Case No: HT-2022-000022

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

Neutral Citation: [2022] EWHC 3698 (TCC)

7 Rolls Building,
Fetter Lane,
London,
EC4A 1NL

Date: 8 July 2022

Before:

THE HONOURABLE MRS JUSTICE O'FARRELL

- -

Between:

LLOYDS DEVELOPMENTS LIMITED

Claimant

- and -

ACCOR HOTEL SERVICES UK LIMITED

Defendant

- -
- -

MR SIMON BROWN (instructed by **SPENCER WEST**) appeared for the **Claimant**
MR ROBERT BLACKETT (instructed by **HAYNES BOONE**) appeared for the **Defendant**

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JUDGMENT

Draft transcript not submitted for approval until March 2023
but approved on the basis that the parties have not identified any necessary corrections

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MRS JUSTICE O'FARRELL:

1. The matter before the Court is the Defendant's application for an order for security for costs. The principle of security is not in dispute, but the parties disagree as to the amount and the form that such security should take.

2. The background can be summarised relatively shortly. The Claimant is a single purpose vehicle company incorporated in Guernsey for the purposes of owning and managing a property development at 236 to 246 Clyde Street in Glasgow.

3. The Defendant is a hotel operating company and part of a corporate group which manages or franchises hotels worldwide.

4. The property in Glasgow was originally intended to be developed as student accommodation, but the Claimant decided to repurpose it as a hotel before completion.

5. On 21st December 2018, the parties entered into a number of agreements, including, firstly, a hotel consultancy services agreement pursuant to which the Defendant agreed to provide advice in respect of the hotel design; and secondly, a hotel management agreement whereby the Claimant would design and complete the hotel and, following handover, the Defendant would manage the hotel.

6. In 2019 and subsequently, disputes arose between the parties concerning the design of the hotel, and a number of copyright issues arose. The parties were unable to resolve their differences, resulting in funding difficulties and what is clearly a breach of trust.

7. In July 2020, the agreements were terminated.

8. On 27th January 2022, the Claimant commenced proceedings claiming damages against the Defendant for repudiatory breach of contract.

9. The quantum claimed is £43.7M of which some £8M is in respect of lost profits, and more than £30M is in respect of re-financing costs and additional construction costs.

10. On 31st March 2022, the Defendant served its defence and counter claim, alleging that the Claimant was in repudiatory breach of contract, disputing quantum and relying on exclusion and limitation provisions specifically in the Hotel Consultancy Services Agreement, which would limit recoverable damages to £90,000. The quantum of the counter claim is about £3M.

11. On 27th May 2022, the Defendant issued this application seeking an order pursuant to CPR 25.13 that the Claimant shall provide security for the Defendant's costs of these proceedings in the sum of £1.5M by payments into the court funds office. The revised amounts and dates of such payments requested are as follows: first of all, £330,000 to be paid within 14 days of this hearing; secondly, £675,000 to be paid by 7th October 2022; and thirdly, £495,000 to be paid six weeks before the trial with the precise date to be fixed at the CMC.

12. The Claimant consent to say an order for security be made as a matter of principle, but its position is that the security should be limited to a sum of £800,000 to be paid in tranches as suggested by the Defendant but on different dates as follows: within 21 days of the order for security, the Claimant should pay £200,000; £300,000 would be paid within 14 days after disclosure; and £300,000 would be paid 28 days before trial.

13. In terms of the mechanism for the security, that would be payment into the client account of the Claimant's solicitors.

14. The principles that are applicable in the case of an application for security for costs in these circumstances are well established and not in dispute. CPR 25.12 provides that:

> A Defendant to any claim may apply under this section of this Part for security for his costs of the proceedings. Such an application must be supported by written evidence.

15. In this case, the application has been supported by the witness statement of Marcus Esly, a solicitor and partner in Haynes Boone CDG LLP Solicitors for the Defendant dated 27th May 2022.

16. CPR 25.13 (1) provides that:

> The Court may make an order for security for costs under Rule 25.12 if:
>
> > (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make an order; and
> >
> > (b) one or more of the conditions in paragraph 2 applies.

17. The conditions in paragraph 2 include:

> > (a) that the Claimant is resident out of the jurisdiction but not resident in estate bound by the 2005 Hague Convention as defined in Section 1 (3) of the Civil Jurisdiction and Judgments Act 1982; and
> >
> > (c) that the Claimant is a company or other body, whether incorporated inside or outside Great Britain, and there is reason to believe that it will be unable to pay the Defendant's costs if ordered to do so.

18. In this case, the Claimant a company resident in Guernsey. Guernsey is not a state bound by the 2005 Hague Convention. There is little or no publicity available as to the Claimant's finances, as explained in Mr Esly's witness statement. It was set up as an SPV for the development, the subject of the proceedings, and the Claimant has not provided any evidence of its financial position to the Court.

19. Therefore, on the basis of the evidence before the Court, I am satisfied that conditions (a) and (c) of CPR 25.13 (2) are met, and, indeed, it is common ground that it would be appropriate for the Court to make an order for security in this case.

20. CPR 25.12 (3) provides that:

> Where the Court makes an order for security for costs, it will determine the amount of security and direct the manner in which and the time within which the security must be given.

21. The Court has discretion to order such amounts of security as it thinks just having regard to all the circumstances of the case.

22. A number of cases have been cited to the Court in which the consensus emerges that, generally speaking, some 60% to 70% of the estimated costs that are accepted by the Court should be used as the foundation of the order for security. The cases include *Stokers v IG Markets* [2012] EWCA Civ 1706; *Mayr & Ors v CMS Cameron McKenna Nabarro Olswang* [2018] EWHC 3093; *Danilina v Chernukhin* [2018] EWHC 2503; *Tugushev v Orlov* [2018] EWHC 3471; *Maroil Trading Inc v Cally Ship Holdings Inc [2020] EWHC 3041*; and *Re Ingenious Litigation* [2020] EWHC 235, and *Kew Holdings v Donald Insall Associates* [2020] EWHC 1862.

23. It is important to recognise that the circumstances of each case vary, and the Court must decide the appropriate security for costs, the costs order to make, in all the circumstances of the case. The Court does not derive any assistance from the statistics that have no doubt been carefully compiled and set out by the Defendant.

24. However, the Court does take account of the general guidance in the White Book at paragraph 25.12.7, which states that:

> In cases in which a costs management order has been made, the Defendant's approved or agreed costs budget will be a strong guide as to the likely costs order to be made after trial if the claim fails. This budget should be used as the relevant reference point in relation to the incurred cost elements and also the estimated cost elements for considering the amount which should be ordered for security for costs, *Sarpd Oil International Ltd v Addax Energy SA* [2016] EWCA Civ 120.

25. In other cases, the Court will calculate the amount to allow a security in a robust, broad brush manner, and may also impose a percentage discount having regard to the uncertainties of litigation, including the possibility of early settlement, and the fact that the costs estimate prepared for the application may well include some detailed items which the Claimant could later successfully challenge on a detailed assessment between litigants.

26. There is no hard and fast rule as to the percentage discount to apply. Each case has to be decided upon its own circumstances, and it is not always appropriate to make any discount. A frequently preferred alternative to discounting is for the Court to order security for the whole costs to be paid in specified instalments as the case progresses.

27. In this case, the Defendant seeks security in the amount of £1.5M. Mr Esly has prepared a budget using the precedent H template showing the Defendant's estimated costs of defending the claims in the sum of £2.158M. That includes two contingent costs which are excluded for the purpose of the application for security, leaving estimated costs in the sum of £2,021,481.25.

28. The Court has been asked to consider the possibility that costs could be awarded on an indemnity basis by Mr Blackett, counsel acting for the Defendant. However, the Court does not consider that this is a case in which it can assume, or even speculate, as to the likelihood that indemnity costs might be awarded. It does not follow that simply because allegations of fraud are made that indemnity costs would follow if the Defendant were to be successful. There are many permutations in relation to the outcome of these proceedings that might result in the Defendant being seen as the successful party and awarded its costs without the Court deciding that those costs

should be awarded on an indemnity basis. The Court is simply not in a position to make an assessment as to that factor one way or the other.

29. Therefore, what the Court has to do is consider whether the estimate of just over £2M that has been put forward by Mr Esly is about right. There are a number of ways in which the Court could approach that, but the two primary ways of doing that are either to consider how the cost budgeting exercise might be carried out by the Court or to simply award or decide the right level of security based on a broad brush percentage adjust.

30. Starting with the approach that the Court might take if it were to carry out a costs budgeting exercise, the first item with which issue is taken by Mr Browne, QC, leading counsel for the Claimant, is in relation to the costs incurred by way of pre-action and issue statement of case phases. The pre-action costs are £30,000. The issue and statement of case phase is £372,566. Both the incurred and estimated costs are challenged.

31. I accept the submissions of Mr Blackett that although the commentary in the budget prepared by the solicitors is relatively short, that this clearly covers more than simply the pleadings. It extends to the investigations, the correspondence between the solicitors, and I also accept that where allegations of dishonesty have been levied at the Defendants, as they have in this case, that that might require a degree of advice and investigations with various witnesses that might be more than would usually be expected. If the Court were carrying out a cost budget exercise at this stage, it would not make any comment on the incurred costs, and there is nothing in the estimated costs that would attract particular criticism.

32. Turning to the disclosure stage, the Court is being invited to find that the estimated costs of £205,830 is far too high based on some 521 and a half hours of solicitor time.

33. At this stage, it is virtually impossible for the Court to have any feel for the level of documentation that might be involved, particularly as there is no DRD before the Court and the parties have not had a chance to discuss the approach that might be taken to disclosure. What the Court can do is to consider whether, in its experience, this looks out of line, and without the normal level of information that the Court would expect to see if it were cost budgeting, the Court finds that there is nothing that indicates that it is way outside the normal estimate that it would expect.

34. I emphasise that this is for the purpose of assessing what the Court can accept for the purpose of the application for security. The Court is not endeavouring to carry out an actual cost budgeting exercise that would fix the parties in any way.

35. Moving on to the witness statement section, the Court accepts Mr Browne's submission that this looks far too high, although it is assuming ten Defendant witnesses and five Claimant witnesses. The number of hours that have been allowed for by way of the solicitors' costs is 543 and a half hours. That seems to me to be far too high, particularly having regard to practice direction 57AC which requires witnesses to produce witness statements in their own words to limit their statements to matters of which they have direct knowledge, and to avoid setting out in their witness statements long narrative sections and/or reference to documents or commenting on pleadings or witness statements from others. Having regard to that, I consider that the hours appear to be too high, and if this were a cost budgeting exercise, the Court is likely to reduce it by about £100,000.

36. Turning on then to the expert phase, again, the Court accepts the submission of Mr Browne that this seems to be too high. The expert disbursements for the purposes

of their reports and joint statements comes to some £161,600, but that is dwarfed by the time proposed to be spent by the lawyers, which is 717 hours at a total of £280,250. That does seem to be extraordinarily high and unjustified actually regardless of whether it was standard or indemnity basis. It is simply an unreasonable amount to incur. In addition, it seems to be disproportionate to the exercise that is being required. If this were a cost budgeting exercise, the Court is likely to reduce that phase by some £200,000.

37. Moving on, then, to the pre-trial review, nothing seems to be out of the ordinary there. The Court, this Court, always orders a pre-trial review save in very exceptional cases, and this is not one of those.

38. Turning then to trial preparation and trial, again, I accept the submission of Mr Browne that this seems to be high. The amount for the trial that is estimated is £182,000. That does not seem to be so significantly high, but then it is combined with the trial itself, which is £472,000. So, over £650,000 for trial prep and trial.

39. This is not the largest case that has come before this Court. The value of the claim is high, some £43.7M, but most of that is the financing and additional construction costs. The loss of profits claim is actually much more modest, sort of £8M/£9M. The case is not particularly fact-heavy or technically complex, although expert evidence will be required and, therefore, it will take some period of time before the Court if fought.

40. I consider that the trial and trial prep phases are too high, taking into account the nature of the litigation, and the Court is likely to reduce that by about another £200,000.

41. Taking that in the round, that would result in the costs coming down, by way of estimate, from £2M to £1.5M, which suggests that the figure that is sought by the Defendant in this case of £1.5M is about right and taking into account all of the circumstances of this case, the Court considers that it would be appropriate to make an order for security in the sum of £1.5M.

42. The Court then turns to consider the form in which the security should take. The alternatives are either payment into the Claimant's solicitors' client account, to be held by the solicitors, or payment into court. In the absence of any details as to the basis on which the sums would be ring-fenced within the client solicitor account and/or mechanics for dealing with it, the Court considers that the appropriate order would be by way of payment into court in each case. The Claimant is required to actually put up the money rather than providing a guarantee. So, it does not make any difference to the Claimant.

43. So, for that reason, the Court will order the money to be paid into court.

44. The Court then comes on to consider the timing. There is a large measure of agreement, actually, between the parties on this. It is agreed that some of the money should be paid now, whether within 14 or 21 days. There should then be a second tranche on the Defendant's case just before the CMC; on the Claimant's case, just after disclosure, and then the final tranche should be either six or four weeks before trial. That seems to be a sensible way forward and takes into account the fact that this is the very early stages of the claim. The cost estimate could be reduced if there were to be cost budgeting, and despite the headline size of the claim, the Court, of course, always has discretion to order cost budgeting, and also it takes into the possibility that the claim could be disposed of before one gets to trial.

45. Starting, then, with the first tranche, it seems to me sensible that the first tranche should be £300,000, and that can be paid within 21 days, so that is by 29th July, just before the end of term.

46. The second tranche, I accept Mr Blackett's submission that this should be just before the CMC, i.e. before significant costs are incurred by the parties and, of course, in this case, the Defendant, in carrying out the orders that are made at the CMC, including disclosure.

47. So, that tranche should be £600,000 to be paid by 7th October 2022. That would leave the final tranche of £600,000 to be made before trial. I agree that six weeks before trial makes sense given the likely length of the trial and, therefore, the time at which the costs of preparation are likely to be incurred, and the precise timing of that can be determined by the Court at the CMC once the trial timetable has been established.