Online Case 39
Wright

v

Rowland

[2016] 5 Costs LO 713

Neutral Citation Number: [2016] EWHC 2206 (Comm)
High Court of Justice, Queen's Bench Division,
Commercial Court
17 June 2016

Before:
Flaux J

Headnote

Costs budgeting. Where the claimant's costs budget had been agreed and approved but the defendants' had not, the court set out the principles that apply where there is a disagreement between the parties which has prevented both budgets being agreed.

Here, the defendants had contended for a high budget to reflect what they said about the case being complex, whereas the claimant had argued that the issues were narrow so the figures should be low.

The problem for the court in fixing the budget was that if the defendants were to be entirely wrong, a budget might be approved for reasonable costs without there being any detailed assessment.

On the other hand, if the claimant's submissions were accepted, that might be acting unfairly to the defendants if the case turned out to be as complex as they contended.

In these circumstances, the court had three choices:

(1) To set a compromise budget figure between the parties' extreme positions. That was not sensible.
(2) Not to approve the defendants' budget and leave the costs to the costs judge, but that would not help the claimant in knowing what debt he might ultimately be exposed to.
(3) Look at those elements in the budget which could be approved and those which could not.

The correct course was (3). Budgets for witness statements, expert evidence and the pre trial review would be approved. Those for trial preparation, trial, ADR and contingency "A" would not. In respect of them, the defendants would be entitled to seek detailed assessment, if successful at the end of the day. Order accordingly.

Cases Cited

Beresovsky v *Abramovich* [2012] EWHC B15 (Ch)
Cherney v *Deripaska* (settled)

Judgment

1. **Flaux J:** This is the costs management conference which was ordered by Blair J at the time he heard the case management conference on 29 April 2016. He ordered that the parties were to file revised budgets by May 20 and to exchange a budget discussion report by May 27 and if the matter was not agreed, there was to be a further hearing to consider the costs budgets, which is this hearing.

2. The position is that the claimant's budget has been agreed by the defendant and there is no issue about the claimant's budget. In those circumstances I would approve the budget. So far as the two defendants' budgets is concerned, there are a number of points that are raised. First of all, there is a point that Mr Casey makes about the value of the claim. The claim is to be assumed to be in the region of 10 million euros, so it is within the costs budgeting regime. I do not have any doubt about that and indeed Blair J has so decided, so it would be

inappropriate for me to seek to revisit his decision.

3. There is a dispute between the parties as to the complexity of the case, which is obviously one of the matters in issue. Mr Casey on behalf of the claimant submits that in reality the issues are narrow. There are issues as to the retainer of the claimant in 2008 and whether or not he was working pursuant to a contract with one or other of the defendants or whether he was acting essentially on an entirely discretionary basis. Then there is an issue as to whether he introduced the deal with the bank and his actual role in the acquisition of the bank. Finally, there is an issue as to what was agreed on the yacht as regards the claimant having an option in relation to which there was nothing in writing.

4. He submits that much of this will turn on oral evidence. None of these issues are difficult and, insofar as there is an issue about the quantum of any minority shareholding in the bank, the expert evidence that is required is nothing like as complex as the defendant suggests.

5. Mr Ali Malek QC, who represents both the defendants, takes issue with that assessment of this essentially being no more than a swearing match. There are, he submits, complex issues. He points out that merely because a case turns on oral evidence or whether there was an oral agreement does not mean that it is not a complex case. He cites the cases which this court has seen in the recent past, such as *Beresovsky* v *Abramovich*, and *Cherney* v *Deripaska*, although the latter case in the end settled, as examples of cases which turned on whether there were oral agreements, which could certainly not be described as anything other than complex. He refers to the extensive disclosure that is going to be required of what the claimant was doing at a particular time. He also submits that there are a number of other aspects of the case which add to its complexity, such as the apparent loss of the iPhone on which there was a recording of a conversation between the claimant and the first defendant, which the claimant relies upon as an admission by the first defendant that there was an option agreement. That apparently has gone missing. Mr Malek QC also referred to the revelation that there is a major archive of 30,000 emails held by the claimant of which the defendants will say the claimant should not have been in possession. All those matters, he said, add to the complexity of the case.

6. Then there is an issue about the relationship between the two

defendants. The position is that, although they are father and son, they have the same solicitors and leading counsel, but each has a separate junior counsel. Mr Casey is critical of that and submits that in circumstances where there cannot be a conflict of interest because the same solicitors and leading counsel are acting for the defendants, it is appropriate only to allow for one counsel.

7. Finally, there is the issue of reputation which arises in considering the size of any budget. Mr Casey submits there is no reputational issue here. These are not professional men. There is obviously an issue as to whether somebody is not telling the truth, but that is the case in many, many cases. Mr Malek QC says there is an issue about whether or not the first defendant misled the Luxembourg regulators as to the extent to which his family would be controlling the bank. It is fair to say, as Mr Casey submits, that it is difficult to see that there can have been a misrepresentation to the regulator in relation to a 5% interest, but I will assume for the purposes of this afternoon's exercise that there are genuine reputational issues which go some way towards justifying the instruction of Mr Malek QC.

8. What has troubled me is that many of the points made by Mr Malek are points which may, at the end of the day, prove to be entirely correct; equally, they may prove to be entirely wrong and I am troubled by, in effect, approving a budget today in circumstances which might lead, on one view of the rules, to a budget being recoverable or budgeted costs being recoverable without any detailed assessment at the end of the day. I am also conscious that, if I accepted Mr Casey's submissions and set the budget at a very low level, the sort of low level that he suggests, then I might very well be acting unfairly to the defendants because it may very well be the case that the case is as complex, or proves to be as complex as they say it is, and does necessitate or does justify the use of a very senior leading counsel such as Mr Malek with particular expertise in this field, and also does justify the use of two junior counsel.

9. It has seemed to me during the course of the argument that this could be dealt with in a number of ways. One way in which I could deal with it would be to seek to set what I regard as an appropriate budget that was, in effect, no more than a compromise between the parties' respective extreme positions. It does not seem to me ultimately that that would be a sensible course.

10. The other possibility is that, whilst not indicating that I

disapprove of the costs which are put forward, I could simply not approve the defendant's respective budgets and leave it to the defendants in the event that they are successful to recover such costs as they are entitled to recover pursuant to a detailed assessment before a costs judge.

11. I am conscious that taking that course, in one sense, does not help the claimant to know what debt he might ultimately be exposed to, which of course is part of the purpose of costs budgets so the parties, so far as possible, know in advance effectively what the downside is in terms of costs on the other side, but on the other hand, if the points Mr Casey makes prove correct at the end of the day, then it is extremely unlikely that the defendants will, even if they are successful, recover anything like the level of costs which they seek to recover before the court today which ultimately are figures which add up to £1.7 million.

12. It does seem to me in those circumstances that the court should look carefully at whether or not it is appropriate to approve the entirety of the budget. It is clear from both Part 3.15 of the CPR and also from the notes at 3.15.2 of the White Book, that the court has jurisdiction not to approve the budget at all, indeed the court can do that even if the parties think they have agreed the budget, which is a line that has been taken in the Technology and Construction Court, particularly by Coulson J. Equally, the court can approve some elements of the budget and not others and it does seem to me that taking that course is the appropriate course to take.

13. What I propose, therefore, to do is to say that I will approve disclosure at £210,240, I would approve a combined figure for the two defendants of witness statements of £170,000. I would approve a combined figure for expert evidence of the two defendants of £150,000 and I will approve a figure for the pre-trial review of £44,000. Just pausing there, it is entirely a matter in those circumstances for the defendants and their legal advisers whether they choose to put in a revised budget to deal with witness statements and expert reports. The alternative is that, if they do not, then the budget will not be approved in relation to those elements and, as I have said, they are left, as it were, to take their chances on a detailed assessment.

14. However, in relation to the other matters such as trial preparation, trial and ADR, it seems to me that the correct approach in the rather unusual circumstances of this case, is to say that the court

is not going to approve those budgets, but those budgeted figures are set out in the defendants' respective budgets, but also to say that at this stage it does not seem to me that the court is in a position to be critical of those figures or to say anything more about them than that they may prove to be justified. Whether they are or not is a matter for another day.

15. Equally, at the moment I am entirely unconvinced by the necessity for contingency A, the additional advice, and I am entirely unconvinced by the necessity for contingency B, amendment fees. I am not going to approve anything in relation to those. So other than in relation to disclosure which I will approve, other than in relation to the lower figures for witness statements and experts reports which I would approve, if the defendants choose to go down that road, they will not have an approved budget. But, as I say, they would be entitled to seek a detailed assessment in the event that they are successful at the end of the day.

Paul Casey appeared on behalf of the claimant.

Ali Malek QC and *Alexia Knight* appeared on behalf of the defendant.