

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

Claim No: BVIHC (COM) 142 of 2019

BETWEEN:

PACIFIC FERTILITY INSTITUTES HOLDING CO LTD

Applicant

and

PACIFIC FERTILITY INSTITUTES (HK) HOLDING CO LTD

Respondent

Written submissions:

Ms. Rachael Stitt and Mr. Matthew Freeman of Campbells for the Applicant
Mr. Richard Evans of Conyers for the Respondent

2020: March 12

JUDGMENT ON COSTS

[1] **JACK, J [Ag.]:** By a judgment handed down on 22nd January 2020 I set aside a statutory demand served by the respondent ("PFI HK") on the applicant ("PFI BVI"). I made provision for the parties to make submissions as to costs. Both parties have made submissions and I proceed to determine the matter on paper.

[2] 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;
(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.”

[3] Applying this rule to the current case, my starting point under CPR 64.6(1) is that PFI BVI, as the successful party, has a claim to its costs against PFI HK. What is urged against applying this general rule is the following.

[4] Firstly, it is said that PFI BVI did not answer the fraud allegations made against Mr. Li. PFI HK is a wholly owned subsidiary of PFI Cayman, which has been put into

liquidation, so there was no personal interest involved in serving the statutory demand. Secondly, PFI BVI lost on the two technical defences it raised, namely that a restitutionary claim could not be “liability” for the purpose of serving a statutory demand and that a statutory demand could not be served before a formal demand for payment of the monies owned had been made.

[5] So far as the first ground is concerned, this in my judgment is irrelevant to the question of costs. As I explained in my substantive judgment, PFI BVI were within their rights not to answer the fraud allegations, because on my findings they were merely collateral issues. Accordingly that conduct should not be held against PFI BVI when considering costs. It may well be that the liquidators of PFI Cayman had no personal interest in the current litigation, but that again is not in point: the liquidators litigated and lost.

[6] There is more force in the second ground. However, just because overall winner loses on some aspects of the case, does not automatically mean that there should be a reduction in costs. An important consideration is the extent to which costs have been increased by the argument on the losing points. In the current case, the matter was listed for hearing on 14th January. Very little saving in cost would have been obtained, if PFI BVI had abandoned the restitution and the formal demand points.

[7] In these circumstances, I shall order that PFI HK pay all the costs of PFI BVI.

[8] I turn then to the issue of quantification. There were four fee-earners involved at Campbells: Jeremy Lightfoot, a partner in Hong Kong on \$900 per hour; Matthew Freeman, a senior associate, on \$775; Charlotte Walker, another senior associate on \$625; and Rachael Stitt, an associate on \$525. The latter three were all based in this Territory. No objection is taken to the hourly rates and they are within the norms for this jurisdiction.

[9] Mr. Evans, on PFI HK’s behalf, submits:

“On a costs/benefit basis, it is not considered effective to devote effort (and judicial time) to a line by line critique of the schedule [of costs], although there are many points that come to mind; e.g. fee earners charging at \$775ph should not be concerned with bundling; post hearing legal research should not be recoverable; service letters should not be charged at \$525pm. Rather the Court is invited to apply a standard, if broad brush approach and allow no more than 75% of the claimed costs.”

- [10] Neither side took me to any case law on the approach to be taken to assessing costs. My understanding is that the first question, I need to address is whether, overall, the costs claimed by the receiving party are proportionate. The total claimed is \$54,477.30. The total in dispute was \$500,000. I note too that the paying party instructed leading counsel from London to appear. In that context the sum claimed by the receiving party in my judgment is proportionate.
- [11] Having determined that the sums claimed are proportionate, it is not, at least as I understand the case law, appropriate to take a “broad brush” approach and knock a quarter off the costs incurred. (That would only be appropriate if the costs were disproportionate.) I must, instead, look at any individual items which are disputed as unreasonably incurred or unreasonable in amount.
- [12] An oddity of the current case is that the majority of the preparation for the application was done by Mr. Freeman, a senior associate, whilst the actual advocacy was done by Ms. Stitt, the most junior member of the team. She appears to have had no involvement with the preparation of the bundles; that was all done by Mr. Freeman. A more normal allocation of tasks would have been to give Ms. Stitt the preparation of the bundle with supervision by Mr. Freeman. That is likely to have been cheaper, but only slightly cheaper, because of the additional cost of supervision. Over the period 7th to 13th January 2020, Mr. Freeman spent 7¼ hours on the case. From the narrative it is not possible to break down what was spent on bundles and on other matters, like finalizing the skeleton argument. In my judgment, there would have been some saving in costs if bundle preparation had been devolved to Ms. Stitt. I shall deduct one hour of the difference between

Mr. Freeman's rate and Ms. Stitt's, so as give a deduction of \$250. (Ms. Stitt would have spent more time on bundles, but there would then have been supervision by Mr. Freeman.)

- [13] PFI HK object to an item on 14th January 2020 described as Ms. Stitt carrying out "[r]esearch regarding common law and equitable restitutionary claims following hearing." I cannot see how that can be a cost of the application. The research should have been done before the hearing, not after. I disallow \$131.25, the amount claimed.
- [14] Lastly, PFI HK object that service letters were charged out at \$525 per hour. Given that was the rate of the most junior team member, I cannot see that there can be any proper challenge to this. I disallow nothing.
- [15] Accordingly I disallow a total of \$381.25 from the bill of \$54,477.30, to give a total recoverable of \$54,096.05. I understand there is a letter from PFI HK written without prejudice save as to costs as regards the sum payable. I shall consider any representations as to the costs of the taxation itself on paper.

Conclusion

- [16] PFI HK shall pay PFI BVI the costs of the application, assessed in the sum of \$54,096.05. I shall consider representations as to the costs of the detailed assessment on paper. PFI BVI shall serve its schedule of costs of the detailed assessment within seven days of the handing down of this judgment. PFI HK shall serve any representations within seven days thereafter, with any reply by PFI BVI within seven days thereafter.

Justice Adrian Jack (Ag)
Commercial Court Judge

By the Court

Registrar