

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM No: BVIHC (COM) 2018/0172

BETWEEN:

**(1) SUMITOMO MITSUITRUST (UK) LTD
(2) STERLING TRUST (CAYMAN) LTD
(3) ZAM ASSET FINANCE LTD
(4) ZAM SPECIALIST OPPORTUNITY LIQUIDATING STAR TRUST**
Claimants
and
SPECTRUM GALAXY LTD
Defendant

Appearances:

Mr. Peter McMaster QC and Ms. Laure-Astrid Wigglesworth of Appleby (BVI) Ltd
for the Claimants
Mr. Tim Prudhoe, with him Mr. Merrick Ricardo Watson of Kobre & Kim (BVI) LP
for the Defendant

2021 July 7
July 13

CONSEQUENTIALS JUDGMENT

[1] **JACK, J [Ag.]:** On 14th April 2021 I gave judgment in this matter dismissing the claimants' claim. This judgment deals with the orders consequential to that substantive decision. I shall use the same nomenclature as in the earlier judgment.

[2] The three issues which are controversial are:

- (a) What order for costs I should make? Mr. McMaster QC for ZAM submits there should be a substantial deduction to reflect the issues on which, he says, ZAM succeeded. Mr. Prudhoe for Spectrum disputes that an issue-based approach is appropriate. Further, he says that I should take a letter of 29th September 2019 into account, either under CPR 35.15 or under **Calderbank** principles.¹
- (b) What payment on account should I make?
- (c) Are ZAM entitled to set off any costs order I make against them against a judgment obtained in this Court against the defendant for US\$4 million on 5th March 2014 by the first claimant?

(a) The appropriate costs order

[3] CPR 64.6 provides:

“(1) Where the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.

(2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.

(3) This rule gives the court power in particular to order a person to pay –

- (a) costs from or up to a certain date only;
- (b) costs relating only to a certain distinct part of the proceedings; or
- (c) only a specified proportion of another person's costs.

(4) The court may not make an order under paragraph 3(a) or 3(b) unless it is satisfied that an order under paragraph 3(c) would not be more practicable.

(5) In deciding who should be liable to pay costs the court must have regard to all the circumstances.

(6) In particular it must have regard to –

- (a) the conduct of the parties both before and during the proceedings;
- (b) the manner in which a party has pursued –
 - (i) a particular allegation;
 - (ii) a particular issue; or
 - (iii) the case;

¹ *Calderbank v Calderbank* [1976] Fam 93, [1975] 3 All ER 333.

- (c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;
- (d) whether it was reasonable for a party to –
 - (i) pursue a particular allegation; and/or
 - (ii) raise a particular issue; and
- (e) whether the claimant gave reasonable notice of intention to issue a claim.”

[4] CPR 35.15 provides:

“(1) The general rule for defendants’ offers is that, if the defendant makes an offer to settle which is not accepted and in –

(a) the case of an offer to settle a claim for damages – the court awards less than 85% of the amount of the defendant’s offer;

(b) any other case – the court considers that the claimant acted unreasonably in not accepting the defendant’s offer;

the claimant must pay any costs incurred by the defendant after the latest date on which the offer could have been accepted without the court’s permission.

(2) If a claimant makes an offer to settle and in –

(a) the case of an offer to settle a claim for damages – the court awards an amount which is equal to or more than the amount of the offer;

(b) any other case – the court considers that the defendant acted unreasonably in not accepting the claimant’s offer;

the court may, in exercising its discretion as to interest take into account the rates set out in the following table:

Net amount of damages Rate of interest

not exceeding EC\$ 100,000 15% per annum

for the next EC\$150,000 12% per annum

for the next EC\$500,000 10% per annum

in excess of EC\$ 800,000 8% per annum

where ‘net’ means the amount of damages on the claim less the amount (if any) awarded on any counterclaim.

(Example)

One year since the offer. Damages – EC\$400,000;

The court might award –

15% on the first \$100,000 for one year (\$15,000);

plus 12% interest on the next \$150,000 for one year (\$18,000);

plus 10% interest on the remaining \$150,000 for one year (\$15,000);

a total of EC\$48,000 interest on damages.)

(3) The court may decide that the general rule under paragraph (1) is not to apply in a particular case.

(4) In deciding whether the general rule should not apply and in considering the exercise of its discretion under paragraph (2), the court may take into account the –

- (a) conduct of the offeror and the offeree with regard to giving or refusing information for the purposes of enabling the offer to be made or evaluated;
- (b) information available to the offeror and the offeree at the time that the offer was made; (c) stage in the proceedings at which the offer was made; and
- (d) terms of any offer.

(5) This rule applies to offers to settle at any time, including before proceedings were started.”

- [5] It is convenient to look at the arguments in relation to CPR 35.15 first. Kobre & Kim’s letter of 23rd September 2019 on behalf of Spectrum said:

“[W]e invite your clients to withdraw their claims and pay our client \$150,000.00 which is roughly half our client’s legal costs incurred to date.”

It then gave 21 days for acceptance and drew attention to Spectrum’s reliance on the letter in relation to CPR 64.6 and 35.15.

- [6] Mr. McMaster QC’s first point is that this invitation to withdraw is not an “offer to settle” at all; it is an invitation to withdraw. CPR 35.15 is, he submits, directed at a situation in which a defendant is giving the claimant something in satisfaction of the latter’s claim. A straight withdrawal gives the claimant nothing.

- [7] In my judgment “offer to settle” stands to be construed on ordinary common law contractual lines. If there is consideration for the offer, then that is sufficient to be an “offer to settle” under the Rules. Here the offer to accept what Spectrum asserts is less than its full costs is a valid offer, which (if accepted) would give rise to an enforceable contract at common law. That is sufficient, in my judgment, to make it an “offer to settle” for the purpose of CPR 35.15. Anything else would require the Court to investigate the adequacy of the consideration, which is not relevant at common law.

- [8] Mr. McMaster QC's second point is that CPR 35.15(1)(a) does not apply. I agree. This case not about damages and Kobre & Kim made no offer for Spectrum to pay ZAM damages. As to CPR 35(1)(b), he submits that ZAM did not act unreasonably in rejecting Spectrum's offer. ZAM had a reasonably arguable claim for many millions, albeit, one which it lost. Spectrum's offer gave it nothing except a reduced liability for costs.
- [9] Mr. Prudhoe pointed out that ZAM would have done better, had it accepted Spectrum's offer. That is true, but is not necessarily sufficient to invoke the Part 35 costs consequences. The Eastern Caribbean CPR has a different schema for offers to that in Part 36 of the English CPR. The main incentive for a party to accept an offer under the English Rules is that if the party making the offer beats it at trial, the other side are liable for indemnity costs rather than standard costs. The Eastern Caribbean Rules make no distinction between indemnity and standard costs. The English Rules cannot be transposed unthinkingly to the Caribbean; the Eastern Caribbean CPR must be interpreted on their own wording. It is significant that under the latter Rules the costs consequences of CPR 35.15(1)(a) only kick in when damages are awarded at less than 85 per cent of a relevant offer. This suggests that "unreasonably" in CPR 35.15(1)(b) must be construed fairly narrowly. Failing to beat a CPR 35.15 offer is a necessary precondition for the Court to exercise its discretion under Part 35, but it is in my judgment by no means sufficient.
- [10] In the current case, the Court has in my judgment to look at the position as it was at the time ZAM rejected the Part 35 offer. At that time, ZAM had an arguable case against Spectrum worth many millions of dollars. Now, it is true, as Mr. Prudhoe argues, that various of the claims, like the contractual causes of action, were barred by limitation. However, the position in relation to misrepresentation was much less clear. Indeed Spectrum's case that there was no actionable misrepresentation was put forward on a factual basis, rather than on the basis (which I accepted) that the law of this Territory was as it was before the enactment

in England of the **Misrepresentation Act 1967**.² I also held that a breach of contract which was barred by limitation could not give rise to an actionable claim of unfair prejudice. That point was not, however, firmly established in the case law.

[11] I have to stand back and consider whether ZAM acted unreasonably in rejecting Spectrum's offer of 23rd September 2019. In my judgment it did not. Spectrum's offer gave ZAM a reduction in its exposure to costs of at most \$150,000 (assuming Spectrum could establish a claim to the full \$300,000 in costs at that stage on a taxation). In return ZAM would be abandoning a claim worth millions, if it succeeded. The benefit to ZAM from Spectrum's offer was (put against the value of ZAM's claim) negligible. There must in my judgment be some real and substantial benefit (as opposed to a notional benefit) to a party before the rejection of a Part 35 offer can be considered to be unreasonable.

[12] I turn then to my consideration of my discretion under CPR 64.6. I am entitled to take the 23rd September 2019 offer into account as a **Calderbank** offer. However, in my judgment in deciding what weight to put on it, I should take some guidance from CPR 35.15(1)(b). If refusal to accept the offer was not unreasonable, then the weight to be given to it should be correspondingly small. The offer is relevant on **Calderbank** principles, but on the facts of this case only little weight should be attached to it under CPR 64.6(5) and (6). Both parties made submissions on the language used by the other side in letters concerning the offer, but in my judgment the tone of the correspondence did not fall outside the generous margin of appreciation given to commercial firms in this jurisdiction.

[13] Should I, as Mr. McMaster QC submits, make an issues-based costs order? Here my starting point is necessarily CPR 64.6(1), because ZAM has lost.³ An issues-based order may or may not be appropriate. There is no presumption to that effect. Instead, the Rules lay down various countervailing considerations. Under

² 1967 c. 7.

³ *Throne Capable Ltd v Agile Start Group Ltd* [2020] ECSCJ No 433 (Court of Appeal, 14th January 2021).

CPR 64.6(6)(c), I have to take into account that ZAM won on some issues. Under CPR 64.6(6)(d) I have to consider whether Spectrum acted reasonably in pursuing points on which it lost.

[14] Mr. Prudhoe argued that ZAM was a serial litigant for which scant sympathy should be shown. On the facts of this case, I do not accept that. It is true that ZAM started proceedings in New York. It then withdrew them and started proceedings in Florida. Those proceedings were then stayed whilst ZAM applied unsuccessfully in this Court for permission to continue the Florida proceedings as a derivative action. In my judgment, these were all part of the same claim. The move from New York to Florida was on procedural jurisdiction grounds. The BVI application was to regularise the parties' status in Florida.

[15] Mr. McMaster QC submitted that Spectrum's schedule of costs amounting to over \$1 million was grossly excessive. That is in my judgment relevant on a detailed assessment and relevant in considering what payment on account should be ordered, but is not relevant to the determination of what costs order is in principle appropriate. Accordingly I shall disregard these factors raised by respective counsel.

[16] Turning to matters which are in my judgment relevant in the current case, from the outset limitation and delay have been issues. Indeed, at the start of the trial Mr. McMaster QC indicated that three of the five causes of action were abandoned on those grounds. Spectrum did not in my judgment act unreasonably in pursuing the case it did, including the points on which it lost. Standing back and looking at the matter overall, in my judgment this is not a case where an issues-based approach is appropriate. The CPR 64.6(6)(d) factors outweigh the CPR 64.6(6)(c) factors. Accordingly, I simply order ZAM to pay Spectrum's costs.

(b) Payment on account

[17] I turn then to the question of a payment being made on account of costs. Counsel are agreed that it is appropriate to make such an order. The only issue is

quantum. As a rule of thumb the Court will often start with a figure of 70 per cent of the costs schedule which has been served. That starting point can, however, be adjusted both upwards and downwards.

[18] The trial in this matter was heard over seven days. That is, however, slightly misleading. The first five days of the trial were heard at the same time as a different trial involving witnesses giving evidence by Zoom from Macau.⁴ Due to the twelve hour time difference, the Court sat earlier in the day for those witnesses and then later the same day to hear the current case, so the days were shortened. Taking this feature into account, I agree that the total amount claimed of \$1,015,501.05 is on the high side.

[19] In my judgment a reasonable figure for a payment on account is \$550,000.

(c) Set off of costs against a judgment debt

[20] This leads to the final question. On 5th March 2014 the first claimant recovered judgment against Spectrum for \$4 million. With **Judgment Act** interest the sum owed is in excess of \$5.4 million. Is ZAM entitled to set off that judgment against the payment on account I have ordered in favour of Spectrum?

[21] The parties were agreed that **Derham on the Law of Set-Off**⁵ accurately sets out the relevant principles:

“It has been the practice of the courts since the eighteenth century to allow one judgment or order for the payment of a sum of money to be set off against another. This practice extends to a judgment for debt or damages and to an order for costs...

The true basis of the set-off is the court’s inherent jurisdiction. Its purpose is to prevent absurdity or injustice, and to do that which is fair. It has long been accepted that the inherent jurisdiction is not confined to judgments in the same action, or the same court, without it being suggested that the claims nevertheless must be closely connected as for an equitable set-off.

⁴ *IsZo Capital LP v Nam Tai Property Inc* [2021] ECSCJ No 478.

⁵ 4th Ed (2010) at paras 2-98 and 2-104 (citations omitted).

Further, in so far as the Court of Appeal in the **Lockley** case⁶ was reticent to accept that a set-off of costs against damages would always be justified, it is nevertheless the case that the courts have been prepared to order a set-off of costs against a judgment for damages and costs, or of costs against a judgment for debt and costs, or of costs against any future sums which may be ordered to be paid on the taking of a partnership account between the parties. In truth, the distinction between damages and costs was not an important issue in the cases in which the jurisdiction was developed.”

- [22] The starting point is thus that the Court should lean in favour of allowing a set-off. This is shown in **Lockley** where the lower court had directed that interlocutory costs orders made against the plaintiff might be set off against any damages award which might subsequently be made against the defendant. The plaintiff was legally aided, which normally would prevent a costs order being made. However, the matter is always discretionary. Scott LJ, giving the judgment of the Court of Appeal, held that while a set-off of costs against costs in the same action is “natural and equitable... [i]t is... less obvious that a set-off of costs against damages would always be justified.” He dismissed the appeal.
- [23] In considering how to exercise a discretion, other cases are not generally binding. The Court has always to consider its discretion based on the facts of the particular case before it.⁷ Other cases will usually be examples of how the Court exercises its discretion.
- [24] Mr. Prudhoe placed particular reliance on **Ridley v Dubai Islamic Bank PJSC**,⁸ a decision of Moulder J. The facts of that case were, however, unusual. The bank had lent some \$500 million to a company called Plantation, which owned land in Dubai which it intended to develop. Ridley gave a guarantee for the money. In 2013 the bank obtained a judgment from Flaux J (as he then was) in the English Commercial Court against, *inter alia*, Ridley for \$432 million. In the meantime the

⁶ Lockley v National Blood Transfusion Service [1992] 1 WLR 492.

⁷ Re Global Diversity Opportunity II Ltd; Re PA Grand Opportunity VIII Ltd [2021] ECSCJ No 490 (Jack J) at paras [12] to [18].

⁸ [2020] EWHC 2088 (Comm), [2020] Costs LR 1485.

bank had repossessed the Dubai land from Plantation under a charge which it had taken. In 2020 a Bahraini Court determined that the Plantation land was worth more than the English judgment debt. By repossessing the land, the judgment debt should be treated as discharged.

[25] Ridley was liable under Dubai law to a criminal sanction for defrauding the bank. He was sentenced to ten years imprisonment. When that period was nearly up, the bank applied (as is permitted under Dubai law) to extend the period of imprisonment by an additional twenty years and was granted the order. Ridley sought an anti-suit injunction in the English Courts to require the bank to retract its application for the twenty-year extension (such retraction being possible in Dubai law). The bank opposed the grant of permission to serve out of the jurisdiction, but lost. Ridley was given his costs. The bank sought to set off Ridley's costs order against the English judgment debt, which it said was still outstanding.

[26] The bank argued that, because the underlying indebtedness merged into the English judgment under the doctrine of *transit in rem judicatam*, the decision of the Bahraini Court, Ridley still owed it the judgment debt. Moulder J held:

“23. The test as to whether the court should order set off is whether it is just and equitable to do so.

24. I accept that as a matter of English law the cause of action under the RSA ceased to exist having merged in the judgment in 2013... I also take into account the fact that the Judgment Debt remains outstanding in a principal amount of some US\$433 million plus interest of over US\$228 million (to date) and has been outstanding for a number of years. In any other circumstances the case for an order for set off of an order for costs against a judgment debt may well be overwhelming.

25. However the application to set off the Judgment Debt has to be considered in the context in which the Costs Award has arisen:

- i) These proceedings are being brought by Mr. Ridley to challenge his continued imprisonment;
- ii) The imprisonment of Mr. Ridley, on the claimant's case, is the result of the wrongful actions of the judgment creditor (the Bank) and arise out of the underlying facts giving rise to the Judgment Debt...

iii) The Costs Award is the result of a protracted challenge by the Bank to an order for service out which has had the effect (if not the express intention) of delaying the substantive proceedings for over a year.

26. The court also has to weigh the fact that an order for set off may adversely affect the just conduct of the present proceedings:

i) Although the Bank submitted that any order for set off now would not set a precedent for the future, in my view the Bank is likely to rely on any order now made by this court to support any similar application which may arise in the future.

ii) The risk of an adverse costs order is one of the few sanctions which the court can use to deter parties to litigation from bringing unmeritorious applications. [I]t is highly undesirable that, in general terms, this potential sanction of an adverse costs order is weakened or removed particularly when, as in this case, one has regard to the likely relative financial resources of the parties which the court may infer would enable the Bank to resist the claim by Mr. Ridley regardless of any cost constraints and in circumstances where the Bank has no apparent interest in, and will receive no obvious benefit from, pursuing its defence to these proceedings in an expeditious manner.

iii) This litigation concerns the liberty of Mr. Ridley and was commenced in December 2018. It has already taken many months largely due to the challenge which the Bank has brought through the set aside application...

iv) Accordingly a decision to allow the Bank not to pay the order for costs in respect of an application in the proceedings where it has been unsuccessful (other than payment by way of set off) would in my view not be in furtherance of the overriding objective. It would mean that should the Bank be minded to take actions to delay or thwart substantive consideration of the issue in the proceedings it would have the comfort that however unmeritorious the application it was unlikely to bear the risk of paying adverse costs orders.

27. Further the court takes into account that even though the Bank relies in this court on the (accepted) proposition of English law that the contractual debt under the RSA has merged in the judgment debt, it separately chose to bring and pursue proceedings (which ultimately led to the judgment of the [Bahraini Court])... In my view this court is entitled to have regard to the conduct of the Bank and the findings of the BCDR in determining what is just and equitable in the circumstances.

28. If set off is refused, in my view the Bank will suffer no real prejudice:

- i) Although the Judgement Debt remains outstanding, the amount of the Costs Award to be set against the Judgement Debt is relatively modest;
- ii) the Bank continues to have the benefit of its security over the Plantation Land.”

- [27] Those facts are so far removed from the present that the case gives me very little assistance with how I should exercise my discretion.
- [28] There are a number of points which in my judgment I need to consider. Firstly, Spectrum is alleged by ZAM to be insolvent, but ZAM (because of its status as a member) cannot apply to wind up the company. This has two consequences. (a) If there were a liquidation, there would be a statutory set-off of the costs order against the judgment debt. (b) There might be some prospect of ZAM actually receiving some money from the assets of Spectrum. As it is, there is no statutory set-off, nor any prospect in even the medium term of receiving payment.
- [29] Secondly, **Ridley** was very much a case of David and Goliath. Refusing to allow Ridley to recover the costs awarded in his favour might well have stymied his attempt to gain release from prison in Dubai. Here the parties are of roughly equal commercial status and power. There is no obvious injustice in treating the order for costs as simply an adjustment of monies owing one way or the other. Mr. Prudhoe submits that other investors in the Fund might be prejudiced, but given no one (except Jericho and Magnum, who are related parties) will be seeing any money soon, this is speculative.
- [30] Thirdly, Mr. Prudhoe says the argument on set-off was only raised very late. However, he does not explain how that has caused prejudice to Spectrum. The issue as to whether any costs order could be set off against the judgment debt owed by Spectrum is, it seems to me, a fairly obvious one. I do not accept that Spectrum would have acted differently if the point had been raised from the outset.
- [31] Fourthly, Mr. Prudhoe submits that “[s]et-offs have been refused when the party claiming the set-off has acted unreasonably.” I agree. However, I do not consider

that ZAM did act unreasonably. The claim was not “very weak” or “doomed to failure”, as was the case in **Faulkner v Secretary of State for Business, Energy and Industrial Strategy**,⁹ on which Mr. Prudhoe relied.

- [32] Looking at matters in the round, in my judgment it is just and equitable for ZAM to be able to set off the costs orders made against it against the judgment debt payable by Spectrum. It is true that the judgment debt was owed solely to the first claimant, but that in my judgment is irrelevant to the right to set-off.

Conclusion

- [33] Accordingly, I determine:
- (a) ZAM should pay Spectrum’s costs of the action, not just a proportion of them.
 - (b) ZAM be ordered to make a payment on account of \$550,000 in respect of those costs.
 - (c) ZAM is entitled to set off the above costs orders against the judgment debt owed by Spectrum to the first claimant.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar

⁹ [2020] EWHC 296 (QB), [2020] 1 WLR 2906.