ENGLISH JUDGES GET TOUGH ON LEGAL COSTS - NEW COSTS REGIME IN ENGLISH COURT PROCEEDINGS

Vitol Bahrain EC v Nasdec General Trading LLC and others (Approved Cost Judgment) (2013)

Mitchell MP v News Group Newspapers Ltd [2013] EWCA Civ 1537

Re Administration of Hellas Telecommunications (Luxembourg) II S.C.A.

Introduction

On 5 November 2013, Mr Justice Males handed down an Approved Cost Judgment in the case of*Vitol Bahrain EC v Nasdec General Trading LLC and others*, in which he granted the defendants less than 50% of its costs on the grounds that the costs incurred by both side were "grossly disproportionate".

Background

The dispute in this case concerned title to two cargoes of oil which were the subject of two sale contracts between Vitol as buyer (the "Claimant") and Nasdec General Trading LLC as seller. Nasdec provided warranties, expressly governed by English law, that it had good title to the oil, which was delivered to Vitol and stored in the tanks leased by Vitol from VTTI. Fal Oil, contended that this was oil which Nasdec had dishonestly misappropriated from it, with the consequence that Nasdec did not itself have good title, and therefore could not pass a good title to Vitol, and so the oil remained the property of Fal Oil.

On 24 May 2013, Mr Justice Cooke in the High Court (Commercial Court Division) granted, in a without notice hearing, an anti-suit injunction which restrained the Fal Oil companies (the "Defendants") from pursuing any application to join Vitol to proceedings commenced by Fal Oil in Fujairah in the UAE and from making any claim against Vitol in connection with the title to two cargoes of oil other than in the present action. Vitol was subsequently joined as a party to the proceedings in Fujairah and sought the continuation of the injunction in a modified form requiring Fal Oil to take positive steps to extricate it from those proceedings.

On 1 November 2013, following a one-day hearing, Mr Justice Males handed down his judgment in which he declined to continue the anti-suit injunction.

Assessment of costs

As the Defendants were successful, they were entitled to their costs assessed on the standard basis, and as the hearing was no more than one day, it was a case which was appropriate for summary assessment.

The Claimant's statement of claim sought a total sum of over £242,000 (which included work relating to the "without notice" hearing). The Defendants' statement of costs sought over £165,000 (which did not include work relating to the "without notice" hearing).

Awarding the defendants only £75,000, Mr Justice Males held that the costs incurred on both sides were "grossly disproportionate".

Mr Justice Males noted that while the parties were free to agree fees with their lawyers, in this case the figures on both sides represented lawyers charging on an "epic" scale.

In this case, the value of the claim was US$119 million. However, it was key that the hearings at the present time were concerned *only* with whether an injunction should be granted to restrain the Defendants from joining the Claimant to existing proceedings in the UAE, in a case where neither party contended that justice would not be served regardless of whether the English or UAE courts decided the substantive proceedings.

Mr Justice Males noted that the situation in this case would not have been prevented if the new rules about cost budgeting had applied in the Commercial Court – as many cases in the Commercial Court involve issues about jurisdiction and anti-suit injunctions, which can incur significant expenditure before it is even known whether the court has or will exercise jurisdiction, to require parties to submit a costs budget at that stage would be impractical.

Observation

The decision in this case is a salutary reminder that the Court will take a dim view where disproportionate costs are incurred for what are relevant brief (and comparatively inconsequential) hearings.

This follows the decision of Mr Registrar Jones on an application to assess 13 invoices (totalling £2.32 million) submitted by Slaughter and May to Ernst and Young in connection with the administration of administration of Luxembourg company Hellas Communications (Luxembourg) II in 2009. While Mr Registrar Jones rejected the application, he directed a criticism at Slaughter and May, highlighting in particular that the "perception, also taking account of the circumstances of Slaughter and May owing their new retainer to a personal connection, is of a 'club mentality'." In particular, instructions were made over the phone, with no back-up documentation and invoices were paid "without any real or adequate challenge".

As Mr Justice Males stated in *Vitol Bahrain EC v Nasdec General Trading LLC and others, "It is important that the message should go out loud and clear that the Commercial Court will not assess costs summarily in such disproportionate amounts merely because the figures on both sides are broadly comparable. Control will be exercised to ensure that the costs claimed from the unsuccessful party are reasonable and proportionate."*

Jackson Reforms – Costs

Lord Justice Jackson's Civil Litigation Costs Report (released in January 2010), which reviewed civil procedure in England and Wales, made a number of recommendations which have resulted in changes in the Civil Procedure Rules, not least relating to costs.

As a consequence, the overriding objective of the Civil Procedure Rules was amended to provide that cases must be dealt with not only justly, but also "at proportionate cost".

From 1 April 2013, new costs budgeting rules applied in the English courts.

Following a pilot in the Technology and Construction Court, the new rules on costs management apply to all multi-track cases commenced on or after 1 April 2013 (unless the proceedings are the subject of fixed costs or scale costs or the court otherwise orders). However, the rules do not apply to cases issued in the Commercial Court or Admiralty Division, or cases in the Chancery Division or Technology and Construction Court where, at the date of the first case management conference, the sums in dispute exceed £2m (excluding interest and costs). Where those rules apply, parties are expected to file a budget at the start of the case and, once that budget has been approved by the court, to adhere to it.

In his report, Lord Justice Jackson stated that *"no case has been yet made out for introducing costs management into the Commercial Court"*. In a later interview, he stated that *"The only exception [to the costs management rules] is in the Commercial Court, where no one is seriously concerned about costs at all."* It is clear from the decision in Vitol, however, that judges in the Commercial Court are now prepared to take a stricter approach to ensure that while cases under their jurisdiction are also dealt with "at proportionate cost".

A warning to legal advisers to meet deadlines

The English Courts have demonstrated that they will take a strict approach in relation to compliance with the new costs rules. On 27 November 2013, the Court of Appeal handed down its decision in *Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537. In that case, the Claimant appealed against the decision of Master McCloud that he had failed to file his costs budget in time and thus he was to be treated as having filed a costs budget comprising only the applicable court fees, and her subsequent refusal to grant relief from that decision. The Court of Appeal dismissed both appeals, and held that the defaults by the claimant's solicitors in filing the costs budget in a timely manner were not minor or trivial and there was no good excuse for them. The Master of the Rolls, delivering the judgment of the Court of Appeal, emphasised that the Courts would take a robust approach to compliance with the rules, and the need to comply with rules, practice directions and orders was essential. In particular, the Court emphasised the need (a) for litigation to be conducted efficiently and at proportionate cost, and (b) for enforcing compliance with court rules, orders, and practice directions, were to be regarded as being of paramount importance and be given great weight. Solicitors should not take on so much work that they were unable to meet their deadlines.

The Court of Appeal added *"We hope that our decision will send out a clear message. If it does, we are confident that, in time, legal representatives will become more efficient and will routinely comply with rules, practice directions and orders. If this happens, then we would*

expect that satellite litigation of this kind, which is so expensive and damaging to the civil justice system, will become a thing of the past.

3rd December 2013