Neutral Citation Number: [2019] EWHC 863 (QB)

Case No: QB/2018/0040
QB/2018/0204

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
On appeal from the County Court at Central London
HHJ Bailey

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/04/2019

Before :

MRS JUSTICE FARBEY

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Between :

SAVI RABILIZIROV

Claimant

-and-

(1) A2 DOMINION LONDON LTD

Defendant/Additional Claimant/Respondent

(2) A2 DOMINION HOMES LTD
Defendant/Additional Claimant/Respondent

(3) GROUND CONSTRUCTION LIMITED
Defendant/Appellant

(4) DURKAN LIMITED
Third Party/Respondent

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Anneliese Day QC and Max Kasriel (instructed by **Kennedys Law LLP**) for the **Appellant**
Joseph Sullivan (instructed by Shoosmiths LLP) for the **Third Party/Respondent**
Adam Robb QC and Rebecca Drake (instructed by **Clyde and Co LLP**) for the **First and Second Defendants/Respondents**
The Claimant (who was not a party to the appeal) made no submissions

If this 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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Mrs Justice Farbey :

1. On 5 February 2019, I handed down judgment in this case which is an appeal from an order of HHJ Bailey sitting in the Technology and Construction Court at the County Court at Central London. The effect of my judgment was encapsulated in my order of the same date by which the appeal was dismissed. I adjourned questions of costs for three weeks in order for the parties to endeavour to reach agreement.

2. In the event, the parties have reached agreement on some but not all issues. I have therefore considered submissions in writing which were filed in accordance with the timetable set out (on a contingency basis) in my order. No party has requested an oral hearing. I am grateful to the parties for their comprehensive written submissions.

3. The background to the case is set out in my February judgment and I do not propose to repeat it here. Should anyone who is not a party wish to consult the judgment, it bears the neutral citation number [2019] EWHC 186 (QB). The appeal before me concerned the liability of the appellant GCL (the fourth defendant below) to indemnify Durkan Limited (a respondent before me and a third party below) in relation to certain losses suffered by the claimant as the occupier of a newly constructed building in the St Pancras area of London. The landlord of the building was A2 Dominion London Ltd (the second defendant below and a respondent before me) until its reversionary interest in the property passed to A2 Dominion Homes Ltd (the first defendant below and a respondent before me). In short, the A2 companies employed Durkan as a contractor to carry out works to the building under the terms of the JCT Standard Form of Building Contract. In turn, Durkan sub-contracted groundworks to GCL. Those works were defectively performed, causing loss to the claimant from water ingress.

4. The claimant in the County Court has taken no part in the appeal, having already been compensated for his losses by other parties. He had claimed three heads of loss. The appeal was concerned with one head only, namely loss of rent arising from the claimant's inability to sub-let the premises. By the time of the trial before HHJ Bailey, the claim for loss of rent had been settled as between the A2 companies and the claimant for £340,000. Moreover, at an earlier hearing, HHJ Saggerson had allowed Durkan’s application for summary judgment against the claimant on the grounds that Durkan owed no freestanding duty to him. As a result, Durkan ceased to be a defendant. However, Durkan was subsequently brought back into the litigation by the A2 companies as an additional party under CPR Part 20. Durkan in turn issued a Part 20 claim against GCL.

5. In the event, it was only necessary for HHJ Bailey to deal with the two Part 20 claims. The effect of his judgment was that GCL was required to pay to Durkan £340,000 in loss of rent. GCL's grounds of appeal were not limited to an assault on that conclusion but also sought to some degree to pass on liability for the claimant's losses to the A2 companies.

6. GCL's wide-ranging grounds of appeal caused Durkan to file a Respondent's Notice such that there was a cross-appeal before me. Durkan stated in the Respondent's Notice that it mounted no independent challenge to HHJ Bailey's order: the cross-appeal was made in order to make Durkan's position clear in relation to all

permutations likely to arise in the appeal. In the event, it was not necessary for me to reach a conclusion about Durkan's cross-appeal.

7. It is now agreed that GCL will pay Durkan's costs of the appeal summarily assessed in the sum of £23,000. GCL has agreed to pay to the A2 companies £36,000 on account of costs pending detailed assessment which they both seek.

8. The principal point of dispute is between the A2 companies and Durkan. The A2 companies submit that Durkan should pay their costs on an indemnity basis. That submission rests on what the A2 companies say is a binding indemnity clause in the contract between A2 and Durkan for the work which formed the subject of the proceedings.

9. In considering the merits of A2's submission, I have considered written submissions on behalf of GCL dated 4 February 2019, 1 March 2019 and 8 March 2019. The A2 companies' submissions are dated 4 February 2019, 1 March 2019 and (twice) 8 March 2019. I have received submissions from Durkan dated 4 February 2019, 1 March 2019 and 8 March 2019.

The Indemnity Clause

10. The indemnity clause on which the A2 companies rely is found in clause 20.2 of the JCT standard form contract:

> "The Contractor shall be liable for and shall indemnify the Employer against any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property, real or personal, in so far as such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the Works and to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the Contractor, his servants or agents or of any person employed or engaged upon or in connection with the Works or any part thereof, his servants or agents, other than the Employer or any person employed, engaged or authorised by him…".

11. On behalf of the A2 companies, Mr Adam Robb QC and Ms Rebecca Drake submit that the words "any expense, liability, loss, claim or proceedings" cover the legal costs in this appeal. Mr Sullivan resists such an interpretation and invokes the principle that indemnity clauses should be strictly construed (Lewison, *The Interpretation of Contracts*, 6th ed, para 12.15). He submits that, on a strict construction, the costs of the appeal are not costs which "arise out of or in the course of or by reason of the carrying out of the works" within the meaning of the indemnity clause. The appeal costs were caused by GCL deciding to pursue an appeal about its own liability and by GCL seeking to argue that it should not be liable for certain losses. The costs of the appeal are therefore to be distinguished from the costs of the original action, which were incurred because the claimant brought a successful claim for losses caused by GCL's defective workmanship. That was a dispute which arose directly from that defective workmanship whereas the appeal was something different. Nor were the costs of the appeal "due to any negligence, breach of statutory duty, omission or default of the contractor, his servants or agents". For these reasons, Mr Sullivan submits that the indemnity clause has no purchase.

12. I have come to the conclusion that Mr Robb's submissions are correct. The indemnity clause applies to "any proceedings". None of the parties addressed me on whether as a matter of principle an appeal is or may be a separate proceeding to a trial below. On the facts of this case, I take the view that the appeal was an adjunct to the trial. Permission to appeal was granted on all grounds, including those which involved the A2 companies who were at one end of a chain of parties below. The appeal (for all relevant purposes) involved the same chain and covered much of the same ground as the trial. In my judgment, there was a sufficient overlap between the issues at trial and the issues in the appeal that they both fall within the same "proceedings".

13. Separating off the trial from the appeal would be artificial. HHJ Bailey rejected an argument that the indemnity did not apply because the exact attribution of liability between the parties did not raise any question of loss or damage to property under the indemnity. That the arguments have been elevated to the High Court does not make a material difference. The indemnity clause applies.

Discretion to awards costs

14. The court nevertheless retains discretion as to whether costs are payable by one party to another (CPR 44.2(1)). It is a feature of this case that the A2 companies shouldered the lowest burden on the appeal but have incurred by far the highest costs: over £71,000. By comparison, GCL (whose legal team undertook very substantial work) incurred costs of around £55,000. I have already indicated that Durkan (whose counsel Mr Joseph Sullivan shouldered most of the advocacy in opposition to the appeal and whose skeleton argument was of particular assistance to the court) incurred £23,000.

15. The A2 companies' costs were in my view disproportionate. No reason has been put forward as to why their costs should have exceeded the costs of other parties by such a wide margin. If the decisive question was the proportionality of costs awarded on the standard basis, I would have reduced the A2 companies' costs to somewhere below the GCL costs.

16. However, Mr Robb submits that I must take into consideration the line of case law to the effect that, in exercising the overriding discretion to award costs under the CPR, the discretion should ordinarily be exercised so as to reflect a contractual right under an indemnity clause: *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171, 193G-194B; applied in *Astrazenica UK Ltd v International Business Machines Corporation* [2011] EWHC 3373 (TCC). In response, Mr Sullivan submits that the principle in *Gomba* applies only to the basis of the assessment of costs: the court is likely to award indemnity costs - rather than standard costs - in order to reflect a previously agreed indemnity clause. I prefer Mr Robb's submissions. In my view, the effect of the case law is that the court should generally reflect the contractual right when exercising its discretion to award costs under CPR 44.2.

17. I have decided to exercise my discretion in favour of the A2 companies. Durkan will therefore pay the A2 costs on an indemnity basis. That accords with the indemnity clause. It also produces a just result. The usual rule is that the unsuccessful party pays the successful party's costs. Durkan was undoubtedly a successful party, which is why GCL has agreed to pay its costs; but the A2 companies were also successful, albeit that they pivoted to a large degree on Durkan's success. GCL has agreed to

indemnify Durkan in relation to the full extent of A2's costs. On GCL's behalf, Mr Kasriel has said in writing that GCL "will make" a payment on account in the sum of £36,000 directly to the A2 parties. That agreement can be incorporated into my order and ought to reduce Durkan's actual liability. These various factors in my judgment reduce the force of Durkan's submission that its success in the appeal should shield it from any costs liability.

Assessment

18. GCL agrees that, in these circumstances, it must be ordered to pay the A2 costs on an indemnity basis. Both GCL and the A2 companies seek a detailed assessment. Durkan seeks summary assessment because it would bring an end to proceedings. I shall order a detailed assessment so that the reasonableness of A2's very substantial costs may be scrutinised under CPR 44.3(3).

Conclusion

19. Durkan will therefore pay A2's costs of the appeal on an indemnity basis subject to a detailed assessment if not agreed. GCL will pay the same amount to Durkan.

20. I should add that the A2 companies (which have basically succeeded in the arguments that are the subject of this ruling) do not seek their costs of the post-hearing submissions listed above in relation to which I shall make no order.

21. The parties should agree the terms of an order reflecting this ruling.