Neutral Citation Number: [2016] EWHC 2789 (Ch)

Case No: HC2016000513

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Competition Appeal Tribunal
Victoria House, Bloomsbury Place
London WC1A 2EB

Date: 03/11/2016

Before:

THE HONOURABLE MR JUSTICE ROTH

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Between:

AGENTS' MUTUAL LIMITED	**Claimant**
- and -	
GASCOIGNE HALMAN LIMITED (T/A GASCOIGNE HALMAN)	**Defendant**

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Alan Maclean QC and Mr Josh Holmes (instructed by **Eversheds LLP**) for the **Claimant**
Paul Harris QC (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for the **Defendant**

RULING (SECURITY FOR COSTS)

Mr Justice Roth:

Introduction

1. On 14 September 2016, I heard an application by the defendant ("Gascoigne Halman") for security for costs. I delivered an unreserved judgment determining the application by holding that the Claimant should pay a further £830,000 as security (i.e., in addition to the security already provided: see below). After further argument, I held that each side should bear their own costs.

2. The resulting order (the "14 September Order") accordingly stated, in para 5, that there should be no order for costs. In the usual way, both parties were given liberty to apply. By letter dated 19 September 2016, the solicitors to Gascoigne Halman ("Quinn Emanuel") sought to vary the provision regarding costs in para 5 of the 14 September Order. Although phrased as an application in the Competition Appeal Tribunal (the "CAT"), to which specified competition issues in this action have been transferred, it seems clear that the application is to be regarded as being made in the High Court, since the 14 September Order is a High Court order. It follows that this application should have been issued in the High Court, paying the appropriate fee. I am prepared to overlook that irregularity on this occasion but make clear that any future application must be issued in proper form.

3. The background to the present matter is that Gascoigne Halman issued an application in the High Court for security for costs on 20 June 2016. That application, along with several other applications in this action and a related action by the Claimant against another defendant, came on before Sir Kenneth Parker, sitting as a High Court judge, in the Chancery Division on 4 July 2016. In his order of 5 July (the "Parker Order"), the judge by consent transferred the competition issues to the CAT for determination by a tribunal chaired by a judge who would also be allocated as the judge hearing the two actions in the High Court: para 16 of the Parker Order. As regards Gascoigne Halman's security for costs application, Sir Kenneth Parker ordered that:

   (a) The Claimant provide Gascoigne Halman with security in the sum of £500,000 within 14 days; and

   (b) Save for (a), Gascoigne Halman's application be adjourned to be heard by the allocated judge.

4. As regards costs, the Parker Order provided, by consent:

   "23. Subject to paragraph 24 below, the costs of the [Gascoigne Halman] Security Application… are reserved to the Allocated Judge to be dealt with at the conclusion of the said application.

   24. There be no order as to costs arising from the adjournment of the [Gascoigne Halman] Security Application."

5. That para 23 is the focus of the present application.

The application to vary

6. Gascoigne Halman does not seek to disturb the costs provision in the 14 September Order as regards the costs of the hearing on 14 September. But it contends that this should not cover the entire costs of its security application: in particular, it submits that the reserved costs under the Parker Order should be dealt with differently, such that at least a portion of those costs should be awarded in its favour.

7. The argument in support of such a variation was put forward in the letter from Quinn Emanuel dated 19 September 2016. In response, I received written submissions of some 6 pages from senior and junior counsel for the Claimant dated 22 September 2016. That in turn led to written submissions in reply of some 8 pages from senior and junior counsel for Gascoigne Halman. Only with those final submissions did Gascoigne Halman serve a statement of costs of the hearing before Sir Kenneth Parker, amounting in total to over £75,000. That statement should of course have been served with the letter of 19 September seeking an order for costs.

8. In its application, Gascoigne Halman makes clear that it is not seeking the costs thrown away by reason of the fact that its security application could not be finally determined during the hearing before Sir Kenneth Parker and had to be adjourned. Although in argument on 4 July 2016 Gascoigne Halman's Counsel had protested strongly that this was due to the very late service of evidence by the Claimant - a point reflected in the 8th recital to the Parker Order – Gascoigne Halman acknowledges that this aspect is covered by para 24 of the Parker Order. But Gascoigne Halman seeks to distinguish from that matter the portion of its costs attributable to the need to prepare argument and evidence as to its entitlement to *any* security on the basis that the Claimant was impecunious. It submits that it was only by a volte-face on the morning of 4 July that the Claimant accepted that it should pay £500,000 by way of security, which was duly ordered by Sir Kenneth Parker. Gascoigne Halman submits that it is entitled to recover the expense of preparing that part of the argument which was entirely wasted, since it then became clear that the entitlement to security was no longer a live issue so that argument at the adjourned hearing would concern only the amount.

9. In its response, the Claimant argues that the distinction which Gascoigne Halman seeks to make is misconceived. Pointing to extensive passages in the transcript of the hearing before Sir Kenneth Parker, the Claimant submits that in argument on 4 July, Mr Harris QC on behalf of Gascoigne Halman pressed an application for the costs thrown away by the adjournment by reference to the costs that had been wasted in preparing for the hearing. In that regard, he specifically identified the costs of preparing evidence and argument about the jurisdiction to award security in this case due to the Claimant's impecuniosity. That work had become unnecessary by reason of the Claimant's volte face that very morning, whereas there was no reason why the Claimant could not have made that clear much earlier. I shall quote only a part of the relevant passages:

> "MR HARRIS: … In other words, there was no concession [by the Claimant] that there should be any form of interim payment, let alone in the amount of £500,000. It was a wholesale rejection of our application for prosecution today. I had to meet all of

those points. That has all been thrown away now. On any view of the world this volte-face has caused there to be some considerable chunk of costs that is now otiose and is wasted.

SIR KENNETH PARKER: Are you able to quantify them by the time you get back tomorrow?

MR HARRIS: May I take an instruction on that point, my Lord? (Instructions taken) By tomorrow we can do that. Indeed, if you are with me on the application with that schedule, then we would invite summary assessment.

The point is that inevitably costs have been thrown away because this could have happened at an earlier stage. In that regard you will have noted, no doubt with interest, that no reason at all has been advanced either in [Ms.] Farrell's statement, or in my learned friend's supplemental submissions, for this volte-face not to have been made clear at any earlier stages. There is just absolute silence on it. All this costs that I am talking about as being wasted could have been avoided, and should have been avoided, if there had been any measure of responsible behaviour….

We have now, in the light of this material change, said, "Okay, we can adjourn, but on conditions". Had this been put forward responsibly, as it should have been, some time ago there is a very good chance, it is almost certain, that we would have said "Fine. Let us adjourn the remaining balance of it up until the CMC in the CAT". Instead we had to work 'hell for leather' at the end of last week on all points of principle, right through the weekend and then up until mid-morning today to take some frantic last minute instructions on the changed development. That is a totally improper way to behaviour. It must merit, in our respectful submission, a costs order in my favour for the costs thrown away by the adjournment.

I am happy to come back to deal tomorrow with the quantum if you are with me on the principle, my Lord."

10. After discussions overnight, the parties returned to court on 5 July with an agreed form of order. In explaining what became para 24, Mr Harris said:

> "Yesterday the position was that I made a cross-application which, were this not otherwise agreed, we thought your Lordship would give a judgment on today and I would either win or not, but instead the parties have agreed that that should be taken care of by consent and that there be no order as to costs. This is, of course, as part and parcel of the remainder of the order."

Accordingly, the Claimant submits that the costs which Gascoigne Halman now seeks were expressly compromised and are covered by para 24 of the Parker Order.

11. I have regard to the further submissions of Gascoigne Halman in reply which seek to portray the position differently, but having read and re-read the portions of the transcript to which both sides draw attention, I essentially accept the argument of the Claimant. Gascoigne Halman's position before Sir Kenneth Parker had been that it should have these costs in any event since if the Claimant had conceded the principle earlier as it should have done, the remaining question of quantum would have been held over by agreement, whereas instead Gascoigne Halman's lawyers had to work hard preparing for

a full argument at the hearing on 4 July, much of which was rendered unnecessary by reason of the Claimant's late volte face. On 4 July, Gascoigne Halman had stated that it would pursue this application with a costs estimate the following day; but on 5 July it was not pursued as part of an overall compromise. In my judgment, these costs therefore fall within para 24 of the Parker Order, construed against its surrounding circumstances.

Circumstances of the application

12. It is therefore unnecessary to deal with the distinct ground of opposition put forward by the Claimant, namely that the present application falls outside the Court's jurisdiction to vary an order under CPR rule 3.1(7), on the basis of the guidance given by the Court of Appeal in *Tibbles v SIG plc* [2012] EWCA Civ 518, [2012] 1 WLR 2591. I shall only say that I would not have been minded to reject the application on that basis. This application concerns costs of a discrete part of the security application incurred prior to the Parker Order, which by oversight was not referred to in the argument on costs at the conclusion of the hearing on 14 September, and the application to vary was made very promptly: see *Tibbles* per Rix LJ at [41] and Lewison LJ at [56].

13. However, my view that the Court here would have jurisdiction to vary its order does not detract from the fact that it is deeply regrettable that the matter is being pursued in this fashion. I note that Quinn Emanuel's letter of 19 September apologises that the point was not raised at the hearing on 14 September. Manifestly, it should have been, since the Court then heard argument on costs. Raising the matter only by way of an application to vary after the event has clearly led to considerable additional costs being incurred in an argument that is entirely about costs and which could have been rapidly dealt with at the oral hearing which took place. I regret to say that this is not the first occasion on which satellite issues have been raised and pursued on the part of Gascoigne Halman in this litigation.

Conclusion

14. The application to vary the order of 14 September is therefore dismissed. Gascoigne Halman will pay the Claimant's costs incurred in opposing the application. The Claimant submitted a statement of costs incurred on this application, for summary assessment. If its costs are not agreed, Gascoigne Halman can make any brief observations on the amount of costs by 4pm on 9 November.