Neutral Citation Number: [2023] EWHC 157 (Ch)
IN THE HIGH COURT OF JUSTICE **CR-2016-008560**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

In The Matter Of CHURCH BAY TRUST COMPANY LIMITED
And In The Matter Of THE INSOLVENCY ACT 1986

Before: INSOLVENCY AND COMPANIES COURT JUDGE JONES
DATED 23 January 2022

BETWEEN:

(1) JOANNA LEMOS
(2) MIRIAM NICHOLS
(3) KEVIN JOHN HELLARD

Claimants

and

(1) CHURCH BAY TRUST COMPANY LIMITED
(2) RODERICK FORREST
(3) KALLIOPI LEMOS

Defendants

Ms E. Weaver (instructed by Gowling WLG (UK) LLP for the Claimants
Mr T. Elias (instructed by Withers LLP) for the Defendants

Hearing date: 11 October 2022

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.

"Remote hand-down: This judgment was handed down remotely at 2.00pm on 30 January 2023 by circulation to the parties or their representatives by email and by release to The National Archives."

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I.C.C. JUDGE JONES

I.C.C. Judge Jones:

1. On 11 October 2022 there was before me a costs management hearing for this ***s.423 Insolvency Act 1986*** ("***s423***") claim. The Defendants' budget was agreed but there were issues raised by the Defendants concerning the Claimants' budget. I expressed my overall concern that the fees from both sides on their face appeared extreme looking at the nature of the case and its value: budgets of some £1.927m for the Claimants and £1.2 million for the Defendants. From general experience of such cases, including ones which needed to consider events decades past, based principally upon the statements of case I was anticipating budgets in the region of £350,000 - £600,000. It is to be emphasised, however, that this range was only an initial impression, and that such anticipation could always prove to be incorrect once the parties have drawn attention to relevant factors which justify far higher budgets. However, the fundamental point resulting from that anticipation is that I considered that both budgets required explanation and justification for the purposes of costs management.

2. The purpose of costs management is, of course, to further the overriding objective. This needs to be achieved by ensuring the costs are reasonable and proportionate. That is judged in particular by applying ***CPR Rules 44.3(5) and 44.4(3)*** to the total figures presented for each budgeted phase. At the hearing, the parties relied upon the details within their budgets, but those budgets do not explain how those details, such as anticipated days/hours and grades involved, were justified. Nor did I find sufficient assistance within the skeleton arguments or submissions. This may well be attributable to the fact that the parties had relied upon consent and had only prepared to address the specific issues of dispute not having anticipated my initial reaction. However, whatever the reason, I remained concerned that both budgets were unreasonable and disproportionate.

3. Plainly this needed to be addressed. First, because the Claimants' budget was in issue, and second because this might be a case where it would be right to record the court's reservations about the reasonableness and proportionality of the budget figures agreed. Rather than purely adjourn the costs management hearing for that information to be made available, which would not further the overriding objective, I considered it best to provisionally decide the matters in issue concerning the Claimants' budget, and to only note the Claimants' consent to the Defendants' budget. That approach being subject, in the first instance, to receiving and considering further (but brief) written justification for their respective budgets in terms of reasonableness and proportionality. Reports were lodged in early November but unfortunately did not come to my attention until 10 January 2023.

4. My concerns are obviously based upon my understanding of the grounds for this ***s423*** claim and for the defences. It is right, therefore, that I should identify that understanding in case this could be a cause for my reaction to the budgets being at odds with the parties. However, it is to be emphasised that nothing in this judgment is intended to be or is to be read as an indication of merits.

5. It seems to me (and this is obviously a summary with the result that a number of potentially important details will be appreciated but not referred to) that the following key matters are raised:

   a) The issue whether either Mr Lemos and/or Mrs Lemos was a beneficial owner of the Liberian corporation which owned Nos 27 and 27A Bracknell Gardens ("the Property") in 1994 when its shares were settled on trust by a transfer to the trustees of the Kalliopi Lemos 1994 Settlement. The claim asserts either that the Liberian corporation and, therefore, the Property was beneficially owned solely by Mr Lemos or that the Property was beneficially owned equally.

   b) Mrs Lemos's defence is that No 27 Bracknell Gardens was purchased for her by her father, and No 27A was subsequently purchased by herself and her father for her benefit.

   c) It is necessary, therefore, to consider the circumstances in which the Property was purchased by the Liberian corporation in or about 1981. As to that:

      i) It does not appear to be in dispute that Mr Lemos received its bearer share the day after its incorporation that year. Nor does it appear to be in dispute that the Property was purchased as Mr and Mrs Lemos' matrimonial home or that they have lived there since 1981. It will be necessary at trial to investigate the objective facts and potentially the subjective intentions of Mr and Mrs Lemos concerning the beneficial interest but the main requirement in the context of the defence will be to establish from where the purchase funds were derived.

      ii) The same observation applies to the extent that renovation and refurbishment works are relied upon. There will either be available documentary evidence or not. In addition documentation concerning the formation and management meetings of the Liberian company together with any documentation concerning the transfer to the settlement trustees will be potentially relevant.

      iii) Insofar as the outcome of disclosure leads to the need for oral evidence, the extent to which it can be provided due to the lapse of time and the consequences for memory (including false memory) will obviously be an issue. The defence of Mrs Lemos also refers to discussions in 1996 and 2006 as evidence corroborating her defence and this evidence is obviously nearer in time but still a long time ago.

      iv) There is issue over the fact and relevance of a legal charge granted by the Liberian corporation over the Property to secure a loan to it made by the Royal Bank of Scotland to be used to refurbish the property. The facts will need to be established insofar as they are in dispute and there will need for the purposes of preparation and trial to be investigation into the inter-relationship between this and the beneficial ownership. This will include the fact of its repayment.

d) To the extent that Mr Lemos is found to have been a beneficial owner at the date of the transfer to the trustees of the Kalliopi Lemos 1994 Settlement, and the transfer of that interest was a gift or at an undervalue, the following issues will need to be determined: Whether the transfer was for the purpose: (i) of putting assets beyond the reach of a person who is making, or may at some time make a claim against him; or (ii) of otherwise prejudicing the interests of such a person in relation to the claim which he is or may make.

e) For that purpose there must have been in Mr Lemos's mind not a specific creditor who would benefit from relief at the date of the transaction but a (i.e. any) person who is making or may at some time make a claim against him. There is no need to establish insolvency but there will be a need, therefore, in preparation for and during the trial to address the facts and matters which gave rise to the transfer.

f) The claim relies upon the fact that Mr Lemos set up a new shipping operation: *"[17] aware of the risk that this new venture might fail and wished to protect his assets from his creditors in the event of his own bankruptcy"*, and whilst there was an investigation into his tax affairs by HMRC.

g) Therefore, it will be necessary to consider in preparation and at trial the circumstances in which this new venture was being or was to be set up, the financial background and the subjective mind of Mr Lemos. The claim relies upon a 1997 solicitor's file note, and a 2015 conversation between Mr Lemos and his trustee in bankruptcy. In addition, upon the dealings of Mr Lemos concerning the trust: instructing payment of trustees' invoices, paying home insurance for the Property and liaising with neighbours over a dispute. Also the actions of Mr Lemos as the owner and controller of the Liberian company including: a 2005 loan secured on the property and its 2011/12 refinancing and the fact that he was contacted for instructions in relation to its bank account in May 2012.

h) If purpose is established, there will be the question of what, if any, relief should be granted taking into consideration the provisions of ***s425 Insolvency Act 1986***.

6. I am not suggesting this is a straight forward case and the matters below must be read from that standpoint. After all, costs of between £350,000 - £600,000 are hardly insignificant. However, as a general observation it is to be noted that the pleadings often rely upon specific documentation that is likely to be construed on its face and/or which presents a relatively narrow field of factual inquiry. Overall, even a pessimistic view of the statements of case would not identify this claim (subject to contrary explanation) as falling in the "massive disclosure" category of case, and the problems with memory are likely to reduce the available oral evidence significantly. It is also to be noted that the evidence for the claimants to the extent that office holders are relied upon will be hearsay based. This does not make the case one which falls within the scale of cost envisaged within the budgets (again, subject to specific information).

7. That is the understanding which led me to the anticipated range of costs identified. The information available to me on 11 October 2022 did not take that anticipation higher. For example, the Claimants' skeleton argument referred to: cost because of the

need to involve the major creditor who started the claim; 25 boxes of documents having been reviewed with issues of privilege and 74 other boxes; the potential for high ADR and privilege issue costs; the preparation of bundles; and to this being a complex matter requiring senior lawyers. None of those factors, even assuming they are all accepted, explain the budgets presented. In reaching that view, I appreciate that I am not directly concerned with the "incurred costs" within the totals presented but it is clear the Court should bear them in mind.

8. I next turn, therefore, to the "Report justifying Cs' costs pursuant to Order dated 11 October 2022". I will only address the points that I consider stand out. Plainly there have been difficulties flowing from the first claimant's involvement, and the joinder of the other two claimants. Yet costs of nearly £200,000 for the claimants' statements of case are not justified by the information provided in terms of reasonableness and proportionality.

9. The document informs me that the matter is substantial enough to result in the Claimants having had to review 381,324 documents, and to do so at the approximate, average rate of about 1 a minute. This produced 6,000 documents tagged as relevant and not privileged. This was narrowed down to 2,200 relevant documents. There are more or less the same quantity of privileged documents. The obvious point, however, is that it is unexplained how the Claimants started with 381,324 documents when there are only some 4,000 documents (including privileged) that reached the third stage. The information does not justify a conclusion (in terms of costs' proportionality and reasonableness) that there was a proper analysis to identify the type of document that would be relevant.

10. Nor is the time to be spent on witness statements explained. The information is based upon numbers and not upon substance. I appreciate there are potential issues of privilege to bear in mind when deciding how much information to give in this document, but the time spent with regard to the evidence of those without personal knowledge is not justified and nor the very long time to be spent on the evidence of the first claimant notwithstanding the facts that she is in Greece, elderly and does not speak English as her first language. Clearly much will depend upon what she is dealing with in her statement but on the basis that it is currently in her memory, the cost has not been justified.

11. The trial preparation costs are based upon stated hours and grades but the times to be spent really do need justification which is not provided. It may be that I simply do not understand what is involved when it comes, for example, to agreeing this bundle (bearing in mind all the work that has gone before with regard to identifying issues, the relevant documents and drafting the witness statements) and/or to witness familiarisation (30 hours or 5 six hour days albeit divided between three people of differing grades) but this court is reasonably familiar with the process. In addition there are figures applicable to other work which sustain the conclusion that the costs budget is so high that it cannot be considered reasonable and proportionate. For example, I refer to the time allocated for the review of skeleton arguments prepared by leading and junior counsel. It is neither reasonable or proportionate to spend 28 hours split between three people. Being perhaps unkind, one would hope that a Grade A solicitor familiar with the claim would be able to write the skeleton themselves in 8 hours.

12. As another example, there is no doubt that the claimants' counsel have the greatest task of cross-examination because they are dealing (it is assumed) with evidence principally of personal knowledge. However, attendance by grade A and B (both for 9 days, 10 hours a day) and C and D fee earners really does need review in terms of reasonableness and proportionality.

13. In addition, although not raised in the letter, I am yet to find justification applying that requirement in the context of costs management for the disbursements for counsel. Of course a party can instruct Leading Counsel but that must be viewed against the fact that this is a claim which could be and would not uncommonly be dealt with by medium to senior junior counsel. I suggest that reasonableness and proportionality at the top end would be considering counsel earning in the region of £750,000 a year with hourly rates and brief fees accordingly. Preparation would be reasonable and proportionate at 5 days (i.e. without undertaking other work). There is no justification of the fact that the disbursements presented do not accord with this approach.

14. The letter from Withers on behalf of the defendants dated 8 November makes a number of points criticising the claimants' budget. Overall they appear to be fair points but I will not dwell upon them because the claimants have not had the opportunity to respond. The first matter concerning their work that stands out is the collection of over 122,000 documents. However, again there is a massive difference between the documents originally identified and those found to be potentially relevant (in this letter by reference to being responsive to the search terms). It is also to be noted that the defendants anticipate there may be a significant number of documents to review when the claimants have incurred costs of £299,055. They may be relieved to find it is not a huge number.

15. I agree that the defendants carry the greater burden with regard to witness statements bearing in mind their witnesses are called (as I understand it) because of personal knowledge. On the other hand the time expected to be taken must be balanced to some extent against the issue of the extent to which it is reasonable to anticipate that someone in 2023 will be able to give lengthy evidence concerning events so long ago. Nevertheless, the letter generally suggests to me that the defendants are adopting a more reasonable and proportionate approach to trial preparation and costs. However, I still cannot understand from the information provided why costs of over £1 million are considered reasonable and proportionate other than by comparison with the claimants' costs.

16. The sum in issue, some £8 million, is not insubstantial and the total sums budgeted could be justified in terms of proportionality based upon that valuation and upon the importance of the outcome to the defendants. However, that justification must also take into consideration the nature of the case and what is required to present the claim or defence at trial. This is clear not only from the general usage of the word proportionate but also from ***CPR Rule 44.4(3)***. Those are also factors to be considered when measuring reasonableness. My conclusion is that the budgets remain unjustified in terms of reasonableness and proportionality.

17. The more difficult issue, it seems to me, is what should be done bearing in mind the date of the trial and the need to reduce not increase costs. That is the last thing I am aiming to achieve. The underlying point is that neither side has had the opportunity to address me further, orally. Insofar as an oral hearing is required, there will be a need

for dates to avoid and a time estimate. However, this will add further to the costs and, therefore, it is worth considering alternatives.

18. My suggestion for the parties' consideration within the draft circulated judgment was that the best course may be to have a new order which further to the order last made by me records this decision (and that it is made without further oral argument as agreed). Namely that although the Defendants' budget in respect of estimated costs is agreed in the sum of £850,355.00 and the provisional assessment of the Claimants' budget in respect of estimated costs produced a figure of £893,455.00, the court does not consider on the information currently available that the budgets are reasonable and proportionate. Reference can be made to this judgment (in final form) for the court's comments upon the budgets for reference in any subsequent assessment proceedings.

19. It was stressed that time would be set aside for a further hearing if required. The parties informed me that they accepted the suggestion and submitted a draft order for approval. It has been approved subject to the court's amendments.

Order Accordingly