



Neutral Citation Number: [2020] EWHC 1057 (TCC)

Case No: HT-2019-000416

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

The Rolls Building
Fetter Lane, London, EC4A 1NL

Date: Friday 1st May 2020

Before :

MR ROGER TER HAAR QC

Sitting as a Deputy High Court Judge

Between:

BROSELEY LONDON LIMITED
Claimant

- and -

PRIME ASSET MANAGEMENT LIMITED
(TRUSTEE OF THE MASHEL FAMILY TRUST)

Defendant

Rupert Choat (instructed by **KT Construction Law Limited**) for the **Claimant**
Samuel Townend (instructed by **Forsters LLP**) for the **Defendant**

APPROVED JUDGMENT

Covid-19 Protocol: This judgment will handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on Friday 1st May 2020.

Mr Roger ter Haar QC :

1. On the 21st April I “handed down” judgment in this matter in a judgment dealing with the Claimant’s application for summary judgment and the Defendant’s application for a stay of execution.
2. By the time of the hearing before me, the application for summary judgment was not opposed, but the application for a stay was. I resolved that issue against the Defendant (“PAML”) and in favour of the Claimant (“BLL”).
3. This judgment now deals with the following consequential matters, all of which have been dealt with without any further hearing:
 - (1) Interest;
 - (2) Issues relating to costs;
 - (3) Directions for determination of the true value of the account between the parties;
 - (4) Issues relating to an appeal;
 - (5) Matter arising out of an email to the court from counsel for BLL dated the 21st April 2020.

Agreed Orders

4. Before turning to contested issues, I should record the orders which are agreed:
 - (1) That the Claimant’s application for summary judgment is granted;
 - (2) That the Defendant’s application for a stay of execution is dismissed;

(3) That the Defendant shall pay the sum of £485,216.17 (“the Judgment Sum”) plus VAT by no later than the 23rd April 2020.

Interest

5. There is a difference between the parties as to the terms of the order as to interest. BLL’s formulation is:

“The Defendant shall pay the Claimant simple interest on the principal sum at the rate of 5.75% per annum from 1 August 2019 until payment of the principal sum is made.”

6. PAML’s formulation is:

“The Defendant shall pay interest on the Judgment Sum at a rate of 5.75% from 1 August 2019 to the date of payment, being £20,356.11 at 23 April 2020, and thereafter at a daily rate of £76.44.”

7. BLL says that it does not agree with PAML’s interest calculation and prefers its own formulation of the order. BLL’s formulation preserves the position of both parties as to what the correct sum is: the order will be in the terms set out at paragraph 5 above.

Issues relating to costs

8. The following matters arise relating to costs:

(1) Should I make an order at this stage in respect of the costs of the action or only in respect of the costs of the applications upon which I have given judgment?

(2) Should costs be assessed on the indemnity basis or on the standard basis?

(3) Should there be a summary assessment or a detailed assessment of the costs?

(4) If a summary assessment, in what sum should the costs be assessed?

(5) If a detailed assessment, what sum should be ordered to be paid on account?

Should the order be for the costs of the action or for the costs of the applications?

9. As will be seen below, PAML seeks directions for this court to proceed to a determination of the true value of the account between the parties. I regard that as an appropriate way of proceeding.

10. The consequence will be that the judgment of BLL will not be the end of this action. However, the costs to date for both parties will overwhelmingly, if not completely, be the costs of the applications with the significant exception of the court fee for commencing these proceedings.

11. In my view, the appropriate course is for a costs order to be made which is for the costs of the two applications (for summary judgment and for a stay), but for the reality of how the costs to date have been incurred to be reflected in the amount of costs to be ordered to be paid at this stage.

Should costs be assessed on the indemnity basis or on the standard basis?

12. For BLL Mr Choat contends that costs should be assessed on the indemnity basis.

13. In support of that submission he relies upon the general principles for awarding costs on the indemnity basis set out by Gloster J. in *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 2848 (Comm) at paragraph [7]. That is a lengthy paragraph with a very useful summary of the relevant case law. At sub-paragraph (x), Gloster J. referred to the decision of Christopher Clarke J. in *Balmoral Limited v Borealis (UK) Limited* [2006] EWHC 2531 (Comm) where the learned judge said this:

“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 the 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 other party to settlement. The making of a grossly exaggerated claim may also be a ground for indemnity costs.”

14. Mr Choat also relied upon four cases in which this Court has ordered the payment of costs on the indemnity basis in respect of adjudication enforcement proceedings: *Gray & Sons Builders (Bedford) Ltd v Essential Box Co Ltd* [2006] EWHC 2520 (TCC); (2006) 108 Con L.R. 49; *Harris Calnan Construction Co Limited v Ridgewood (Kensington) Limited* [2007] EWHC 2738 (TCC); [2008] Bus LR 636; *Harlow & Milner Ltd v Teasdale (No. 1)* [2006] EWHC 54 (TCC); *O’Donnell Developments Ltd v Build Ability* [2009] EWHC 3388 (TCC); 128 Con. L.R. 141.

15. Mr Choat relied on features of those cases which he submits were also features of the present case insofar as the application for summary judgment is concerned:

- (1) PAML forced BLL to trouble the Court with a summary judgment application, when one should never have been necessary;
- (2) PAML's Acknowledgement of Service declared PAML's intention to defend "*all of this claim*";
- (3) There were delays in service of PAML's reply evidence;
- (4) PAML wasted court time by forcing BLL to trouble the Court with an application to serve by alternative means when that application should have been unnecessary;
- (5) PAML did not commence any other proceedings;
- (6) PAML ignored BLL's requests to explain its position;
- (7) PAML raised unmeritorious points that were bound to fail.

16. In respect of the application for a stay of execution, Mr Choat argues:

- (1) That the application was based upon unmeritorious points that were bound to fail;
- (2) That a reasonable applicant would have concluded that the application was so speculative or weak or thin that the application should no longer be pursued;

- (3) When it came to the litigation, PAML used up all of the float in the litigation timetable, thereby denying BLL the opportunity of obtaining expert evidence of its own or evidence from its accountants;
 - (4) It was not until six and a half months after seeking relief from the adjudicator that PAML served its application for a stay of execution;
 - (5) PAML very belatedly sought financial information from BLL;
 - (6) PAML has sought to intimidate BLL;
 - (7) PAML has engaged in opportunistic behaviour;
 - (8) Most significantly, PAML has repeatedly made serious allegations against BLL which should never have been made.
17. For PAML, Mr Townend accepts that the costs of the applications should be paid by PAML, but argues that the assessment should be on the standard basis.
18. For his part he refers not only to *Gray & Sons Builders*, but also to *Mead General Building Ltd v Dartmoor Properties Ltd* [2009] EWHC 200 (TCC); [2009] BLR 225 and then cites paragraph 16.24 of *Coulson on Construction Adjudication*, 4th edition, which says:

“Notwithstanding this, it must always be remembered that the test for indemnity costs is a high one and will not ordinarily be granted. Thus in *Supablast (Nationwide) Ltd v Story Rail Ltd*, Akenhead J found that there was ‘an absence of reality’ about the defendant’s argument that there was more than one sub-contract, but, because he did not consider that the argument was put forward in bad faith, unprofessionally or wholly unreasonably, he declined to order indemnity costs. Similarly, in *Mead General Building Ltd v Dartmoor Properties Ltd* the judge declined to make an order for indemnity costs on the grounds that the argument put forward by Dartmoor in support

of a stay of execution was at least arguable, even if it had ultimately proved to be unsuccessful. The judge reiterated that it was not appropriate to make an indemnity costs order simply because a point raised by a defendant had failed.”

19. Basing himself upon these authorities, he argues:

- (1) That here PAML has dealt with the litigation properly, reasonably and professionally;
- (2) The delay between the application being made on the 14th November 2019 and the hearing before me was by reason of a stay for settlement discussions;
- (3) PAML stated that it would not contest the application for summary judgment on serving its evidence in response: this was not a case of leaving this aspect until the eve of the hearing as in *Gray & Sons Builders*. PAML did not continue to give the impression throughout that the application for summary judgment was resisted. Nor was PAML caused additional cost;
- (4) The stay application was arguable and was not doomed to fail from the start;
- (5) Large passages of the exhibit to Mr Thursfield’s first witness statement were unnecessary, although it is accepted by PAML that this is a subsidiary matter;
- (6) PAML’s approach and conduct in the application does not fall outside the ordinary.

20. I accept that the test for indemnity costs is a high one, and that the order should only be made if there is something out of the norm justifying the making of such an order.
21. I also accept that a significant part of the delay between the commencement of proceedings and the making of the application for a stay was caused by settlement discussions.
22. It seems to me that the greater part of the costs on both sides is likely to be related to the application for the stay rather than application for summary judgment not only because there came a time when the application for summary judgment was conceded, but also because the overwhelming mass of the evidence went to an examination of BLL's financial position for the purposes of supporting the stay application.
23. In my judgment, the strongest parts of the argument in support of the application for indemnity costs are the points raised in paragraph 44 of Mr Choat's skeleton argument, to which I have referred at sub-paragraph 16(8) above, namely that serious allegations were made which should not have been made.
24. Given that the vast majority of the costs related to the stay application, it is to that application that greatest weight should be given. Whilst in the end the application did not succeed, there were serious points to be made and considered as to whether the grounds for a stay were made out. Whilst the allegations made were regrettable, in my judgment the making of those allegations is not sufficient to make this a case for indemnity costs given that there were many legitimate points which were reasonably raised and required

consideration. I have in mind, in particular, that given the concerns as to repayment which any paying party is likely to have in the current climate and given the interrelated nature of the accounts of the Broseley companies, it was legitimate for the points to be raised and considered, albeit that in the end BLL's evidence and submissions persuaded me that a stay should not be granted.

25. For those reasons, in my judgment BLL's costs should be assessed on the standard basis.

Should there be a summary assessment of costs? Directions in respect of costs

26. Mr. Choat contends that this is a case where the normal practice under CPR PD 44, paragraph 9.2 should be followed, namely that as the hearing did not last more than one day there should be a summary assessment of the costs.
27. Whilst that is, of course, the usual practice, in this case the scale of costs sought (over £100,000) seems to me to make this an appropriate case for a detailed assessment of the costs.
28. However, it is also a case in which it is clearly appropriate for a substantial payment on account of costs to be made.
29. As yet, BLL has not put forward a statement as to the costs of the applications, as opposed to the costs of the action. It should do so. Subject to liberty to both parties to apply to vary these directions: BLL will have until close of business on Thursday 30th April to put forward a statement as to the costs of the applications and to make an application for a payment on account of costs. PAML will have until close of business on Monday 4th May to object, and

then BLL will have until close of business on Thursday 7th May to respond to those objections.

Directions for determination of the true value of the account between the parties

30. PAML has expressed its desire to have a determination as to the final account. Part 7 proceedings being on foot, PAML seeks what it contends is a reasonable time within which to plead out its cross-claim for the Judgment sum and a further £270,000 which it says that it will plead formally as a set-off in the Defence and claim in the Counterclaim. Given the present COVID circumstances, PAML seeks an order that it does so within 56 days of the date of handing down Judgment, namely, by the 16th June 2020.

31. This appears to be a sensible approach to resolving the dispute between the parties as to the true value of the account and this timetable is at first sight acceptable to the Court. I direct that by Monday 4th May 2020 BLL shall set out any alternative timetable and the time which BLL needs in order to plead to the claim once put forward, it being the Court's assumption that BLL already knows in broad terms at least the areas of dispute between the parties, and any other directions proposed by BLL. PAML will then have until Thursday 7th May 2020 to respond to BLL's proposals.

Permission to Appeal

32. PAML seeks permission to appeal.

33. This application is refused.

34. The first ground of appeal raises the question as to whether my approach to whether PAML could mount a “true value” adjudication without first paying the amount found due in the first adjudication was right in law. Whilst I accept that my decision is an extension of the principle established by the Court of Appeal in *S & T (UK) Ltd v Grove Developments* [2018] EWCA Civ. 2448; [2019] BLR 1, in my judgment that extension was in accordance with the reasoning in that case. In any event, even if I had not so decided, there were other hurdles which PAML had to overcome in order to justify a stay, and which PAML did not overcome.
35. The other four grounds raise no fresh points of law, but are rather criticisms of the manner in which I applied what are now well established principles to the facts of this case. In my judgment there are not sufficient prospects of success in the points raised individually or cumulatively to justify the grant of permission.
36. PAML seeks, in the event that I refuse the application for permission to appeal, that I grant 42 days from the date of handing down of the judgment for an application to be made to the Court of Appeal.
37. Given that, through no fault of the parties, a week will have passed from the date of handing down of the judgment to the date of receipt of this second judgment in draft, I do not regard the extension sought as unreasonable, and that extension is granted.

An email to the court from counsel for BLL dated the 21st April 2020

38. At 17.30 on the 21st April 2020, Mr Choat communicated by email with my clerk, passing on some Land Registry entries.

39. At present there is no application before me arising out of the matters raised in that email. For the avoidance of doubt, no decision on any matter contained in that email is made in this judgment.