



Neutral Citation Number: [2022] EWHC 2507 (Comm)

Case No: CL-2020-000630

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2022

Before :

MR JUSTICE CALVER

Between :

Optimares S.p.A.	<u>Claimant</u>
- and -	
Qatar Airways Group Q.C.S.C.	<u>Defendant</u>

Mark Beeley (instructed by Orrick, Herrington & Sutcliffe (UK) LLP) for the Claimant
Edward Cumming KC and Emma Hughes (instructed by Norton Rose Fulbright LLP) for
the Defendant

RULING ON COSTS

Mr Justice Calver :

1. It is common ground that the Claimant (Optimares) must pay the costs of and occasioned by its claim (as opposed to the Defendant (“Qatar”)’s counterclaim). However, I am asked to determine the basis on which those costs should be paid. I am also asked to assess the payment on account of those costs.
2. As to the basis, I consider that costs should be assessed on the indemnity basis.
3. The caselaw as to when the court will assess costs on the indemnity basis was summarised by Christopher Clarke LJ in *Excalibur Ventures LLC v Texas Keystone Inc* [2013] EWHC 4278 (Comm) at paras 4-7, where he stated as follows:

“4. In *Balmoral v Borealis UK Limited* [2006] EWHC 2531 I expressed matters in this way:

“The basic rule is that a successful party is entitled to his costs on the standard basis. The factors to be taken into account in deciding whether to order costs on the latter [indemnity] basis have been helpfully summarised by Tomlinson J in *Three Rivers District Council v The Governor & Company of the Bank of England* [2006] EWHC 816. The discretion is a wide one to be determined in the light of all the circumstances of the case. To award costs against an unsuccessful party on an indemnity scale is a departure from the norm. There must therefore be something, whether it be the conduct of the claimant or the circumstances of the case, which takes the case outside the norm. It is not necessary that the claimant should be guilty of dishonesty or moral blame. Unreasonableness in the conduct of proceedings and the raising of particular allegations or in the manner of raising them may suffice. So may the pursuit of a speculative claim involving a high risk of failure, or the making of allegations of dishonesty that turn out to be misconceived, or the conduct of an extensive publicity campaign designed to drive the party to settlement. The making of a grossly exaggerated claim may also be a ground for indemnity costs.”

5. In the *Three Rivers* case Tomlinson J as he then was pointed out that if a claimant chooses to pursue speculative, weak, opportunistic or thin claims, he takes a high risk and can expect to pay indemnity costs if he fails. He gave examples of circumstances which took the case out of the norm as being where a claimant:

“(a) advances and aggressively pursues serious and wide-ranging allegations of dishonesty or impropriety over an extended period of time.

(b) advances and aggressively pursues such allegations despite the lack of any foundation in the documentary evidence for those allegations and maintains the allegations without apology to the bitter end.

(c) actively seeks to court publicity for its serious allegations both before and during the trial.

(d) turns a case into an unprecedented factual inquiry by the pursuit of an unjustified case.

(e) pursues a claim which is to put it most charitably thin, and in some respects far-fetched.

(f) pursues a claim which is irreconcilable with the contemporaneous documents.

(g) commences and pursues large scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant and during the course of the trial of the action the claimant resorts to advancing a constantly changing case in order to justify the allegations which it had made, only then to suffer a resounding defeat.”

That seems to me to a considerable extent a summary of the present case.

6. In *European Strategic Fund Limited v Skandinaviska Enskilda Banken AB* [2012] EWHC 749, Gloster J, as she then was, awarded indemnity costs in circumstances where the claim was:

“(i) speculative involving a high risk of failure; (ii) grossly exaggerated in quantum; (iii) opportunistic; (iv) conducted in a manner that has paid very little regard to proportionality or reasonableness giving rise to the incurring of substantial costs on both sides; (V) pursued on all issues at full length to the end of the trial.”

That too seems to me a pretty fair summary of the present case.

7. The fact that a claimant loses a massive claim and does so badly is not of itself a reason for ordering indemnity costs. Cases involving very large sums which founder on sharp juridical rocks are not automatically outwith the norms of this court. But all depends on the circumstances...”

4. In the present case, I consider that the following features in particular take the case outside of the norm:

- 4.1 The case was extremely thin. Optimares' construction arguments were very weak and involved it seeking to disregard the plain wording of professionally drawn contractual documents;
 - 4.2 The weakness of Optimares's case also led it to advance an argument that the good faith provision in the Standard Conditions applied to an unfettered right to terminate at will, which was a hopeless argument in the light of the express wording of that provision. It also led Optimares to advance a vague, unpleaded but serious and unsustainable allegation of bad faith against Qatar;
 - 4.3 The unjust enrichment claim was likewise hopeless in light of the express contractual provisions and it was not adequately pleaded in any event.
5. Applying the principled approach to awards of indemnity costs summarised by Christopher Clarke LJ in *Excalibur*, this was a speculative claim with a high risk of failure. Optimares pursued the claim on all issues despite the weakness of its construction arguments (which ought to have been apparent to it), conducting its claim with an insufficient regard to proportionality or reasonableness, which gave rise to the incurring of substantial costs on both sides. In particular, it pursued the claim on all issues at full length with voluminous factual and expert evidence to the end of the trial. I also accept Qatar's submission that the quantum of the claim was initially exaggerated and inevitably fell to be substantially reduced by the time of trial.
 6. Optimares complains that it was open to Qatar itself to seek a trial of preliminary issues on the construction questions and yet it chose not to do so. But that accusation could equally be levelled at Optimares. Instead it chose to adduce large quantities of factual and expert evidence. Qatar cannot be blamed for responding to that evidence in order to protect its position. Optimares took the risk that the court might find (as it did) that none of that evidence assisted it because the issues of construction were decisive in Qatar's favour, in which case it would have to bear the costs of that unnecessary exercise (on an indemnity basis).
 7. Optimares also say that Qatar could have chosen not to cross-examine its factual witnesses, thereby saving time and costs at trial. I do not consider that to be a realistic submission. Again, it was Optimares who put these witnesses forward in support of its claim and Qatar cannot be penalised for choosing to cross-examine them in order to fully protect its position. Moreover these witnesses were making some serious allegations against Qatar to which Qatar was entitled to respond. Rather, it is Optimares who ought not to have adduced this largely irrelevant evidence.
 8. Qatar identify certain other features which they say take this claim out of the norm, but in my judgment the factors set out above are sufficient for an award of indemnity costs in this case.
 9. So far as the payment on account is concerned, Qatar's bill of £4.2m seems somewhat excessive for a 3 week trial (and I note that many of Qatar's solicitor charge out rates are in excess of the Guideline hourly rates). I consider that an appropriate amount to pay on account of costs is accordingly £2m.