERY APPEALS LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 25 July 2024

Before :

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

- -

Between :

ANTHONY JAMES BROOM	**Respondent**
- and -	
MARIA DEL PILAR MOLINA AGUILAR	**Appellant**

- -
- -

Stefan Ramel (instructed by **DAC Beachcroft**) for the **Respondent**
Daisy Brown (instructed by **Harrison Clark Rickerbys**) for the **Appellant**

Consequential matters dealt with on paper

- -

This judgment was handed down remotely at 11.00am on 29 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HHJ Paul Matthews :

Introduction

1. On 10 July 2024 I handed down judgment, under neutral citation number [2024] EWHC 1764 (Ch), in relation to an appeal and cross-appeal against the decision of DJ Taylor, delivered on 16 November 2023. I allowed the appeal brought by Mrs Maria Molina Aguilar and dismissed the cross-appeal by the respondent, her husband's trustee in bankruptcy. The decision below was made on the appellant's application under section 375 of the Insolvency Act 1986 for an order setting aside the much earlier order of DJ Davis dated 18 March 2015. *That* order, made in the absence of the appellant, required her to pay significant sums to the respondent, in respect of alleged transactions at an undervalue or preferences. On handing down my judgment, I gave directions for written submissions on consequential matters. My directions were varied slightly to take account of the temporary absence abroad of one of the counsel involved. I subsequently received those written submissions, and have now considered them. This is my judgment on those consequential matters.

2. The appellant had originally sought permission to appeal against DJ Taylor's order on six grounds, of which I gave permission on five (refusing permission on ground 3). The appellant succeeded on grounds 1 and 4, but failed on grounds 2 and 6. On ground 5, I held that the judge below had erred, but in itself not enough to justify allowing the appeal. The main ground of the appeal was clearly ground 1, a point of law about the jurisdiction of the English court over a person living abroad. The appeal would have been allowed on that ground alone, whatever the results on the other grounds.

The parties' positions

The issues

3. The appellant now seeks (i) an order that the respondent trustee in bankruptcy pay her costs of (a) the appeal and cross-appeal, and (b) the application under section 375, together with (ii) an order for a substantial payment on account of the costs liabilities. The respondent accepts the principle of liability for costs, but submits that he should be liable only for a percentage of such costs, and to make a payment on account in a lesser sum than sought. He also submits that any payment to be made should be made within 56 days rather than the default 14. Those are the three issues with which I must deal. No application is made to me for permission to appeal, since my decision is itself on a first appeal, and any further appeal would be a second appeal. By CPR rule 52.7(1), only the Court of Appeal itself can give permission for a second appeal.

Extension of time

4. As to that, I mention here that the parties are apparently agreed on a recital to be introduced into the order "to make clear that the 'date of the decision' will be the date of this court's order." This date is relevant for the purposes of calculating the latest date by which any application for permission to appeal may be sought from the Court of Appeal. It arises out of the provision in CPR rule 52.12(2) that

> "The appellant must file the appellant's notice at the appeal court within—

> (a) such period as may be directed by the lower court at the hearing at which the decision to be appealed was made or any adjournment of that hearing (which may be longer or shorter than the period referred to in sub-paragraph (b)); or
>
> (b) where the court makes no such direction, and subject to the specific provision about time limits in rules 52.8 to 52.11 and Practice Direction 52D, 21 days after *the date of the decision of the lower court* which the appellant wishes to appeal" (emphasis supplied).

5. I have to record that am not happy with this proposed recital. The date of the decision is the date on which the judgment was handed down, and not the date of the formal order giving effect to the judgment, if different. I do not think it is right to subvert the rules by using the order to redefine the date of the decision as the date of the order. And there is no need to, because the court has express power to stipulate the period within which an appellant's notice may be lodged. In this case, the parties are apparently prepared to agree that time for lodging an appellant's notice with the Court of Appeal should be 21 days from the date of the order, because that is the effect of the proposed recital.

6. For myself, I see no necessity for such a lengthy extension of time, given the obvious public interest in the finality of litigation. Nevertheless, since the parties are agreed on this, I will provide in my order that the time for lodging any appellant's notice should be 21 days from the date of the *order*, rather than 21 days from the date of the *decision*. Since the written submissions take the place of the "the hearing at which the decision to be appealed was made or any adjournment of that hearing", I have power to do this under CPR rule 52.12(2)(a).

Costs liability

The general rule

7. I turn therefore to the question of costs liability. The rules on costs are well known. Under the general law, costs are in the discretion of the court: Senior Courts Act 1981, section 51(1); CPR rule 44.2(1). 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 "the conduct of all the parties" and any admissible offer to settle the case (not falling under CPR Part 36) which is drawn to the court's attention: CPR rule 44.2(4).

8. In my judgment, first of all, here the court *should* make a costs order. This was hard fought litigation, and cost a lot of money, in pursuance of a decision as to whether an order for the appellant to pay a significant sum should stand. So I need to consider which party, for the purposes of the "general rule", was the successful party overall. In my judgment, this was the appellant, even if she did not succeed on all the grounds she put forward. The main victory was the decision, under ground 1, that the court had no jurisdiction over her. The other matters were comparative sideshows. So in principle I should make a costs order in favour of the appellant. The question is whether I should make a different order, and, if so, what.

A different order?

9. The respondent says that I should make a different order, and points to various matters that I should take into account. The first is that the appellant's conduct in the litigation was criticised by DJ Taylor. She was found by him to have sought to evade service, and some of the evidence given on her behalf (including by her) was rejected by the judge. By contrast, the respondent's conduct was not criticised. Indeed, he brought these proceedings as "an officer of the court discharging a statutory function" and "is not an ordinary litigant". The second matter was that she did not get permission to appeal on all six grounds advanced, but only five. And, of the five, she clearly lost on two of them, and on a third she did not do well enough to win the appeal by itself. A third matter was that she took points before the district judge on which she lost but did not appeal.

The appellant's conduct

10. I do not consider that any of these points makes a difference to the operation of the general costs rule. As to the first point, it has long been the case that a person does not become a party to proceedings until he or she is served with originating process. Thus, in *Re Evans* [1893] 1 Ch 252, 264, Lindley LJ said:

> "The Defendant has not appeared, and it has been contended that he therefore is not a party to the action; but I think that he became such when he was served."

11. Moreover, as Bingham LJ (with whom Ralph Gibson LJ and Sir Stephen Brown P agreed) said in *Dresser UK Ltd v Falcongate Freight Management Ltd* [1991] 1 QB 502, 519H, a case under the former RSC,

> "It is service of proceedings, not issue, which ordinarily activates the litigious process and imposes procedural obligations on the parties."

Later in the same case, at 523C-D, he said that, before service:

> "(5) the defendant is not obliged to respond to the plaintiff's claim in any way, and … (7) the defendant has not become subject to the jurisdiction of the court."

12. The same thing was said more recently in different words by Lord Sumption (with whom Lords Wilson and Carnwath agreed) in *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, a case under the CPR, when he said:

> "8. … Although the court may dispense with service altogether or make interlocutory orders before it has happened if necessary, as a general rule service of originating process is the act by which the defendant is subjected to the court's jurisdiction."

That dictum was unanimously approved by the Supreme Court in the later case of *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471, [14].

13. Accordingly, the mere fact that a named defendant to originating process does not proffer herself to be served does not mean she is guilty of poor conduct potentially resulting in an adverse costs order. As I understand the law, no potential defendant within the jurisdiction has a duty to volunteer to be served, or to instruct solicitors to

accept service. (The position of a potential defendant *outside* the jurisdiction is obviously even stronger.) Every potential defendant is entitled, within the law, to prefer his or her own interests to those of the claimant. To put the matter another way, the "conduct" to be taken into account in rule 44.2(4), (5) is conduct in *relation to the proceedings*, whether before or during them. Seeking to avoid service of proceedings in the first place is not conduct in relation to any proceedings that are eventually served. Of course, if you seek to avoid service, you are unlikely to be recommended for an honour for civic solidarity, but it is not *wrong*.

14. I accept, of course, that there are pre-action protocols which amount to codes of best pre-action practice in relation to certain types of litigation. But they do not impose legally enforceable duties on potential defendants. At most a failure to follow a protocol may be taken into account by the court in giving directions (CPR rule 3.1(4)) or ordering money to be paid into court (CPR rule 3.1(5)) and in deciding what order to make, if any, about costs (CPR rule 44.2(5)), in subsequent proceedings. However, I am not aware of any pre-action protocol (or, for that matter, in the Practice Direction for such protocols) which requires a potential defendant to volunteer to be served, or to instruct solicitors to accept service. In any event, there is no pre-action protocol applicable to insolvency proceedings. So the general principle applies intact to the present case.

15. Moreover, the mere fact that some or even all of a party's factual evidence is rejected by the judge does not mean that the party's conduct of the proceedings is reprehensible for costs purposes. The court must find the facts necessary for its decision. A party's evidence is that of the witness or witnesses that the party calls. Again, unless it is carried out in pursuance of a scheme deliberately to mislead the court, it is not the conduct of the proceedings themselves: *cf Deutsche Bank AG v Sebastian Holdings Inc* [2016] 4 WLR 171, [42]-[45], CA. And in any event the evidence may be rejected for reasons other than deliberate attempts to mislead. Here the judge did not find any such attempt to mislead.

The respondent's status

16. In my judgment, the fact that the respondent is a trustee in bankruptcy carrying on a statutory function cannot (in the absence of statutory sanction) in itself amount to a reason for the court's making a different costs order to that which would be made in a case not involving a statutory officeholder carrying on litigation in an official capacity. Insolvency practitioners do not seek or accept appointment as trustees in bankruptcy for altruistic motives. They are professionals who make their living by accepting appointment, being both well trained and properly remunerated for the important work that they do. Accordingly, they are subject to the ordinary costs rules.

17. For example, in *BPE Solicitors v Gabriel* [2015] AC 1663, SC, Lord Sumption (with whom all the other judges agreed) said:

> "4. The ordinary rule is that a trustee in bankruptcy is treated as party to any legal proceedings which he commences or adopts, and is personally liable for any costs which may be awarded to the other side, subject to a right of indemnity against the insolvent estate to the full extent of the assets."

There is nothing here to suggest that a different rule should apply to this respondent. He has adopted an adversarial attitude, adduced evidence to support his case, and instructed counsel to argue for it. He has not suggested that, had he won, he would nobly decline to ask for his costs.

Lack of success on some points

18. Secondly, the fact that the appellant did not obtain permission to appeal on all grounds, or did not succeed on all the grounds for which permission was given, is not determinative of anything. Appellants nearly always put forward more grounds than they hope to succeed on. In addition, Ms Brown has made clear that no costs are sought for the drafting of the grounds. It is not unreasonable for the appellant to develop all the grounds for which permission is given, for the court has in effect said that they are arguable. The fact is that the respondent could have given in on the first and main ground, namely lack of jurisdiction, and saved all these costs, but chose instead to fight on, and lost.

19. Thirdly, the fact that the appellant took points before the district judge on which she lost, but did not appeal, does not mean that overall she was not the successful party. As Simon Brown LJ once put it, in *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125,

> "35 … the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues … "

As I have said, the general rule is that the unsuccessful party pays the costs of the successful. But there is power to make a different order, and one example of that is to discount the costs to be paid by a percentage, to reflect a lack of success on other points. There are cases where this is the just result. But self-evidently that is not the general rule. Instead, it is the exercise of the power to make a *different* order. I have to ask myself, is there is sufficient reason here to make a different order?

20. In my judgment the answer is No. The big point, up front and centre stage, was whether the English court had any jurisdiction over the appellant. I cannot regard the other matters as more than a side show. In relation to those other matters, the honours were more or less even, and they made no real difference. My decision therefore is that on the facts of this case the respondent must pay the whole of the appellant's costs of the application, the appeal and the cross-appeal, to be subject to detailed assessment on the standard basis if not agreed.

21. I am fortified in my conclusion by the salutary warning by Jackson LJ in *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790, that

> "62. There has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in [rule 44.3(3)(a)] too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates. This unwelcome trend now manifests itself in a (a) numerous first instance hearings in which the only issue is costs and (b) a swarm of appeals to the Court of Appeal about costs, of which this case is an example."

Payment on account of costs

22. I turn now to consider the question of a payment on account of costs liability. CPR rule 44.2(8) provides that:

> "Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so".

In *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), Christopher Clarke LJ said:

> "22. It is clear that the question, at any rate now, is what is a 'reasonable sum on account of costs'…
>
> 23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad."

23. The appellant asks for a payment on account of costs in the sum of £47,000, which amounts to approximately 65% of the costs shown on the two costs schedules provided (one for the appeal and the cross-appeal, totalling £15,168.40, and one for the application, totalling £57,142.80). I see no reason in principle not to make an order. In fact, the respondent does not oppose the making of such an order, but he does contest the level of that payment. The respondent says that the appropriate figure would be £25,000. He reaches this by taking 60% of the total of the two cost schedules, of £72,311.20, that is, about £43,000 (rounded down). He says this is what the appellant can expect to recover on an assessment. He then says that the "reasonable sum" should be no more than 60% of that, thus amounting to about £26,000 (again rounded down), which he then further reduces to £25,000 to reach what he calls "a round figure".

24. The respondent submits that the appellant's cost schedules are on the high side and are likely to be substantially reduced on assessment. In the application before the district judge, all of the work was done by grade A and B fee earners, with hourly rates (he submits) significantly exceeding the guideline rates. There were excessive attendances on others and excessive work done on documents. In relation to the appeal and cross-appeal, there was excessive work done on the documents. The appellant points out that the sums set out in the two schedules are actually similar to or less than the respondents' schedules. She points out that the proceedings were specialist insolvency proceedings. She also points out that the respondent's own solicitor had an hourly rate exceeding those charged by the appellant's solicitors.

25. First of all, I cannot be much influenced by the relationship between the totals on the cost schedules from each of the two sides. For one thing, each of the two sides has a

different role in the particular litigation. Sometimes a greater burden falls on one than the other. For another, the question is not whether the receiving party's costs are higher or lower than those which the paying party would have asked for if it had been successful. The question on assessment on the standard basis will be whether the receiving party's costs are reasonable and proportionate for the litigation undertaken. That involves a focus on what the receiving party actually did.

26. Secondly, I do not think it can be right to "double discount" the raw figures in the way that the respondent asks me to. The discount of 40% which he proposes from the raw figures to show what might be awarded on assessment is one thing. It might be the appropriate discount, or it might not. But once it has been arrived at, and the discount made, that represents the court's estimate of what is likely to be awarded on assessment. If it could be known at the time that that was the figure that would indeed be awarded in due course on assessment, then the court might well take the view that that was a "reasonable sum" within the rule, and should be the figure of the payment on account.

27. The point of the payment on account is to reduce so far as possible the amount of time that the receiving party is out of pocket for the amount of costs which it has had to spend and which are properly to be laid to the door of the paying party: see *Mars UK Ltd v Teknowledge Ltd* [2000] FSR 138, costs [8]. It may also encourage settlement: see *Days Healthcare UK Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2006] 4 All ER 233, [4]. Of course, it cannot be known with certainty that that is the figure that will be arrived at on assessment, and so there may be scope for argument that a small buffer should be built in, in case the estimate of what will be recovered on assessment is too generous. But I do not think that a further 40% discount, or anything like it, would be appropriate in such a case.

28. It is certainly true that the fee earner rates applied exceed the relevant guideline rates in force at the times of the two hearings. But, with one exception, they do not exceed them by very much. The exception is Derek Jones, whose rate exceeds the guideline by about 27.5%. But the charges attributable to his work are only about 10% of the solicitor charges for the application, and nothing at all on the appeal. There are also factors here which support the allowance of an above guideline rate, such the specialist nature of the work, and the cross-border nature of the case. But, being prudent at this stage, I will ignore those for the present purpose, and assume that assessment will result in a reduction of, say, 15% overall on the sums sought in the schedules.

29. The respondent says the work actually done was excessive. That is more difficult for me to deal with in this summary way. I bear in mind that the figures provided are in a schedule of costs signed by a partner in the appellant's solicitors. It will have been based on the time records maintained by his firm. So, the sums claimed are by no means a mere stab in the dark. I must proceed on the basis that the time recorded has been incurred. Looking at the materials that I have, I accept that a lot of time appears to have been spent. But cases involving foreign languages and foreign courts often generate significant extra work compared with domestic cases. For the sake of robustness, however, I would deduct a further 15% in case assessment shows that the time spent was indeed excessive.

30. That means that I would deduct 30% from the figures claimed. That is in fact less that the 35% (approximately) deducted by the appellant in asking for a payment of £47,000 on account. I think a discount of 30% to the total costs sought by the two schedules would produce a "reasonable sum" in this case, and there would be no need for a further "buffer". But, since the appellant limits herself to £47,000, I will order that sum to be paid on account of costs.

Time of payment on account

31. The final matter relates to the timing of the payment. The respondent seeks an order for payment only after 56 days. This is said to be justified by counsel's understanding that "it will be necessary for assets to be realised, which it is understood will take a number of weeks to arrange." But no details are given, either of the assets concerned, or indeed of the size and composition of the estate. The liability is personal to the respondent, who is a professional insolvency practitioner, and there is no explanation of any cashflow difficulty which makes it impossible for him to pay sooner, for example by borrowing the money if need be. The default position is payment in 14 days: CPR rule 44.7. On the material before me, I see no sufficient basis for applying any other than the default position. The payment on account must be made within 14 days of the date of the order.

Conclusion

32. Accordingly, I order the respondent to pay the whole of the appellant's costs, to be assessed on the standard basis if not agreed. I further order the respondent to pay the sum of £47,000 on account of costs to the appellant within 14 days from the date of the order. The order will be sealed and sent out shortly. It will bear today's date. I am grateful to counsel and solicitors on both sides for their interesting submissions and their hard work in preparing this appeal.