Neutral Citation Number:

Case No:

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
SENIOR COURTS COST OFFICE

Royal Courts of Justice, Queens Building,
London, WC2A 2LL

Date: 4th October 2016

Before :

Master Gordon -Saker

- -

Between :

Various Claimants	**Claimants**
- and -	
MGN Limited	**Defendant**

- -
- -

Philip Daval Bowden (instructed by **Atkins Thomson**) for the Claimant
James Carpenter (instructed by RPC) for the Defendant

Hearing dates: 4th October 2016

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APPROVED JUDGMENT

Master Gordon -Saker Tuesday 4th October 2016
(12.01 pm)

Ruling by Master Gordon-Saker

1. The issue arises as to whether the costs of the detailed assessment of the common costs bill and the bills of the four individual claimants should be allowed on the standard basis or on the indemnity basis. There is no issue as to the incidence of those costs.
2. The claimants contend that the costs should be allowed on the indemnity basis because of an unreasonable failure on the part of the defendant to respond to a suggestion of mediation.
3. A subsidiary issue arises because part of the costs which fell to be assessed were the subject of an agreement before the assessment hearing which commenced on 21 September. I think it would be helpful if I deal with that subsidiary issue first.
4. By a letter dated 2 September 2016, made without prejudice save as to the costs of the detailed assessment, the defendant's solicitors offered a sum of just over £2 million in respect of the base costs. The letter provided that the offer would remain open until 16 September and, if accepted, the defendant would pay the claimants' reasonable and proportionate base costs of the assessment up to 16 September, to be assessed if not agreed.
5. There was then a caveat that, for the avoidance of doubt, that would not include the brief fee for the first detailed assessment hearing listed to commence on 21 September.
6. If that offer was accepted, what would fall to be decided in relation to the common costs bill would be the success fees and the costs of the assessment. It is not in issue between the parties that by making that offer the defendant was not offering anything other than costs on the standard basis.
7. On 6 September the claimants' solicitors replied, raising two issues. First, they questioned how the success fees would be dealt with and, secondly, they raised a concern about the offer not including the brief fee for the first detailed assessment hearing listed to commence on 21 September; and they sought confirmation that if the offer was accepted the defendant would pay

the reasonable and proportionate costs of the assessment, including any recoverable success fee payable on the costs of the assessment, subject to any argument under Article 10 of the European Convention on Human Rights.

8. The defendant's solicitors responded on 7 September in these terms:

> "In relation to success fees, our letter of 2 September made it clear that MGN reserves the right to pursue all arguments available to it in relation to the recoverability and quantum of success fees. To the extent you are claiming success fees on the costs of assessment (it being a particularly regrettable feature of the CFA system that success fees are potentially recoverable in relation to the costs of assessing costs), MGN similarly reserves the right to pursue all available arguments as to what success fees, if any, are payable on those base costs of assessment. It also, of course, reserves the right to pursue all available arguments as to the base costs of assessment up to and including 16 September, including any arguments as to the level of brief fees, having regard to the offer that has been made."The confirmation you seek seems to be no more than a confirmation that MGN will comply with whatever order the court makes as to the costs of assessment, including success fees on such costs. MGN will, of course, comply with such an order."

9. On 9 September the claimants' solicitors replied, accepting "your offer dated 2 September 2016 to pay the sum of [£2 million-odd] in settlement of the base costs claimed in the common costs bill of costs, excluding interest, success fees and costs of the detailed assessment, as clarified in your letter, dated 7 September 2016".

10. The offer of 2 September was clearly an offer to pay the costs of assessment on the standard basis, for the defendant was offering to pay reasonable and proportionate base costs.

11. It seems to me that the proper construction of the letter of 7 September from the defendant's solicitors is not that the basis of the assessment could be the subject of further argument but,

rather, that the defendant reserved its right to raise arguments as to the quantum of the success fees payable on the costs of assessment and to raise arguments as to the level of brief fees that were claimed, that being a specific response to the claimants' solicitor's letter of 6 September.

12. It seems to me, therefore, that in relation to the base costs of the common costs bill there was a concluded agreement that those costs would be paid by the defendant on the standard basis.

13. In relation to the claimants' argument that there has been an unreasonable failure to engage in a discussion about mediation, the relevant correspondence is relatively brief. On 22 December 2015 the defendant's solicitor e-mailed the claimants' solicitor:

> "More generally, it seems to us that to avoid the risk of satellite litigation on costs the parties ought to be exploring a means of assessing costs which might avoid the need for lengthy hearings of the kind you envisage. It seems to us there ought to be a managed process, possibly involving mediation, and that as part of that process the costs of the process should themselves be managed. There is otherwise a serious risk that the costs of the assessment process will become disproportionate and unreasonable."

14. So there a suggestion by the defendant of a managed process, possibly involving mediation.

15. That was replied to on 13 January by the claimants' solicitors:

> "In respect of your proposal for mediation, given the highly contentious history of this litigation, and incidentally the second wave to date, we have serious concerns that agreeing to mediation could well, in our view, achieve nothing for the claimants except delay and incur costs. For that reason, we are not prepared to stay the assessment process pending any such attempt at ADR. That said, we would of course be happy to engage in a considered and genuine ADR process if one could be had."

There is then a suggestion of engaging the former senior costs judge as a potential mediato and the claimants' solicitors ask the defendant's solicitors whether they would be prepared to engage in an arbitration or mediation before him.

16. Then: "If so, please let us know which type of ADR your client would agree to and if the latter (mediation), whether it would meet the entire costs of the process, given the concerns we have raised above."
17. That seems to me to be a relatively lukewarm suggestion of alternative dispute resolution, at least as it starts, but a positive suggestion is made in relation to the identity of a mediator. Then a question is raised as to whether the defendant would be willing to pay for the mediation process.
18. No response, as I understand it, was sent to that suggestion.
19. On 4 February 2016 the claimants' solicitors wrote a letter to the defendant's solicitors, quoting the latter part of the suggestion made in the e-mail of 13 January which began, "That said, we would of course be happy to engage in a considered and genuine ADR process, if one could be had", which included the suggestion of the former senior costs judge as the mediator and which concluded with the suggestion or request for confirmation whether the defendant would be willing to pay for the process.
20. That letter concluded:

    "You have not responded to this proposal and we would be grateful if you would do so by return, in light of the very significant costs that are being accrued in respect of the current assessments."
21. Again, there was no response to that letter.
22. On 6 May 2016 the claimants' solicitors e-mailed the defendant's solicitors. The relevant part is:

    "The claimants are of course happy to discuss a sensible and co-ordinated scheme for the management of the various detailed assessments or in place of the assessment process. Indeed, we have suggested a mediated or arbitrated process on many occasions. You have not responded. If your concern is to preserve your argument that the recovery of additional

liabilities is a breach of Article 10, this should not be a bar to a mediated or arbitrated process, as the base costs and additional liabilities could be addressed separately."

23. Finally, on 7 June 2016 the claimants' solicitors wrote to the defendant's solicitors pointing out their earlier suggestions of alternative dispute resolution, pointing out that they had received no response, and then expressing their surprise that at the directions hearing on 16 May 2016 the defendant's counsel had submitted that the defendant wished to settle all of the outstanding claims for costs.

24. The claimants' solicitors then went on to point out the amount of court fees that they were having to pay in relation to the bills being lodged for assessment, and concluded:

"We therefore request that you respond to our previous correspondence and engage with the ADR proposal we have made. In the event that you refuse to do so, we will bring this correspondence to the attention of the senior costs judge when the costs of the assessment are to be awarded."

25. It seems to me that there has been a blanket refusal by the defendant to engage in any process of discussing alternative dispute resolution. Mr Carpenter, on behalf of the defendant, seeks to excuse the defendant's solicitor's behaviour by pointing to the request by the claimants' solicitors in their e-mail of 13 January for confirmation whether the defendant would be willing to pay the costs of the process. It seems to me that request was not a reason simply to ignore the suggestion of ADR. It could have been dealt with, possibly suitably robustly, by a response that there was no reason why the defendant should pay for it, but that the defendant would nevertheless be willing to engage in the process. That was not done.

26. Mr Carpenter also submits that this was a case in which the defendant would wish the court to reach conclusions in relation to decisions in some cases which could then be used in relation to further cases. Again, it is surprising, if that was the reason why the defendant was avoiding mediation, that that was not stated, but it also seems to me that the decisions I was required to

make following the hearing on 21 and 22 September were decisions which could easily have been the subject of agreement between the parties, as were the base costs of the common costs bill.

27. Accordingly, I have no hesitation in concluding that the defendant has behaved unreasonably in failing to engage in the process of discussing at least the possibility of alternative dispute resolution, and mediation in particular, and given that the common costs base costs have been agreed, it seems to me that there was no reason for pessimism as to the outcome of any mediation.

28. It seems to me, therefore, that the defendant's conduct is unreasonable to a high degree and is such as to justify an award of costs on the indemnity basis. Accordingly, save insofar as the parties have agreed that the defendant should pay costs on the standard basis, it seems to me that the claimants are entitled to the costs of the assessment of the common costs bill and of the four individual claims on the indemnity basis.

29. That might be thought to cause some difficulty in relation to the summary assessment process upon which we are about to embark, but Mr Daval-Bowden, on behalf of the claimants, has indicated that there should be no overriding difficulty, insofar as, as I understand what he said, the claimants' costs on the indemnity basis would be restricted to those costs incurred after 9 September 2016, which costs should be easily identifiable from the claimants' statement of costs.