Neutral Citation Number: 2015 EWHC 204 (QB).

Case No: 3BM40042

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MERCANTILE DIVISION

The Priory Courts,
33 Bull Street,
Birmingham B4 6DS.

Date: 16/1/2015

Before:

HIS HONOUR JUDGE SIMON BROWN, Q.C.
(Sitting as a Judge of the High Court)

- -

Between:

EXCELERATE TECHNOLOGY LTD.

Claimant

- v -

LINDSAY CUMBERBATCH

First Defendant

and

RED FOOT TECHNOLOGIES LTD.

Second Defendant

and

DAVID OSMOND

Third Defendant

- -
- -

MR. BAILEY of counsel appeared for the Claimant
MR. SELF of counsel appeared for the Defendants

- -

Approved JUDGMENT on costs orders

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HIS HONOUR JUDGE SIMON BROWN:

1. The judgment having been handed down, the Claimant seeks five orders.

   i) David Osmond be joined as a Defendant for the purpose of determining liability for costs;

   ii) The Defendants pay the costs of the claim to be assessed if not agreed;

   iii) The Claimant's approved costs budget be increased to £ 172,677.40;

   iv) The assessment of costs be on the indemnity basis; and

   v) The Defendants pay a sum on account of costs.

2. (1) The first one is whether or not Mr. David Osmond, a participant in the proceedings, should be joined as a defendant for the purposes of costs. I am referred to Section 51 of the Senior Courts Act in which a wide discretion is given upon that. I have also been referred to the case *Deutsche Bank AG v. Sebastian Holdings In & Anor [2014] 4 Costs L.R 711* where Mr. Justice Cooke reviewed and summarised the relevant principles and authorities at paragraphs 45-52.

3. He also refers to, and follows, a case where the Privy Council gave guidance in the case of *Dymocks Franchise Systems* (*NSW*) *Pty Ltd v Todd* (No. 2) (New Zealand) [2004] UKPC 39 where there was a consideration of non-party costs orders under the law of New Zealand - there is no difference, as they said, to the approach taken in England and New Zealand as to the exercise of the discretion. I emphasise the word "discretion".

4. Paragraph 25 of that judgment says:

> *"A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would seek to summarise the position as follows: although costs orders against non-parties are to be granted as exceptional, 'exceptional' in this context means no more than outside the ordinary run of cases when parties pursue or defend claims for their own benefit and at their own expense. The ultimate question is: in any such exceptional cases whether in all the circumstances it is just to make the order. It must be recognised that this inevitably to some extent a fact-specific jurisdiction and there will often be a number of different considerations in play, some militating in favour of an order, some against."*

5. Paragraph 48 of *Deutsche Bank* (supra) distils this:

> *"The court went on to find that where a non-party funds the proceedings and also substantially controls or is to benefit from them, justice would ordinarily require that if the proceedings failed he should pay the successful party's costs."*

6. The grounds of the application are set out in the sixth witness statement of Paul Gordon dated 9 December 2014. Based upon this, Mr Bailey, for the successful Claimants, submits that the principal factors relevant in the present case are as follows:

   i) Mr Osmond has had complete control over the manner in which the Second Defendant has conducted its Defence;

ii) That Defence is inextricably bound up with the First Defendant's Defence;

iii) The Defences of both Defendants have been nothing but a tissue of lies;

iv) The principal reason for the legal costs being incurred is the advance of a false Defence;

v) Mr Osmond is the person responsible for the Second Defendant's failure to give proper disclosure;

vi) Mr Osmond stood to benefit from the successful Defence of the claim in the sense that the compensation judgment will be executed on the Second Defendant's assets and he is a 97% shareholder;

vii) It is probable that his monies and the Second Defendant's monies are one and the same thing in the sense that he has been able to determine what sums have been paid out to him (about which there has been no disclosure).

7. The judgment handed down supports most, if not all, of these submissions. I draw attention to some particular fact-specific issues concerning Mr. Osmond and Red Foot Technologies Ltd. and Mr. Cumberbatch.

8. In paragraph 15 of my judgment I made this finding of fact:

> *"In my judgment such clandestine meetings and discussions must have taken place between Mr. Cumberbatch and Mr. Osmond not in May but in July 2001 after Mr. Cumberbatch had been sorely jilted by the*

Claimant, as I found he was, as evidenced by the phone calls and texts of his company Vodafone account whilst Mr. Cumberbatch was on gardening leave and under fiduciary and contractual duties to the company which he severely breached. I am satisfied that Mr. Osmond, a corporate businessman, fully appreciated what he was doing, opportunistically inducing Mr. Cumberbatch to breach his duties with a view to their mutual personal gain behind the safety of the corporate veil of a new company, Red Foot, set up deliberately by Mr. Osmond and Mr. Cumberbatch for their joint purposes in conspiracy against the Claimants and their business interests."

9. Further on I found under paragraph 81:

"The facts found from piecing and cross fertilising the whole of the evidence together amount to a finding that Mr. Cumberbatch was personally and through Red Foot in breach of his contractual tortuous and alleged fiduciary duties as pleaded to the Claimant. Red Foot was a company set up by Mr. Cumberbatch and Mr. Osmond to act as a corporate veil over his illegal activities and to further them."

10. Mr. Osmond has also, in my judgment, been untruthful and implicitly dishonest in his evidence and dealings in this case. He has contemptuously lied in statements of truth supporting pleadings and in his witness statements. In the circumstances as a 97% shareholder in a shell company that became lucrative and active trading company within a year through the illegal activities it was involved in, he was aiming to benefit from these particular illegal activities. Whilst hiding behind this corporate shield, he has been a very

live and non shadowy person in this litigation whether or not he has personally funded it – which I suspect he has- and has been heavily involved throughout as a witness and in attendance. Therefore it seems to me that this is the 'exceptional' case well outside the norm envisaged by *Deutsche Bank* and *Dymocks Franchise* (above). In the circumstances, it would only be just, fair and reasonable that he should be joined to the proceedings for the purposes of costs and therefore I accede to the application made by the Claimant as far as that is concerned.

11. (2) There is no issue that the Defendants, having been unsuccessful, should pay the costs of the claim. Those costs are normally to be assessed on a standard basis by way of a detailed assessment, if they cannot be agreed.

12. (3) There is an application by the Claimant for its agreed cost budget to be increased to £172,677.40.

13. The Claimant's original 'cost estimate' (13th May 2013 when the case was still in London in QB before being transferred by Master Kay) was £193,397.20. Upon transfer and for the purposes of a Summary Judgment hearing and CMC on 9th September 2013 the first Budget was £199,699.70 including provision for expert evidence but was neither agreed nor approved. Revised budgets of both parties were filed and approved on 27th January 2014 - the Claimant's budget was £146,547.40; the Defendants' was £75,292.40. Further revised costs budgets of £160,947.40 and £84,512.40 were recorded as agreed at the PTR on 8th September 2014 when the Defendants were represented by solicitors whose budget of £84,512.40 was similarly recorded as agreed (CPR

3.15 (2) (a)). Neither budget made provision for contingencies, none being foreseen at that late stage.

14. The basis of this application is set out in the seventh witness statement of Paul Gordon dated 5 January 2015.

i) When the Claimant's costs budget was last approved, by consent, at the PTR on 8 September 2014, it included an additional 2 days hearing time beyond the budget previously approved (the court allowing 4 days hearing time rather than 2 days). There have been 2 further days needed to conclude the evidence and submissions and deal with judgment and costs in the absence of solicitor representation of the Defendnats who have put the Claimants to proof on everything. This will pro rata to an increase in the budget – referred to as Contingent Cost A.

ii) The additional costs connected with joining Mr Osmond as a Defendant for the purpose of making a costs order against him are referred to as Contingent Cost B. Not surprisingly, Mr Osmond declined to consent to being joined and actively opposed his joinder.

iii) The costs connected with the First Defendant's IVA are referred to as Contingent Cost C. These are claimed as being the costs of associated litigation which is incidental: see *Roach & another v Home Office [2010] QB 256.*

15. As rehearsed with counsel, I cannot increase a 'budget' once the costs have already been 'incurred' (as they have been), no application for variance has

been made and no contingencies have been provided for such items of increase; it is too late to do that (see Elvanite Full Circle Ltd v. AMEC Earth & Environmental (UK) Ltd [2013] 4 Costs LR 612.

16. However, I accept that each of these three items of costs were quite properly incurred and were not remotely foreseeable in ordinary breach of covenant litigation. It was also not practicable or viable to make applications for variance or agree them with litigants in person as the First two Defendants became shortly before trial.

17. What I can do upon this application, and do so, is to 'record' a note upon the 'reasonableness' and 'proportionality' of such 'additional' costs incurred for the purposes of any Detailed Assessment of them.

18. In my judgment, all these costs were, looking at it on a summary basis only, prima facie 'reasonably' incurred and were 'proportionate' to what was 'at 'stake' for the Claimants – an efficacious judgment with costs, the survival of the company and the livelihood of its 35 or so employees.

19. (4) The Claimant seeks an order that summary or detailed assessment of its costs be on the indemnity basis pursuant to CPR 44.3(1). The general proposition is that indemnity costs are appropriate where the facts of the case and/or the conduct of the parties were such as to take the situation 'out of the norm' i.e. 'exceptional' as above in Deutsche Bank but here see *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson [2002] C.P. Rep 67* where Waller LJ said at para 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 ?'

20. I am grateful to Mr. Self, who has provided a more recent case of *Richmond Pharmacology Ltd. v. Chester Overseas Ltd. & Ors* [2014] EWHC 3418 (Ch) where Stephen Jourdan, Q.C., sitting as a Deputy High Court Judge, helpfully listed in paragraph 4 of his judgment on costs and orders all the applicable guidance in this particular area of costs, having distilled it from a number of judgments which are referred to in the White Book.

21. It is a requirement to review the 'conduct' of the parties in the case.

22. Mr Bailey submits as recorded verbatim from his skeleton argument on costs and orders:

    i) Deceitful case: The Defence of both Defendants (and Mr Osmond via Red Foot) is based upon a falsity in that they have prepared an elaborate plan involving an alias to conceal unlawful conduct. When they were caught out, they perpetuated the deceit and were deliberately evasive.

        a) That has continued into the application for summary judgment and through the complete court process.

        b) That behaviour is not merely unreasonable; it is deceitful and contemptuous of the court process which exists to determine legitimate disputes. Whilst it is, regrettably, commonplace for parties and witnesses to exaggerate their cases and to depart, on occasion, from the truth, this case does not fall within that

category. Here, there has been careful consideration of a complex web of deceit both in regards to the matters which form the basis of the causes of action and in relation to the Defence of the claim.

ii) Deliberate flouting of the rules: The falsity of the Defence is compounded by the disregard of the court's rules. That has already resulted in the £62,500 being ordered to be brought into court for repeated breaches. The court, having now heard the evidence, is able to see the wholesale disregard of the obligation to give proper disclosure. The Defendants compounded that failing by disingenuously suggesting that it was an accident. It was no accident. The Defendants knew that giving disclosure properly would wholly undermine their case. They have been legally represented throughout. They can have been left in no doubt about the extent of their obligations and the consequences of their failings.

23. Mr Self nobly attempted to resist the application for indemnity costs not by disputing the substance of Mr Bailey's submissions based as they were on findings of facts against the Defendants but by tentatively arguing that the behaviour of the Defendants was not 'out of the norm' in hard fought civil litigation where the burden is upon the Claimant to prove its claim upon the balance of probabilities.

24. I cannot, and do not, agree. I accept all Mr Bailey's submissions. In my judgment the 'conduct' of the Defendants throughout of the Defendants has been reprehensible; there has effectively been a pernicious conspiracy against

the Claimant that meant the Claimant had to bring these proceedings to ensure its survival and the livelihood of its employees. Indemnity costs on that ground alone are wholly appropriate.

25. Whilst untrue witness evidence is to be deplored, more importantly, as far as this is concerned in the question of costs, is the time consuming and expensive disclosure process where, in my judgment, the Defendants tried to cover their tracks by spoliation and/or concealment of contemporaneous electronic and paper evidence that would have positively helped the court to decide the case objectively upon its merits. Such 'contemporaneous' documentation in the digital age is now the best evidence for any fact finding court or tribunal. Standard disclosure (CPR 31.6), as ordered and by consent, includes both documents that 'adversely affect' a party's case as well as those that 'support' it. Otherwise, the court does not have all (and no more) of the 'relevant' contemporaneous documents to deal with the case 'expeditiously and fairly' in accordance with the overriding objective (CPR 1.1).

26. Not only was there a woeful failure by the Defendants to comply with the rules on Standard Disclosure at a time when they had solicitors quite properly acting for them, in my judgment it was deliberate and part of their deceit upon the Claimants but also upon the court itself in trying to deceive the court that there was no evidence of any relevant activity by Mr Cumberbatch during the year in question.

27. The consequence was that when the case came before court, the claimants with no cooperation by the Defendants were forced to place <u>all</u> documents that that had been disclosed in the files they had been disclosed from, making the

case extremely over documented and in duplication; the Claimants had to show that they had disclosed everything, but that the Defendants had not so as to enable them to demonstrate the obvious lacunae and to submit to the court it should draw adverse inferences against the Defendants for failure to disclose highly material documents which were 'adverse' to their own case, as is the test under standard disclosure. I found that they had not disclosed what they ought to have done and duly did draw such adverse inferences against the Defendants after painstaking forensic examination, as in a fraud trial, of the documents disclosed and those obviously not. In normal civil litigation the court should not be so burdened, nor should any opposing party at their inevitable extra great cost.

28. Despite at the time being represented by perfectly capable and experienced straightforward solicitors, a whole file was referred to me which showed that there was numerous solicitor's correspondence, on the part of the Claimant, requesting relevant documents, and all sorts of excuses and reasons given by the Defendants solicitors - upon instructions - not to disclose those documents.

29. I am satisfied that there was a significant failure to engage in the process of disclosure in this case by the Defendants and that has substantially increased the Claimant's costs. It is only right, just and fair that the Defendants, having played that dangerous game in litigation, should have to bear all those costs on an indemnity basis; such conduct is 'exceptional' in civil litigation as well as reprehensible and contrary to the overriding objective. It is worth remembering that the duty of the parties under CPR 1.3 & 4 is '*to help the court to further the overriding objective'* and in doing so '*cooperate with each*

other in the conduct of the proceedings' even though they may otherwise, of course, fiercely contest the merits of their respective cases.

30. It therefore means that in this particular instance, as I find the conduct of the Defendants both before and during the proceedings to be reprehensible and 'exceptional', I award indemnity costs to the successful Claimants. It will therefore be for the Defendants upon any detailed assessment to show that the costs of the Claimant which are being sought against them are 'unreasonable' and the burden of proof is upon them to prove unreasonableness rather than the Claimant having to prove 'reasonableness' and 'proportionality' of their costs (CPR 44.3).

31. Where costs are ordered to be assessed on a standard basis, such assessment will not depart from an agreed or approved budget 'unless satisfied that there is good reason to do so' (CPR 3.18.). Where, as here, the Claimant's costs will be assessed on an indemnity basis, the Claimant will not be so limited by the rules to the agreed costs budget but it may, in practical terms be a starting point or guide for the costs judge on any detailed assessment: see the conflicting fist instance cases of *Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd [2013] 4 Costs LR 612* and *Peter Kellie v. Wheatley and Lloyd Architects Ltd . [2014] EWHC 2886 (TCC).*

32. (5) The Claimant also seeks payment on account of those costs pending any detailed assessment. Mr Bailey submits that even on the standard basis the costs awarded on account should be almost the entirety of the budget, say 80% of it but on an indemnity basis it should be 90% to reflect the different basis of assessment under CPR 44.3.

33. He refers me to *Elvanite* where an interim standard costs award of £250,000 was made against a budget of £264,708 and *Thomas Pink Ltd v Victoria's Secret UK Ltd [2014] EWHC 3258* where the interim costs award was calculated at 90% of the costs budget £645,000 against a budget of £678,000. In the case of *Kellie* (above), indemnity costs had been declined but £90,000 was ordered on account of standard costs which had been budgeted at £91,700. This was on the basis there was little argument about them and the actual costs were said to be £161,000.

34. As the actual costs are within budget but there are three items of 'additional' costs that may be debatable as not even a contingency in any budget (as discussed above), in my judgment 90% of the actual costs are bound to be payable upon any detailed assessment; there maybe a margin of 10% which maybe arguable as being 'unreasonable'. Accordingly and accepting, as I do, that *prima facie* the benchmark is that the actual costs of the Claimant are £172,677.40 pence and @ 90% basis, the costs to be paid on account in 14 days will be £155,409.66 pence.
