Case No: SC-2019-BTP-000248

**IN THE HIGH COURT OF JUSTICE**
**SENIOR COURTS COSTS OFFICE**

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 24/06/2020

**Before**:

**MASTER ROWLEY**

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**Between:**

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|---|---|
| **Vadim Maratovich Shulman** | **Claimant** |
| **- and -** | |
| **(1) Igor Valeryevich Kolomoisky** | |
| **(2) Gennadiy Borisovich Bogolyubov** | **Defendants** |

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**Mark James** directly instructed by and for the **Claimant**
**Roger Mallalieu** (instructed by **Enyo Law**) for the **Second Defendant**

Hearing date: **9 March 2020**

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER ROWLEY

## Master Rowley:

1. This is my decision regarding the hourly rates to be allowed for the work carried out on behalf of the second defendant.

Location & Starting Point

2. The second defendant instructed Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"), a firm that he had used previously, to represent him in these proceedings. Skadden's offices are in Canary Wharf and as such as the postcode begins "E14". That postcode would place the solicitors in the Outer London (or London 3) band for the Guideline Hourly Rates ("Guideline Rates").

3. The Guideline Rates were last revised in 2010 and the length of time since then has led to them becoming much maligned, particularly since Mrs Justice O'Farrell said, in the case of Ohpen Operations UK Ltd v Invesco Fund Managers Ltd [2019] EWHC 2504 (TCC), at paragraph 14:

> "…the hourly rates of the defendant's solicitors are much higher than the SCCO guideline rates. It is unsatisfactory that the guidelines are based on rates fixed in 2010 and reviewed in 2014, as they are not helpful in determining reasonable rates in 2019. The guideline rates are significantly lower than the current hourly rates in many London City solicitors, as used by both parties in this case. Further, updated guidelines would be very welcome."

4. When the Master of the Rolls considered a report proposing to vary the Guideline Rates in 2014, he accepted the conclusion that they could be used as a starting point in detailed assessments even though they had originally only been intended to be used in summary assessments. That was, in my view, a reflection of the fact that there is rarely any other starting point offered by the parties to the court when considering the appropriate level of hourly rates.

5. The Guideline Rates for City of London (London 1) work are (Grade) A - £409; B - £296: C - £226; and D - £138. The Outer London rates are considerably below these figures (£229-267 / £172-229 / £165 / £121) and it is the claimant's case that the reasonable hourly rate to be allowed fall somewhere between the two given the locality of Skadden and the nature of the case. Consequently, the claimant offers £400 for Grade A; £280 for B; £180 for C; and £130 for D.

6. In my view, the claimant's starting point is entirely opportunistic. Whilst Canary Wharf may be located in a postcode outwith those allowed by the Guideline Rates for the City (EC1 to EC4), the presence of firms such as Skadden and Clifford Chance as well as many multinational financial institutions inevitably leads to the conclusion that rates equivalent to those to be found in the City are much more appropriate.

Nature of the case (CPR 44.4(3))

7. Such rates would be appropriate if the work involved in the particular case justified being done in the City. As the former Senior Costs Judge said, "City rates for City

work." Sometimes that is suggested to be only for legal work involved in transactional matters such as mergers and acquisitions, but it seems to me to be the case that litigation can equally command City rates in appropriate circumstances. Indeed, there would be little purpose in the Guideline Rates if that were not so, given that they were produced for the assistance of judges at the end of short hearings who would be summarily assessing the costs of the litigation.

8. As would be expected, the advocates for both parties sought to describe the nature of this case in a manner which supported their argument as to the hourly rates to be allowed. For the paying party, Mr James concentrated on the limited procedural steps and the number of witnesses and evidence required before a two-day hearing took place before Barling J. In his submission, the case was a "fairly ordinary" one by the standards of the Commercial Court. It was simply a question of establishing the residence of the second defendant and consequently, whether he had managed to establish that residence in Switzerland by the time these proceedings were commenced, or whether he remained resident in this jurisdiction.

9. Mr James argued that there were only two features of the case which might take it slightly out of the usual run of such litigation. These were the involvement of Swiss law and the allegation that the separation of the second defendant from his wife was a sham. But, Mr James submitted, even those aspects were, in reality, fairly limited. For example, the interpretation of expert evidence was no more difficult in this case than in clinical negligence matters where a lot of expert evidence would be expected.

10. Mr Mallalieu, for the second defendant, described the case as having great urgency and complexity. An application to contest jurisdiction needed to be made within 28 days or else the party would be deemed to have submitted to the jurisdiction of the court. It was not clear, in Mr Mallalieu's submission, that any extension of time could be made (in order to put sufficient evidence together to support the application) without this, in itself, amounting to a submission to the jurisdiction of the court.

11. The parties were involved in litigation in other parts of the world and the second defendant needed to be advised by Skadden about the context of these other proceedings when advising him about his prospects of disputing jurisdiction. There was also, in the particulars of claim, an allegation that an oral agreement regarding the jurisdiction of the English courts had been reached between the parties to deal with. The time recording showed that a lis pendens claim was run at the same time as the jurisdictional challenge and this also added to the complexity.

12. In respect of the value of the case, Mr Mallalieu pointed out that the second defendant had placed a figure of US$500 million on the potential claim at the handing down hearing and that had never been disputed by the claimant. Mr James accepted that there were substantial assets involved in the various claims but said it was unclear whether there were charges on the various properties; whether the businesses were profitable or loss-making et cetera. As such, he would accept that tens of millions of pounds were involved, but the matter in issue was the question of the second defendant's residence, not whether he would get, for example, shares in certain steelworks.

13. Neither advocate went slavishly through the so-called seven pillars of Wisdom in CPR 44.4(3). As I have set out, they made submissions particularly regarding the size of the claim and the complexity of it. Mr Mallalieu also submitted that the conduct of the

claimant in bringing proceedings without there being any Pre-Action Protocol letter first, added to the urgency and therefore the weight of the case, given the time limits involved.

14. Both advocates relied upon the points of dispute and replies in addition to their submissions. Mr Mallalieu referred specifically to the replies regarding the question of proportionality which tread very similar ground to the hourly rates. I have reconsidered those points of dispute and replies when drafting this decision but do not think there is anything further that I need to add to the summary of the submissions that I have set out.

15. The claim brought by the claimant was clearly of a significant sum, however it might ultimately have been quantified, if the proceedings had gone any further. The size of the case and its international flavour clearly justified the use of City solicitors to conduct the litigation, in my view.

16. But there is a limit to the impact that the size of the case can have on the hourly rate. Once it is clearly a significant sum that is involved, there is a finite limit to the rate a solicitor can charge for shouldering the burden of that value, and generally therefore the importance, of the case. It is not as if the hourly rate is proportional to the size of the claim, for example.

17. Other than the size of the case, it does not seem to me that the second defendant has made out that the litigation was at all out of the mainstream that might be expected to be dealt with by City solicitors. I do not think that the urgency urged upon me by Mr Mallalieu is made out by the papers that have been lodged. It was clear from the beginning that an extension of time for service of the evidence was going to be sought and there was no agonising about whether this might inadvertently cause the client to submit to the jurisdiction. Similarly, it is clear from a note produced by the associate Ms Fu at the outset, that the legal questions to be answered ultimately by the judge were very largely established right at the beginning. It was not a case of novel issues having to be dealt with in terms of legal precedent. It was a matter of establishing the facts and then applying the law to them. I am very clearly of the view that the subject matter of these proceedings in terms of the application to contest jurisdiction was of the normal grist to a City litigation solicitors' mill.

Case law

18. Mr James relied on two cases in support of the arguments he raised on hourly rates. The first, and more important case, was Dana Gas PJSC v Dana Gas Sukuk Limited and Others [2018] EWHC 332 (Comm) where Leggatt LJ dealt with an application for a payment on account of costs. As Mr Mallalieu commented, Leggatt LJ clearly took a dim view of the costs of the receiving party, Black Rock in that case. As an example, he criticised the attendance of four solicitors in addition to leading and junior counsel at the hearing. In relation to hourly rates, he said the following:

> "A number of criticisms of the costs claimed by Black Rock have been made by Dana Gas, of which the following are in my view valid. First, the hourly rates charged by Black Rock's solicitors are extremely high. No fewer than nine fee earners were involved, of whom six had their time charged at hourly rates of

> over £700 (the top rate being £946). Even a trainee was charged out at £282 an hour. From my experience of assessing costs and reviewing costs statements and budgets in complex cases in the Commercial Court, competent representation can be obtained at much lower rates, in the region of around half the hourly rates paid in this case."

19. Mr James relied upon this authority to demonstrate that the (half) figures which Leggatt LJ appeared to have allowed, where in the region of the offers made by the claimant. He described the case as being much more on point than Ohpen. It involved heavyweight City firms on both sides and culminated in a three-day hearing before a High Court judge. Mr Mallalieu queried whether £350 per hour i.e. half of £700 per hour was a realistic expectation of current City hourly rates given that it was less than the Guideline Rate set in 2010.

20. Mr James also relied upon the case of JXA v Kettering General Hospital NHS Foundation Trust [2018] EWHC 1747 (QB) where Goss J upheld the hourly rates allowed by a costs judge of £350 for a partner (Grade A); £200 for a Grade C Solicitor and £150 for a Grade D trainee. That case involved a clinical negligence claim estimated to be worth around £20 million (taking periodical payments into account) which placed it at the top end of such claims. That sort of clinical negligence case would involve, in Mr James' submission, at least 10 experts on each side and as such was rather more complex than the case here. If £350 per hour was a reasonable rate for costs in such a case, it showed that the offers made in respect of the costs claimed here were reasonable, unlike the "grossly exorbitant" figures claimed, as the claimant had described them at an earlier hearing.

21. Mr Mallalieu queried the relevance of a clinical negligence case where the hourly rates were being assessed for a case beginning in 2013. I have to say that I agree entirely with Mr Mallalieu on this point and did not find the reference to JXA to be of any real assistance in the context of this case.

22. As far as case law examples were concerned, Mr Mallalieu simply relied upon the comment of Mrs Justice O'Farrell in Ohpen that I have set out above and in particular the line *"the guideline rates are significantly lower than the current hourly rates in many London city solicitors, as used by both parties in this case."*

23. He pointed out that, from paragraph 19 of the Ohpen judgment, it could be ascertained that the rate claimed by the Grade B fee earner was £655 and the Grade C was £445. Whilst it was not evident from the judgment itself, the case had been reported as involving Grade A rates of £786 per hour. The judge reduced the summary assessment schedule that she was assessing by a number of hours for the grades B and C fee earners in order to reach the figure that she wished to allow. On the basis that she had not made any variation to the hourly rates claimed at any level, Mr Mallalieu's submission was that she had considered them all to be reasonable.

Discussion

24. The uphill nature of the challenge set for Mr Mallalieu by his instructing solicitors in defending the hourly rates claimed in this case can be seen by the fact that the rates seemingly allowed by Mrs Justice O'Farrell are only roughly 2/3 of the amounts

claimed here by some of the partners and associates. Consequently, Mr Mallalieu was forced to rely on Ohpen to demonstrate higher figures should be allowed but, at the same time, distance himself from the figures that actually were allowed. As Mr James pointed out, there is nothing in the Ohpen judgment to give an indication of the weight of that case. As such, although Mr Mallalieu submitted that this case was more urgent and complex, it is difficult to see how that submission can really be made out.

25. The precise figures for the hourly rates claimed here are complicated by the fact that the bills rendered to the second defendant by Skadden were priced in US dollars and have had to be recalculated at the prevailing exchange rate when they were rendered. The fluctuation in that rate has meant that there appeared to be a considerable variance in the hourly rates charged by Skadden to the second defendant over the short period in which they were instructed in this case.

26. I have been provided with the letter of engagement of Skadden and I am satisfied that the hourly rates claimed for the first two parts of the bill are in line with the rates set out in that letter. The lower rates subsequently claimed are explained by the fall in the pound when compared to the US dollar and I accept Mr Mallalieu's explanation of the unusual variation in the rates that resulted from that fluctuation. For the purposes of considering the hourly rates claimed, I have therefore set out in the following table the highest rate for the key fee earners. A number of fee earners have not suffered a fluctuation in their hourly rates and I have little doubt that that is because they have only worked on the file during one of the periods covered by a single bill.

| | | |
|---|---|---|
| A | David Kavanagh QC<br>David Edwards<br>Alex van der Zwaan | £1,043.29<br>£940<br>£717.95 |
| B | - | - |
| C | Judy Fu<br>Emma Farrow | £665.87<br>£636.33 |
| D | Alexander J. Halms (Trainee) | £286.44 |
| D | Roman Vikis (Legal Assistant) | £256.68 |

27. The letter of engagement refers to Mr Kavanagh, Mr Edwards, Mr van der Zwaan and Ms Fu as being the core fee earners. It is noticeable that it is their rates which have fluctuated (along with Messrs Halms and Vikis) and this, together with the number of hours recorded, demonstrates their longer term involvement with the case.

28. At the hearing, I asked Mr James if the claimant had provided details of the hourly rates that the claimant paid to his solicitors (Hogan Lovells) by way of comparison. Mr Mallalieu informed me that the claimant had been asked for such information but had refused to provide it at the handing down of the judgment. In Mr Mallalieu's submission, there was no reason to think that the claimant had instructed solicitors and counsel in any materially different way from the second defendant. It was a very high value case that had been very hard fought. Both sides had used eminent leading counsel with senior juniors. From the second defendant's point of view, there was no evidence that the claimant had dealt with this matter in a different fashion in terms of legal spend.

29. Mr James subsequently provided me with a copy of an invoice from Hogan Lovells to the claimant which provided the following hourly rates. The grade of fee earner is not set out and so I have assumed that, for example, a senior associate would be a grade B i.e. 4 to 8 years' relevant experience post qualification.

| | | |
|---|---|---|
| A | Partner | 585 |
| B | Senior Associate | 453.75 |
| C | Associate | 258.75 / 397.50 |
| D | Trainee | 180 / 202.50 |
| D | Paralegal | 60 |

30. In response to this invoice, Mr Mallalieu had many criticisms. A number of them related to the belated disclosure of the documents and the partial nature of that disclosure which combined to make it impossible for the second defendant to respond fully. The most cogent argument, in my view, was that the invoice related to litigation in the United States of America and as such the hourly rates could very well be part of a contingency fee agreement. In that context, and in the absence of the retainer letter rendered, the information could not be safely considered by the court. Mr James, having only recently come to the case, was not in any position to deal with these criticisms and his comments on the invoice related to a contrast of the experience of the two firms' fee earners and the ostensible disparity between the rates agreed by the parties with their solicitors.

Decision

31. The Guideline Rates were originally provided to judges when the Civil Procedure Rules arrived in April 1999 and the concept of summary assessment of costs first came into being. Many judges had little or no experience of costs and the guideline rates were there to provide assistance on summary assessment. They were not intended to replace a more thorough consideration of appropriate hourly rates in detailed assessments. But it is something of an indictment on the evidence usually provided at detailed assessment

hearings that the Guideline Rates have often been used for detailed assessments as well without variation.

32. This case is a good example of why Guideline Rates are often relied upon by advocates and the court. Despite the points of dispute challenging the rates wholesale, there is no evidence whatsoever from the second defendant or Skadden as to how the level of the hourly rates charged to the second defendant have been determined.

33. However, one of the many issues that has arisen with the use of the Guideline Rates over time is the fact that there is a single figure for a particular level of lawyer in a particular locality. That figure takes no account of the size of the firm, the nature of the work undertaken et cetera in the particular case. It is described as a broad approximation and it is really the roughest of rough guides as to what might be allowed. The potential range of litigation in the City can be seen in this case and it explains why the Guideline Rates are barely even a starting point in a case such as this.

34. In the absence of any evidence, the court is required to consider the so-called seven pillars of Wisdom in CPR 44.4(3) in order to arrive at a conclusion as to whether or not the rates claimed are reasonable. Whilst the value of the claim and the amount of time spent may be capable of arithmetic calculation, most of the factors involved for assessing the "weight" of the case and the solicitors running it, simply lead to an evaluative decision.

35. It seems to me that caution has to be applied to deriving too many pointers from the Ohpen decision given that Mrs Justice O'Farrell was conducting a summary assessment of costs. There are many ways in which judges carry out a summary assessment and I consider that I should be slow to draw any conclusions about the hourly rate she considered to be appropriate based upon the fact that she did not expressly alter the rates claimed. It seems to me to be just as likely that she concluded that the amount of time she had reduced from the costs claimed led to a figure which she considered to be reasonable and so had no need to consider altering the rates themselves. In my view, it is only the general comment of paragraph 14 which holds any weight on a detailed assessment. I accept entirely the comment that hourly rates considerably above the Guideline Rates are regularly agreed by clients using City solicitors for what can properly be called City work.

36. The figures agreed by the claimant with Hogan Lovells demonstrate that there is a very fluid market in terms of what hourly rates can be obtained. Factors such as the solicitors' appetite for the kind of work on offer or other potential work to be obtained from a client may be involved when setting rates. Such matters are not catered for directly in CPR 44.4(3). In my experience, discounted rates are often provided and, in my view, the figures agreed by Hogan Lovells with the claimant here represent figures below those that I would have expected in this sort of case. Whether that had anything to do with a contingency fee agreement is impossible to know. All I can say is that I would undoubtedly have allowed them as being reasonable if the claimant had been the receiving party but that does not mean that higher rates would necessarily be unreasonable.

37. I make these comments regarding Hogan Lovells' rates simply from the figures set out on the invoice. Mr Mallalieu's criticisms of their lack of provenance would only serve to give less weight to them if I thought they were determinative in any way of the

Skadden rates. In fact, even though they are considerably lower than the Skadden rates, they are still higher than the rates offered here by the Claimant. That confirms my view that the rates offered here by the Claimant are simply opportunistic based on the postcode of Skadden and the low level of Guideline Rates for truly City work, rather than any of the 44.4(3) factors.

38. As indicatd above, the reasonable hourly rates have to be considered in the light of the factors in CPR 44.4(3). I have already set out my view of the nature of this case in that it was of significant value but was not otherwise unusual for a litigator in a City firm. That description does not seem to me to justify the hourly rates which the solicitors have claimed. Whilst it cannot be said that no client would pay the rates claimed in this case – since the second defendant has already paid these fees – I do not consider that they can be justified between the parties. If the case involved truly novel or ground breaking litigation, it might be possible to justify the figures claimed, or at least something close to them. But that is not the situation here and, in my view, competent representation, to use Leggatt LJ's phrase, could easily be obtained from any number of similar firms to Skadden at considerably lower figures.

39. In my view, taking into account my conclusions on the relevant factors in CPR 44.4(3) set out in this decision and, in the absence of any evidence from the second defendant regarding the actual calculation of the hourly rates by Skadden, the reasonable hourly rates to be allowed in this case are Grade A – £750: Grade C – £400 and Grade D – £200. Where the relevant grade of fee earner is claimed at lower figures than these then obviously it is that lower rate which will apply.

Postscript

40. Prior to the formal handing down of the judgment consisting of the previous paragraphs, I heard argument and made decisions regarding appropriate hourly rates for Mr Van der Zwaan and Mr Bainsfair. Although I gave a short extempore ruling on these points on 22 June 2020 at the resumed hearing, I indicated that I would record the decisions made so that they would all be in one place. As discussed at the hearing, I have not as yet made any decisions on the hourly rates of the costs lawyers.

41. In respect of Mr Van der Zwaan, who is described as a Senior Associate, I allowed a rate of £550 per hour placing him between the Partners (£750) and the Associates (£400).

42. I allowed the hourly rate claimed of £325 for Mr Bainsfair on the basis that his experience as a barrister with two years' call made him comparable with the Grade C solicitors (the Associates) who had previously been allowed a rate of £400.