Neutral Citation No.[2024] EWHC 2555 (SCCO)

SC-2019-DAT-001022

IN THE HIGH COURT OF JUSTICE
IN THE SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
Thomas More Building Strand
London WC2A 2LL

Hearing Friday, 27 September 2024
Judgment Wednesday 9 October 2024

Before:

COSTS JUDGE JAMES

- -

BETWEEN:

MICHAEL WILSON & PARTNERS LIMITED

Claimant

- and -

JOHN FORSTER EMMOTT

Defendant

- -

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.

MR M WILSON appeared on behalf of the Claimant

MR J EMMOTT appeared in person

1. This is my Judgment in these issues.

Introduction

2. This Hearing was originally set for Detailed Assessment of the costs of the Claimant, represented by Mr Wilson as Solicitor and corporate legal representative. In this Judgment 'the Claimant' refers to the receiving party, Michael Wilson & Partners Limited, but also to Mr Wilson, who is of course a separate legal entity but was making submissions on the Claimant's behalf.

3. Detailed Assessment was listed pursuant to the Claimant's Request for Detailed Assessment (N258) dated 26 June 2024 (in respect of a Notice of Commencement (N252) dated 18 January 2019). Over time it devolved into a Hearing regarding whether the correct Authority had been produced by the Claimant for Detailed Assessment and (flowing from that) whether the matter has properly been brought within the jurisdiction of the SCCO.

4. The Defendant asserted that the Claimant's costs could not be assessed without an application under the Arbitration Act 1996, Section 63 (4):

'*If the tribunal does not determine the recoverable costs of the arbitration, any party to the arbitral proceedings may apply to the court (upon notice to the other parties) which may—*

(a)determine the recoverable costs of the arbitration on such basis as it thinks fit, or
(b)order that they shall be determined by such means and upon such terms as it may specify.'

5. The Defendant relied upon the Judgment of Master Whalan (as he then was) upon his application to set aside a Default Costs Certificate (DCC) dated 12 February 2019 and issued in favour of the Claimant.

6. As Master Whalan held (on 7 November 2019):

'The issue to be determined on the Defendant's application is clear and straightforward: should the Default Costs Certificate be set aside, or should it endure? Is the Claimant entitled to a detailed assessment of his costs in the Senior Courts Costs Office? If not, then the Notice of Commencement is invalid and in turn the Default Costs Certificate must be set aside on the grounds that the Claimant was (to quote the wording of CPR 47.12(1)) 'not entitled to it'.'

7. Master Whalan noted (as do I) the observations made by the Court of Appeal in February 2019 in their determination of one aspect of this long running dispute between the parties, and specifically the observations of Peter Jackson LJ at paragraph 70 of that judgment. Having first protested against what

he had described as '*the shameful waste of time and money caused by this private dispute*' his Lordship went on to state as follows:

'Any court in this jurisdiction that has to consider this dispute in future would do well to remember that the overriding objective in civil proceedings includes a duty on the court to save expense, deal with the case expeditiously and fairly, and allot to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; further, that the parties have a duty to help the court to achieve this. This pathological litigation has already consumed far too great a share of the court's resources and, if it continues, judges will doubtless be astute to allow the parties only an appropriate allotment of court time.'

The brief facts and the parties' submissions

8. These are as they were when Master Whalan heard this matter and need not be repeated save for two key points which should be highlighted. Firstly, the N252 exhibiting the Claimant's Bill claiming costs in the total sum of £158,359.34, is the same one dated 18 January 2019 and referred to in paragraph 3 above. It was relied upon by the Claimant on 26 June 2024 when filing its N258 and there has been no replacement N252.

9. Secondly, before Master Whalan nearly five years ago, the position was that the members of the Tribunal that dealt with the Arbitration between 2006 and September 2014 (governed by an agreement between the Claimant and the Defendant incorporating the provisions of the Arbitration Act 1996) rejected the Claimant's assertion that the tribunal was functus officio, and (as Master Whalan held) remained individually and collectively willing to continue to determine any outstanding issues on costs. Before me, the Claimant submitted that the position is now very different as the Tribunal can no longer act because (the Claimant's Skeleton Argument dated 27 September 2024 at paragraph 2):

'Lord Millett was too incapacitated and unable to continue being involved and to act, Ms Davies had long ago ceased to be involved in private practice, becoming instead the in-house counsel on a full time basis of Norton Rose, and where Mr Berry also ceased to be a partner of and employed by Messrs Edwin Coe, in which capacity he was appointed to act and be involved by the Law Society, so that he could no longer continue either.'

10. During the Hearing, the Claimant asserted that one Tribunal member has since passed away, and although I was not taken to any evidence of that, I am aware that Lord Millett sadly passed away on 27 May 2021 after a distinguished legal career. The Claimant's position was that, with the original Tribunal no longer in existence and no suggestion of a new one being constituted, the Arbitration Act 1996 no longer has any relevance. In effect, the Senior Courts Costs Office (SCCO) must have jurisdiction – there is now a void and the SCCO is the correct place to fill it.

11. As I understood it, the Claimant also submitted that the Defendant had accepted that the Tribunal was no longer involved (by reference to correspondence from the Defendant dated 16 October 2020). The Claimant addressed me several times regarding the Defendant's alleged attempts to *'approbate and reprobate'* the SCCO's involvement, including in regard to the Defendant's own costs, to which I shall return below.

12. The Defendant simply relied upon submissions first made before Master Whalan nearly five years ago, that the Claimant had failed (and failed in every respect) to comply with the provisions of section 63(3) and (4). Subsection (3) means that the primary jurisdiction is that of the Tribunal. Per the Defendant it is incumbent upon the Claimant, as the receiving party, to apply to the Tribunal for a determination and only where the Tribunal fails to do so, for whatever reason, to invoke subsection (4).

13. Subsection 4 then provides that the Tribunal's jurisdiction can devolve to the court (in this case the SCCO) **subject to and dependent on an application on notice**, whereupon the SCCO may assume and exercise its jurisdiction.

14. Matters have certainly moved on since 2019 in that the Defendant's submission before me was no longer that the Claimant had failed manifestly to request the Tribunal to exercise its function. Instead, the Defendant rested on the latter part of his argument from five years ago, i.e. that jurisdiction does not in any event devolve or defer to the SCCO as no application has been made by the Claimant, on notice or otherwise, for the SCCO to assume that jurisdiction. Absent any such application on notice, the SCCO cannot simply take over as proposed by the Claimant; per the Defendant's Skeleton Argument (26 September 2024 paragraph 14):

'Until such an application has been made, and the relevant determination made it is submitted that the SCCO has no jurisdiction to assess the costs.'

15. The Claimant's submission, in distilled summary, was as follows. It is not merely a case (as previously) of there being no functioning Tribunal since September 2014. As set out above, the Tribunal members have, since 16 October 2020 at the latest, not only ceased to function, but the Defendant has accepted that this is so, and has put it in writing. As such, the Claimant asserted before me (as it did before Master Whalan in 2019) that the jurisdiction of the Tribunal has automatically ceded to the SCCO so that the only jurisdiction able to hear and determine this issue is the SCCO.

Analysis and conclusions - section 63(3)

16. I have considered the detailed written and oral submissions and the accompanying documents carefully. I have considered a letter from Christopher Berry of Edwin Coe LLP dated 13 October 2020 in which he states (on behalf of the Tribunal, whose members had all agreed to the letter being sent):

'Despite the indications they gave in July 2019, the Arbitrators now feel that it is inappropriate for them to deal with the quantification of the various costs orders or the different issues raised by the Claimant, for example in relation to the Indemnity Principle issue which is said to arise, and whether or not some costs claims are time-barred. ***If the Arbitrators do not determine the recoverable costs the Court is able to do so.*** *In the above circumstances the Arbitrators are inclined to refuse further involvement.'* Emphasis mine.

17. It was in response to that letter that the Defendant wrote on 16 October 2020 to state:

'Thank you for your letter of 13 October 2020. I note that you feel it inappropriate to now deal with the quantification of the various costs orders and the various matters raised by the Claimant and that in the circumstances the Arbitrators do not wish to have any further involvement in the arbitration. I am, of course, disappointed with the Arbitrator's decision but reluctantly accept it.'

18. Per the Claimant that meant that the Defendant had accepted (or *'approbated'*) the involvement of the SCCO, but was now seeking to resile from (or 'reprobate') that approbation. Per the Defendant, his disappointed acceptance of the Tribunal's refusal to have any further involvement, is entirely beside the point in respect of the continuing applicability of the Arbitration Act 1996.

19. I prefer the interpretation of the Defendant, to that of the Claimant. The parties, in agreeing to go to Arbitration, agreed that the terms of the Arbitration Act would govern matters including costs. As such, in order to pass the costs phase from the Tribunal to the SCCO, section 63(3) and (4) of the 1996 Act must be put into effect. Master Whalan held (in November 2019) that the N252 had been served in circumstances where the Claimant simply assumed that the Tribunal was no longer willing **or able** to conduct the assessment and exercise its jurisdiction. Master Whalan found that this assumption by the Claimant was misplaced and fundamentally wrong.

20. Master Whalan then referred to communications which post-dated the N252 and the issue of the DCC, and which showed that the Tribunal members, individually and collectively, remained willing (as at November 2019) to continue to determine any outstanding issues of costs. They had not purported to cede jurisdiction to the SCCO and would reject any assertion to the contrary although an email from Lord Millett on 15 July 2019, suggested a possibility that the Tribunal could cede jurisdiction to the SCCO (described as 'the High Court') but had not at that stage done so.

21. I have looked at the Claimant's Bundle (uploaded at 16:35 on Monday 23 September) and I cannot see that email from Lord Millett. I indicated to the Claimant that uploading a 379-page Bundle so close to the Hearing date was unhelpful, to which the Claimant stated that *'three days is enough'* for a Bundle. Based upon that response, the Claimant's timing was deliberate and was a deliberate breach of the directions contained within the Notice of Hearing dated 8 July 2024 which clearly states that papers filed electronically must be filed not less than **seven** days before the start of the Hearing. The Claimant's

Bundle, deemed served on the morning of Tuesday 24 September (since it was uploaded just after 16:30) should have been filed on the morning of Friday 20 September 2024 and was **four days** late.

22. Similarly, the Claimant's Skeleton Argument was not uploaded until after 13:00 on the day of the Hearing, which meant it had not yet been 'accepted' by CE-file until just over half an hour before the Hearing began at 14:00. Until it was 'accepted' by CE-file, the Defendant could not see it (which may have been the point) but nor could I. At several stages during the Hearing the Claimant expressed the view that I was missing the point or that I was *'confused'*. I was not, but if I had been, given the situation as above described it would not have been surprising. I take the time to record this so that if this matter comes back, the history in terms of compliance with both this Court's directions and the overriding objective of the Civil Procedure Rules (or lack thereof) is fully understood.

23. As long ago as November 2019, Master Whalan referred to the Tribunal members' individual and collective willingness and capacity to consider jurisdiction if they were ever asked specifically to do so, and to the fact that the Claimant had deliberately attempted to sidestep the Tribunal's jurisdiction by simply and unreasonably purporting to invoke the jurisdiction of the SCCO instead.

24. The Claimant was correct to point out that the Tribunal members are now no longer willing (nor do they have the capacity) individually or collectively, to consider jurisdiction or to assess the Claimant's costs themselves. This is clearly a difference to how matters appeared when they were considered by Master Whalan back in 2019. However, does that have any significance in terms of how the 1996 Act (specifically sections 63(3) and (4)) impacts upon the Claimant's decision to file a N258 in the SCCO as it did in June 2024, without first making a formal application on notice to the SCCO to assume and exercise the jurisdiction of the Tribunal? In my view it has none.

25. I respectfully agree with Master Whalan's decision from 7 November 2019. By reference to the breach of the provisions at section 63(3) of the 1996 Act, the Claimant 's assertion of jurisdiction was wrong, and the N252 was invalid (so that the DCC was issued in circumstances where the Claimant was not entitled to it). Almost five years on, the N258filed by the Claimant in June 2024 referenced this same, invalid, N252.

26. Master Whalan went on to put a secondary point *'If, however, I was adjudged to be incorrect on that assessment…'* The Claimant has sought to Appeal Master Whalan's Judgment in the High Court (HHJ Pelling KC [2023] EWHC 1005 (Comm)) and in the Court of Appeal (Lord Justice Popplewell, 23 April 2024 – see the Claimant's Skeleton at paragraph 6 *'By an order of 23.04.24 Popplewell LJ in the EWCA refused the Claimant's application for permission to further appeal and a stay, but on the papers only'*). Both the High Court and the Court of Appeal have refused the Claimant Permission to Appeal (PTA)

and as Master Whalan was not adjudged to be incorrect on his assessment, it would in my view be perverse were I to depart from it when it has already withstood challenge up to the Court of Appeal.

27. Interestingly, neither the Claimant's Grounds of Appeal nor Lord Justice Popplewell's reasons for refusing the Claimant PTA, are contained in the Claimant's Bundle. That is a curious omission given that in its Skeleton Argument at paragraph the Claimant states:

'By reference to the test in CPR 52.7, the Claimant submits that the Court of Appeal should have granted permission to appeal, because: (a) the appeal would- (i) have a real prospect of success, for the reasons set out above; and (ii) raise an important point of principle or practice, namely (A) the circumstances in which there may be a waiver of a jurisdictional requirement and/or (B) the effect of a previous representation on a subsequent inconsistent representation, there is some other compelling reason for the Court of Appeal to hear the appeal, namely that ***the prospects of success are very high, since the judgment and order under appeal was clearly wrong****.'*

28. The *'reasons set out above'* had to do with whether the Defendant had waived the jurisdiction point under the 1996 Act by purporting to apply set-off against the Claimant's costs (and serving notice of set-off upon the Claimant). The Defendant denies that this is so, and given the dismissal of the Claimant's PTA applications by both the High Court and the Court of Appeal, I am certainly in no position to accept the Claimant's argument on waiver, not least because the Defendant had barely half an hour from the Claimant's Skeleton Argument appearing on CE-file to consider and respond to it.

Analysis and conclusions - section 63(4)

29. Turning to section 63(4) of the 1996 Act, the Claimant remains in clear and undeniable breach, as it has been since (at the latest) 7 November 2019. Its argument, as summarised before Master Whalan at paragraph 40 of its Skeleton Argument (and repeated in paragraphs 44 and 45 of its latest Skeleton Argument) is that section 63 simply does not apply or have any effect in circumstances where the Tribunal has ceased to function.

30. Whereas Master Whalan found that this was incorrect, and that the Tribunal did (in 2019) continue to function, it no longer does and has not since October 2020 or thereabouts. However, I agree entirely with Master Whalan in finding that the Claimant's analysis of the law is simply wrong. The provisions of section 63, as incorporated in this arbitration (by the Claimant and the Defendant agreeing that they should be incorporated) did not cease to have effect when the Tribunal ceased to function. One of the purposes of section 63 is to provide for a procedure in precisely those circumstances; it sets out the manner in which jurisdiction should pass from the Tribunal to the Court (here, the SCCO). In agreeing to go to Arbitration, the Claimant agreed to the operation of section 63 if it wished to proceed before the SCCO.

31. The Claimant 's analysis of that section, or rather, of the applicability of that section if the Tribunal is no longer in a position to exercise jurisdiction is, from the outset, in my view, wrong. There are no grounds upon which I could conclude that the Claimant has purported to comply with the requirement to apply to the SCCO on notice in circumstances where the Claimant wishes the court simply to assume jurisdiction in this matter. The N252 dated 18 January 2019, is not and cannot be such an application. Quite aside from Master Whalan's ruling that it was invalid, the N252 is a document that need only be served on the paying party (here, the Defendant). There is no requirement that it be filed at the SCCO. The SCCO has no purpose or business unless and until either there is a (valid) Request for a Detailed Assessment Hearing or one of the parties issues some form of other interlocutory application.

32. I respectfully agree with Master Whalan's finding that the request for a DCC on 12 February 2019 could not be construed as compliance with subparagraph (4) because it is not an application to the court, it is not on notice to the other parties, and more particularly its form and purpose does not enable the court to carry out the functions anticipated and indeed required at subparagraphs (a) and (b) of subparagraph (4) to section 63. All of those caveats apply equally to a Request for Detailed Assessment.

33. It is manifestly clear to me (as it was to Master Whalan five years ago) that there has been a fundamental failure by the Claimant to comply with the provisions of subparagraph (4) of the 1996 Act. For all those reasons, the jurisdiction of the SCCO is not invoked in this assessment and the Claimant's Bill has not been brought properly within the SCCO's jurisdiction. An application, on notice to the Defendant, is required as the Claimant was told by Master Whalan almost five years ago.

The Defendant's own costs

34. I indicated above (paragraph11) that I would return to the Defendant's own costs. The Claimant asserted (Skeleton Argument of 27 September 2024, at paragraph 43):

'…all of the Paying Party's purported arbitration liability and quantum phase costs were disallowed at 4:30pm on 18.06.24 pursuant to the debarring order of HHJ Pelling KC of 23.04.24, and related costs order, which the Paying Party has also failed to comply with.'

35. The Order of HHJ Pelling KC dated 23 April 2024 states:

'Pursuant to CPR r.47.8(1) by no later than 4pm on 18.06.24, Mr Emmott must file and serve a Notice of Commencement and Bill of Costs in the SCCO, relating to all of his arbitration (liability and quantum) costs; (2) Pursuant to CPR r. 47.8(2) unless Mr Emmott commences detailed assessment proceedings by no later than 4pm 18.06.24, all of the costs to which Mr Emmott would otherwise be entitled will be disallowed'

36. It is noted that HHJ Pelling KC ordered the Defendant to **file** and serve N252; as stated at paragraph 28 above, the N252 is a document that, according to the CPR, need only be **served** on the paying party (here, the Defendant). There is no requirement in the CPR that N252 be **filed** at the SCCO. Oftentimes upon receipt of N252 the parties enter into commercial negotiations and the costs are settled without the SCCO ever becoming involved, although I appreciate that is unlikely to happen here.

37. I mean no disrespect (much less any criticism) towards HHJ Pelling KC who may well have been provided with a draft Order by the Claimant. Again, that is said without any asperity; it is entirely commonplace for a party seeking an Order to provide the Court with a draft. However, I can see why there may be confusion and a dispute as to whether the Defendant has done what he needed to do to maintain his right to recover any costs from the Claimant, or not. He appears to have been ordered to do something which, per the CPR, he is not required to do (file N252).

38. According to the Claimant, the Defendant did try to file documents at the SCCO; the Bundle contains an email from the SCCO dated 15 July 2024 and stating:

'RE: alleged CE-filing confirmation number: 298851718718571772 Dear Sir/Madam, Thank you for your email. The submission number in the subject line is from a rejected filing from 28/06/2024 due to the incorrect fee being paid, the points of dispute not being included, the Order has not been sealed and the documents need to be filed separately and individually labelled.'

39. Be that as it may, the Defendant asserts that he did commence Detailed Assessment proceedings within the required time, but the Claimant asserts that he did not. Hence (as there was before Master Whalan) there is a dispute of fact between the parties. I was not in a position to decide this, in particular being without evidence from either party but also having received the Bundle and the Claimant's Skeleton Argument at such a late stage. It was also not what the Hearing before me had been listed for.

40. The Claimant asserted that if it is not able to commence Detailed Assessment simply by dint of serving a N252 (without the need for an 'on notice' application under the 1996 Act) then surely the same should apply to the Defendant. Whilst I asked during the Hearing on 27 September 2024, *'why is sauce for the goose, not sauce for the gander?'* that was not what the Hearing before me had been listed for, either. I understood the Defendant to indicate that, whilst his own costs also arose in the Arbitration, they were not subject to the same requirement to issue an on-notice application and were properly before the SCCO without one, but he did not elaborate on this and nor was he required or expected to do so on 27 September 2024.

41. On the point which was before me, I find in the Defendant's favour. The Claimant was told in the Judgment of Master Whalan dated 7 November 2019 that it needed to make an on-notice application to

the SCCO under the 1996 Act, to bring this matter within the jurisdiction of the SCCO. Master Whalan specifically addressed the question of whether the 1996 Act would still apply even if the Tribunal was not willing and able to deal with costs, to which his answer was, yes it would. I respectfully agree with Master Whalan and am in good company given that both the High Court and Court of Appeal have refused PTA applications regarding Master Whalan's Judgment, from the Claimant, most recently on 23 April 2024.

Costs of this exercise

42. After the Hearing on 27 September 2024, the Claimant uploaded a Statement of Costs (N262) claiming £39,979.80 costs and disbursements for this one-hour Hearing (claiming Mr Wilson's time at £680.75 per hour). I note the Judgment of Mr Justice Saini dated Wednesday 5 April 2023 [2023] EWHC 816 (KB) awarding Mr Wilson's costs against the Defendant at the Litigant in Person rate of £19 per hour. Had it won, the Claimant would clearly have needed to explain how this case differs from that one.

43. The Claimant has clearly lost. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. The Court may, however, make a different order: CPR 44.2(2). CPR 44.2(4) provides that in deciding what (if any) order to make about costs, the Court will have regard to all circumstances, including:

> *The conduct of all the parties;*
>
> *Whether a party has succeeded on part of its case, even if that party has not been wholly successful; and*
>
> *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.*
>
> CPR 44.2(5) provides that the conduct of the parties includes:
>
> *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;*
>
> *Whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
>
> *The manner in which a party has pursued or defended its case or a particular allegation or issue; and*
>
> *Whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.*

44. Accordingly, I will consider brief written submissions from the Claimant and the Defendant (limited to two sides of A4) on the incidence and basis – standard or indemnity – of costs, to be filed within seven (7) days, by 16:30 on 7 October 2024.

Parties' errata and submissions on costs

45. After the draft Judgment was circulated on 30 September 2024, the Claimant submitted a number of 'errata' which were filed (by being uploaded onto CE-file) at 18:53 on 7 October 2024. Hence they were not accepted by CE-file (and not deemed filed) until the following day, 8 October 2024, which is past the deadline in paragraph 44 above. A copy was also emailed to my clerk at 17:27, but again that was past the deadline and I did not see them until the following morning.

46. Even so, rather than hand down a Judgment that may have contained errata I considered them out of time and a number were proper matters to bring to my attention, examples being correction of paragraph and page numbers and correction of an unfortunate elision of the position of the Claimant's Solicitor and corporate legal representative, Mr Wilson, with that of the Claimant. Those corrections have been incorporated into this Judgment.

47. The remainder of the Claimant's 'errata' went beyond what may properly be regarded as proposed corrections to the draft judgment and are dealt with in the Order issued today, along with my decisions on costs.

Costs Judge James

9 October 2024