

Neutral Citation Number: [2022] EWHC 1134 (Ch)

Case No: CR-2020-003966

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INSOLVENCY & COMPANIES LIST (ChD)**

7 Rolls Buildings  
Fetter Lane  
London EC4A 1NL

Thursday, 7 April 2022

BEFORE:

**HIS HONOUR JUDGE MARK CAWSON QC**  
**(Sitting as a Judge of the High Court)**

BETWEEN:

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**ERIC DUNEAU**

Petitioner

- and -

**(1) KLIMT INVEST SA**  
**(2) KLIMT SA**  
**(3) FRÉDÉRIC SÉNÉGAS**

Respondents

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**MR D LIGHTMAN QC** with **MR M MARENBON** (instructed by Marriott Harrison LLP)  
appeared on behalf of the Petitioner and Third Respondent

**MR C NEWINGTON-BRIDGES** (instructed via Direct Access) appeared on behalf of First  
Respondent

**MR M WRAITH** (instructed by Mayer Brown International LLP) appeared on behalf of the  
Second Respondent

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**APPROVED JUDGMENT**

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1. HHJ CAWSON QC: On 17 March 2022, I handed down judgment in this case, which involved a petition to wind up the company Klimvest plc (“**the Company**”) on the just and equitable ground, a number of bases being put forward for seeking to wind up the Company on this ground. The matter is listed before me today to deal with consequential matters arising out of the judgment, including the question of costs as between the parties.
2. The effect of my judgment was that I found that the Company ought to be wound up, subject only to the possibility of the court granting a stay to enable an offer to be made to purchase the shares of the Petitioner and others. However, I only found for the Petitioner on one of the bases upon which he maintained that the company should be wound up, namely loss of substratum or purpose, and I found against the Petitioner in respect of a number allegations, namely an allegation that assurances had been given by Michel Balcaen (Mr Balcaen), the individual behind the first respondent, Klimt Invest SA (“**Klimt Invest**”), an allegation that the Petitioner had been removed from the board of the company in breach of agreement or understanding, an allegation that the Company was founded on the basis of a personal relationship of trust and confidence between the Petitioner and Mr Balcaen which had broken down, and an allegation based on the Petitioner’s loss of confidence in the management of the Company.
3. It is not in dispute that the starting point is that Klimt Invest should pay the Petitioner's costs of the petition. However, two issues arise for determination so far as costs are concerned, namely whether those costs should be paid on the standard or indemnity basis and in any event, as to whether there ought to be a discount on the amount of costs that are awarded to the Petitioner in order to reflect those aspects of the petition in respect of which the Petitioner did not succeed.
4. Dealing firstly with the question of the basis of assessment of costs, the relevant principles are well-established. The court has a discretion as to whether to order costs on an indemnity basis or standard basis. The authorities, and in particular the leading authority, *Excelsior Commercial & Industrial Holdings Limited* [2002] EWCA Civ 879, provide Court of Appeal authority that the key consideration is as to whether

the conduct of the parties, or other particular circumstances of the case, take the situation "out of the norm".

5. What this means and how it ought to be applied has been considered in a number of subsequent other cases. I am referred by Mr Newington-Bridges on behalf of Klimt Invest to the judgment of Gloster J in *Euroption Strategic Fund Limited v Skandinaviska Enskilda Banken AB* [2012] EWHC 749 (Comm), where at paragraph 14 she said:

"However, as Mr. Shivji emphasised, by reference to paragraph 8 of the decision in *Noorani (supra)*, conduct must be unreasonable 'to a high degree' to attract indemnity costs. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight: see *per* Simon Brown LJ (as he then was) in *Kiam v MGN Limited (No 2)* [2002] 1 WLR 2810. In each case, it is a fact dependent question as to whether or not the paying party's conduct has been unreasonable to a high degree."

6. The factors relied upon by the Petitioner to say that, in the present case, the circumstances are such as to take the case out of the norm and that Klimt Invest's conduct, by Mr Balcaen, is such as to take the case out of the norm, are the following:
  - a. Firstly, the evidence of Mr Pol who I found to have been economical with the truth and whose evidence I did not accept, my finding that Mr Balcaen had, to all intents and purposes, knowingly caused Mr Pol to give false evidence to the court, and the general tenor of Mr Pol's evidence and Mr Balcaen's reliance upon it.
  - b. Secondly, paragraph 72 of the Points of Defence, which denied what had been said during the course of a board meeting on 25 January 2019 in relation to important matters which, when the minutes of the meeting were produced, proved to be inaccurate if not false.
  - c. Thirdly, that at trial serious allegations were made against the Petitioner, in particular as to insider trading, the Petitioner having been cross-examined in relation to the circumstances in which he acquired shares from Innovacom.

- d. Fourthly, the attempt by Mr Balcaen following the hearing to use the court's process as a vehicle to blacken the names of the Petitioner and the third respondent, Mr Sénégas, by selectively relying on transcripts of the Petitioner's cross-examination in proceeding being brought in France.
  - e. Fifthly, complaint is made in relation to the collateral use of disclosed documents for the purposes of the present proceedings.
  - f. Sixthly a refusal to accept an offer made on 27 January 2022, which is said to have been a reasonable offer.
7. So far as these various considerations are concerned, I can see considerable force in the argument that costs ought to be paid on an indemnity basis in the circumstances of the present case and I consider this to be very much a borderline case to that extent. But on balance, I am not persuaded that it is an appropriate case to order that costs be paid on an indemnity basis.
8. I say that for the following reasons. Although I do have serious concerns about Mr Pol's evidence and the basis upon which his evidence was put before the court, and whilst I accept that it was certainly not unimportant evidence on the issue as to the attitude of independent shareholders and as to whether Mr Balcaen had control of the company, at the end of the day, it was not, as I see it, fundamental evidence that went to the heart of the case that would, if accepted, ultimately have led to a different conclusion being reached as to the merits of the case.
9. So far as the putting forward of a false defence in paragraph 72 of the Points of Defence is concerned, I do have to bear in mind that recollections as to what may or may not have occurred at the relevant meeting might well have been down to a genuine lack of recollection rather than positive dishonesty as to what was pleaded.
10. So far as the making of allegations against the Petitioner is concerned, it is unfortunate that the allegations regarding insider trading were put forward in the way that they were without having been properly formulated, but there were certain considerations about the circumstances in which the Petitioner acquired shares from Innovacom which

did require at least questioning and probing, and that purchase was in any event in breach of rule 9 of the Takeover Code. Whilst the extent of the attack on that transaction was unjustified, there were enquiries to be made, and issues to be raised in respect of it.

11. So far as the use of the court process to blacken the Petitioner's and Mr S n gas's names in other proceedings are concerned, that is a factor to take into account, but ultimately it has not affected the incident of costs in the present proceedings, or led to additional costs being incurred.
12. I accept that it is a factor the court is entitled to take into account in considering whether costs ought to be paid on an indemnity basis: see *Three Rivers District Council v The Governing Company of the Bank of England* [2006] EWHC 816 (Comm) at [11] to [12], but in the circumstances of the present case, I do not consider it to be sufficiently serious to tip the case over the line and I reach the same view in relation to the collateral use of disclosed documents.
13. So far as the settlement offer made on 27 January is concerned, whilst it is unfortunate that Klimt Invest did not seek to engage with that offer, it was made on 27 January 2022, very shortly prior to trial and so it is unlikely to have had any significant impact so far as the costs of the proceedings are concerned.
14. So whilst I do consider that a cogent case can be made for costs being ordered to be paid on an indemnity basis, I do not consider that, bearing in mind the comparatively peripheral nature of the matters that are relied upon, and bearing in mind the very wide scope of the present proceedings, I should exercise of my discretion in favour of awarding costs to the Petitioner on an indemnity basis.
15. Turning to the question of whether there ought to be a reduction so far as the percentage of costs is concerned, the relevant jurisdiction is under CPR 44.2. So far as the general rule is concerned under CPR 44.2(3) whereby the starting point is the unsuccessful party should pay the successful party's cost, the court has a discretion to depart therefrom and in doing so will have regard to the conduct of all the parties, whether a party has succeeded on part of its case, even if that party has not been wholly

successful and any admissible offer to settle made by a party which is drawn to the court's attention, CPR 44.2(4). So far as conduct is concerned, see further CPR 44.2(5).

16. CPR 44.2 enables the court to order that a party pay a proportion of another party's costs, which is what is asked for in the circumstances of the present case. CPR 44.2(7) encourages the court to make a proportionate order, rather than one, say, based upon particular issues in the case.
17. But, I am invited by Klimt Invest to order that a proportion of the costs be paid. In short, the arguments on behalf of Klimt Invest are, as I have indicated, that the Petitioner only succeeded on one of the various bases upon which it sought to seek to wind up the company on the just and equitable ground, and failed on other grounds, that that has had a not insignificant effect on the costs that have been incurred in the course of the proceedings as well as lengthening the trial. On that basis it is submitted that some discount is appropriate.
18. As against that, it is said by the Petitioner that the loss of substratum ground on which the Petitioner succeeded was always the primary ground upon which the petition was being pursued and, to the extent that other arguments were pursued, they did not significantly increase the costs that were incurred or the time that was incurred in dealing with the various issues, bearing in mind the overlap of evidence on the various issues.
19. Cutting through this, I am persuaded that some modest discount is appropriate in the circumstances of the present case.
20. In essence, I consider that before ordering that there ought to be some discount, I should be satisfied that the raising of the relevant unsuccessful issues or allegations has caused a significant increase in the length or cost of the proceedings: see *Re Elgindata (No.2)* [1992] 1 WLR 1207 at 1214B per Nourse LJ.
21. I am satisfied that there has been a significant increase in the length and cost of the proceedings as a result of the other grounds for the winding up being pursued. In short

terms, the running of the other issues did, in my judgment, require a considerably more detailed examination as to the relationship between the parties in the present case, in particular in considering whether equitable considerations arose and the quasi-partnership arguments. That will have not insignificantly have increased the length of the evidence and the cross-examination that was required during the course of the trial. But not only that, it clearly led to a lengthening in the pleadings and the costs that would have been incurred in dealing with the pleadings in the case and responding to the pleadings, but also so far as the preparation of written submissions for trial are concerned and the presentation of argument at trial on which a considerable amount of time was spent in dealing with the other issues and, in particular, the somewhat difficult issues as to whether equitable considerations could arise in the context of a plc and a company which included shareholders other than the supposed or alleged quasi partners.

22. So, I am satisfied that there has been certainly a not insignificant increase in the length or cost of the proceedings as a result of those allegations being pursued. But in my judgment, the discount should be a modest one, bearing in mind the overlap of issues and on that basis, I will order that the Klimt Invest pay 90 per cent of the Petitioner's costs, allowing for a discount of 10 per cent of those costs.
23. I will therefore order that Klimt Invest pay 90 per cent of the Petitioner's costs on the standard basis.

**(After further submissions)**

24. Having determined the question of costs as between the Petitioner and the Klimt Invest, an issue now arises as to the costs of the Company itself incurred in relation to the present proceedings. The position is that the Company has incurred costs through Mayer Brown Solicitors, totalling some £233,204 plus VAT, plus counsel fees of £3,031 plus VAT, a not insignificant amount. These costs were largely incurred in relation to providing disclosure of company documentation.
25. I note that the Klimt Invest has appeared in person in the present proceedings through Mr Balcaen, although instructing counsel for the trial and in respect of other discrete



matters during the course of the proceedings. This might provide an explanation as to why disclosure has been provided through the Company in the way that it has, but that disclosure has involved disclosure of documents that include a significant number of emails written from Mr Balcaen's own email account.

26. In addition, the costs include items in relation to witness statements incurred in dealing, amongst other things, with a request that the officers of the company provide witness statements on behalf of the Klimt Invest, which was objected to on legitimate grounds by the Petitioner. So those costs have been incurred.
27. It is argued by Mr Lightman on behalf of the Petitioner that those costs ought to be paid by Klimt Invest to the Company. The basis upon which that application is made is that the Company and the Klimt Invest are both parties to the proceedings and so there is jurisdiction in the court to order that one party to proceedings pay the costs of another party to proceedings. Further, Mr Lightman invokes the principle that it is a general principle of company law that a company should not participate in, and its funds should not be expended on disputes between shareholders: see for example, *Smith v Butler* [2012] BLR 1836 per Arden LJ at [44]. Although it might be added to this that there are circumstances in which a company may, quite legitimately, be involved in disputes between shareholders to provide disclosure of company documents, although that would depend on the particular facts of the case.
28. It is said by Mr Lightman on behalf of the Petitioner that the amount of costs being so significant, the effect of not requiring Klimt Invest to pay the Company's costs would be that those costs will have to be borne ultimately by the shareholders of the Company, and it is submitted that it would be unfair if any proportion of the costs were foisted on shareholders other than Klimt Invest, and that, therefore, the appropriate course for the court to take is to order that the costs be paid by the Klimt Invest to the Company.
29. The company is separately represented today by Mr Mark Wraith of Counsel, who has informed the court that the Company takes a neutral approach to the question of costs. That is perhaps understandable bearing in mind that Mr Balcaen has effective control of the Company through Klimt Invest.

30. So, the question arises whether it is appropriate for the court at this stage to order that the Klimt Invest pays the costs, even though the Company is not actually making an application for costs.
31. It is said by Mr Newington-Bridges on behalf of Klimt Invest that this is something of an unprecedented situation where the court is being invited to order that costs be paid by one party to another party that has only taken part in the proceedings on a neutral basis, although it is, as I say, right to point out that part of the function of the Company has been to provide disclosure, substantially in respect of documents which might otherwise have been disclosed by Klimt Invest.
32. I have considerable sympathy for the application and I do consider that the court probably has jurisdiction to make the order for costs that is sought, but I do have concerns as to whether it is appropriate in the present circumstances to order that costs be paid if there is no formal application being made by the Company for costs.
33. In these circumstances, I consider that the appropriate course is this. I have made an order, subject to the question of an offer being made to purchase share. I consider that the appropriate course is to provide in my order that the Company should, by its liquidator in the event of the winding up order being made, have permission to apply for an order for costs as against the Klimt Invest. That would enable an application to be made by the Company in the event of the company being wound up. In the event that an offer is made, and this is a matter which I will turn to in a moment as to whether a stay ought to be granted in order to facilitate the making of an offer, then in the context of any discussions or negotiations that may take place between the parties, or indeed the formulation of any offer, a factor to bear in mind would be that, as I see matters, a liquidator of the Company would have strong grounds to apply for an order for costs on behalf of the Company against Klimt Invest.
34. Given the particular circumstances of the present case, at this stage all I propose to direct is that the Company, whether by its liquidator or otherwise, has permission to apply for an order for costs as against the Klimt Invest in respect of the costs of the proceedings.

**(After further submissions)**

35. So far as a payment on account of costs is concerned, the issue between the parties is as to whether the appropriate proportion of the costs claimed awarded ought to be in the region of 60 per cent of the amount claimed by the Petitioner, or whether it ought to be in the region of 50 per cent of that amount.
36. The total costs claimed by the Petitioner are approximately £810,000. So far as those costs are concerned, there has been no costs budgeting in the present case, so there has been no prior scrutiny of those costs and to that extent they are very much at large. It is further right to say that the detail so far as the costs are concerned is limited, being merely a bracketed total sum in relation to the various stages of the litigation, and a total sum for counsel's fees involved in the case. On that basis it is difficult if not impossible to be able to scrutinise or consider the costs claimed in any detail.
37. The essential principle so far as an order for the payment of costs on account is concerned is that the amount awarded should not exceed the minimum amount which might reasonably be expected to be awarded on a detailed assessment of the costs. Having regard to the factors I have identified, and bearing in mind all the uncertainties involved, I consider that 50 per cent is a more appropriate figure than 60 per cent,
38. So, the amount to be paid would be 50 per cent to the total of £809,000-odd that is claimed, but as the entitlement is to only 90 per cent of the Petitioner's costs, the appropriate award would be 50 per cent of 90 per cent of £809,000-odd which, on my calculations, comes to just under £365,000. I will thus order that Klimt Invest pays the Petitioner on account of costs the sum of £365,000.
39. So far as when payment ought to be made is concerned, 21 days is proposed by the Petitioner. Subject to any submissions from Mr Newington-Bridges, I would propose to order 28 days.

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**This transcript has been approved by the Judge**