Costs of an Interim Injunction Where a Defendant Consents to Relief

By Arnold Ayoo

In Clayton Recruitment Limited v Wilson & Anor [2022] EWHC 1054 (Ch), the Claimant obtained a costs order after compromising an application for injunctive relief in the Chancery Division against a Defendant.

Arnold Ayoo appeared for the Claimant.

In the Judgment, handed down on 5 May 2022, Sir Anthony Mann considers the Court's approach to injunction costs where parties have settled the substantive issues - but where a defendant maintains that the settlement is not an indication that the claimant was entitled to the relief, nor was reasonable in making the application. A court should consider to what extent a defendant has bowed to the inevitable, which entails an assessment of the merits if there is enough evidence to do so. However, it should be wary of allowing sensible and practical concessions to be turned into a weapon on costs, lest defendants be discouraged from reaching pragmatic compromises.

Key Facts and Background

1. The First Defendant ("D1") previously worked for the Claimant ("C") as a legal recruitment consultant, before resigning and setting up his own recruitment company ("D2"). At the end of his employment with C, D1 refused to delete his electronic records of business contacts which were stored as 'connections' on his

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LinkedIn account. Subsequently, he shared a Linkedin 'post' to those connections about the establishment of D2, his own recruitment agency.

2. C issued proceedings for breach of contract and breach of confidence and made an application for various interim injunctions which, it alleged, gave effect to an employment contract under which D1 was not entitled to (a) retain or use information pertaining to business contacts gathered during the time of his employment or (b) solicit, canvass or deal with C's clients.

3. At the commencement of the hearing, the Parties reached a compromise of both the injunction application and, for all intents and purposes, the underlying proceedings. The agreed order which embodied the settlement contained injunctive relief intended to be final and the underlying action was stayed save for a liberty to apply to restore if an inquiry as to damages was sought, which was thought to be unlikely.

4. The only matter outstanding was costs. The question for the court was what the approach should be when faced with an apparent agreement on everything except costs, and when the court has not had the benefit of a prior determination of the issues to which the costs go.

5. This point had been considered by the Court of Appeal in *BCT Software* Solutions Ltd v C Brewer and Sons Ltd [2003] EWCA Civ 939 where the parties had compromised matters at trial, part way through cross examination. There, the Court cautioned against a judge embarking on the determination of disputed facts solely in order to put themselves in a position to make a decision about costs. Set against that, Sir Anthony Mann considered the proper approach of a court faced with an interim injunction, where a defendant has consented to relief but maintains that the claimant was not necessarily entitled to that relief and did not act reasonably in making the application.

JUDGMENT

Was there enough material to decide: (i) if one party had 'won' and (ii) whether C was reasonable in bringing the application?

6. Sir Anthony Mann noted that this case differed from *BCT* in that the issue was costs at application stage rather than at trial. However, given that the compromise of the interim application also provided some final and irreversible relief, the parties had in effect agreed substantial parts of the whole action. That was capable of affecting the approach to this matter, because as well as having to consider the overall merits in the dispute, the court had to consider to what extent the application was reasonable and, conversely, to what extent the defendant had brought the application upon himself.

7. The first point to establish was whether the court had enough material to be able to decide whether one side or the other should be treated as having won. If it did not, the appropriate order was no order as to costs. The Judge considered that he did have sufficient information to assess the merits as well as to be able to judge the extent to which C was justified in launching its application/action.

The assessment of the substantive merits

8. The Judge assessed the contractual bases for the injunction and found that D1 was plainly wrong to resist the demands of C in relation to the deletion of the LinkedIn connections, which enured for the benefit of C - who was also entitled to delivery up of D1's password to facilitate the deletion. Additionally, D1 was obliged to provide a signed statement confirming that he had complied with his contractual obligations regarding the aforesaid and was wrong for not doing so. As such, insofar as C had achieved a deletion of the 3500 LinkedIn contacts as well as a signed confirmatory statement, D1 was not merely conceding arguable points; he was actually bowing to the inevitable.

9. However, C had also obtained a number of other provisions in the order, including undertakings as to non-competition, affidavits covering retention/use of confidential information and other injunctions requiring deletion of various LinkedIn posts. C argued that it had succeeded because it sought such remedies in its application and had obtained them in the final order.

10. Sir Anthony Mann was not minded to treat C as having succeeded merely by dint of the final order containing provisions which it sought to obtain. He could not dismiss the possibility that D1 was providing the restraints and obligations in the order to avoid the distraction of further litigation and that he might have established that he never intended to breach the obligations of his contract (other than those that the Judge had already held to have been breached) such that a wider application (and the wider aspects of the action) were unnecessary and further relief inappropriate.

The assessment of the pre action position and behaviour of D1

11. Having assessed the pre-action behaviour of D1 together with the inter-parties correspondence, the Judge considered that C was justified in being sufficiently concerned to start proceedings and seek interlocutory relief. That being said, the demands in the letter before action might be viewed as over-extensive.

The policy consideration: not to deter defendants from reaching sensible compromises out of a fear of being penalised on costs

12. The Judge stated that it is in the interests of all concerned that defendants should not be dissuaded from reaching sensible compromises of interim applications, particularly where, as here, the compromise is capable of disposing of the whole action, by a fear that concessions will be taken to be acknowledgments of wrongful behaviour and of the fact that the claimant was

right in its claim (or application). There will be some (probably many) defendants who will give undertakings because that is practically expedient in the circumstances, not because they acknowledge that they (the defendants) are wrong and the claimants are right. If a defendant is placed in a position in which practical concessions are turned into weapons on costs then that defendant may be disinclined to reach a sensible settlement of the application. That sort of fear should be guarded against and the court should be alive to those risks.

13. On the facts of the present case, D1 had agreed to various concessions out of a desire for a "quiet life", and the Court did not want to not adopt a stance which discourages that as a factor in settlements.

Conclusion on costs

14. Ultimately, Sir Anthony Mann found that C had succeeded in establishing some of its clear contractual entitlements as against D1, and had established, to a significant degree, that it was justified in seeking interim relief. However, there had not been a trial of the matter and it was not clear that all the relief sought against D1 would have been granted had there been a trial and had the court been satisfied as to the (at present untested) bona fides of D1's activities and intentions. There was also the factor, operating in D1's favour, that defendants such as him should not be discouraged from settling by the prospects of adverse costs orders where there has been no trial. Taking all those matters into consideration, the correct costs order was that C receive 55% of its costs of the application.

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