[2022] EWHC 1209 (TCC)

Ref. HT-2022-000152

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

7 Rolls Buildings
Fetter Lane
London

Before THE HONOURABLE MR JUSTICE CONSTABLE

IN THE MATTER OF

RESOURCE RECOVERY SOLUTIONS (DERBYSHIRE) LIMITED (Claimant)

- v -

(1) DERBYSHIRE COUNTY COUNCIL (
(2) DERBY CITY COUNCIL **(Defendants)**

MR S CATCHPOLE KC and MR P BURY appeared on behalf of the Claimant
MISS L GARRETT KC appeared on behalf of the Defendants

JUDGMENT
5 MAY 2023
(AS APPROVED)

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MR JUSTICE CONSTABLE

1. Following the handing down of my judgment dismissing the Defendants' application for summary judgment/strike out and dismissing the remaining aspects of its application to strike out parts of the Reply to the Defence ('the Reply Strike Out'), I gave directions to the parties in respect of seeking to agree consequential orders. The parties have not been able to agree that the appropriate costs orders should be argued their respective positions before me this morning.

2. In relation to the summary judgment/strike out application, the Defendants argue their costs should be reserved. The Claimant seeks its costs of the application on an indemnity basis.

3. In relation to the Reply Strike Out application different orders are sought in relation to different periods:
   (1) The first period chronologically is the period from the date of the application to the date of the Amended Reply. The Claimant seeks its costs in the case. The Defendants seek their costs.

   (2) The second is the period from the Amended Reply onwards, including the hearing before me. The Claimant seeks its costs on an indemnity basis and the Defendants seek an order that each side should bear their own costs.

4. The Defendants also contend that if I were to consider that the Claimant is entitled to its costs post-Amended Reply, then looked at in the round, and when adjusted hourly rates are factored in, the Defendants' costs pre-Amended Reply slightly overtop those of the Claimant's post-Amended Reply, so no order as to costs will be appropriate.

5. I will deal first of all with the principles that I should apply in respect of indemnity costs.

6. The starting point is the appropriateness of indemnity costs is extremely fact-specific. The guiding principle, set out in the case of *Excelsior Commercial & Industrial Holdings Limited v Salisbury Hammer Aspden & Johnson* [2002] EWCA 879, is that the court must be persuaded that the conduct of one of the parties, or other particular circumstances of the case, take the situation '*out of the norm*'.

7. In the application before me it is the conduct of one of the parties that is the focus of submissions.

8. As pointed out in the White Book at CPR 44.3.9, the discretion to award indemnity basis costs is ultimately to be exercised so as to deal with the case justly. The number of authorities where judges have considered the exercise of that discretion are legion and an extensive review of those authorities is unnecessary. However, I do note from the various cases drawn to my attention in written and oral argument the following features.

9. First of all, as set out in the first point of the summary provided by Coulson J, as he then was, in *Elvanite Full Circle Limited v Amec Earth and Environmental (UK) Limited* [2013] EWHC 1643 (TCC), himself relying on the case of *Kiam v MGN Ltd* [2002] EWCA Civ 66, indemnity costs are appropriate only where the conduct of the

paying party is unreasonable to a high degree. And unreasonable in this context does not mean merely wrong or misguided in hindsight.

10. Secondly, as set out in the third point in the same summary, the pursuit of a weak case will not usually on its own justify an order for indemnity costs, provided that the claim was at least arguable. The pursuit of a hopeless claim, or a claim which the party pursuing it should have realised was hopeless, may well lead to such an order, and example is given in the summary is to *Wates Construction Limited v HGP Greentree Allchurch Evans Limited* [2005] EWHC 2174 (TCC). Language used to describe the type of case to which indemnity costs may attach have included phrases '*extraordinarily thin*' and '*exceptionally weak*'. I also note that, as stated by the Court of Appeal in *Arcadia Group Brands Ltd & Ors v Visa Inc & Ors* [2015] EWCA Civ 883, weakness itself may not be sufficient. However, indemnity costs will be appropriate when the position taken is not only hopeless but motivated by some ulterior commercial purpose, or tactical reasons unconnected with any belief in merit.

11. Thirdly and finally, as identified by Akenhead J in *Courtwell Properties Ltd v Greencore PF* (UK) Ltd [2014] EWHC 184, dishonesty or moral blame does not have to be established in order to justify indemnity costs. However, the order does, as set out in *Excelsior* and in *Kiam*, carry some stigma. It is to be regarded as penal rather than exhortatory.

12. I now turn to the issues relating to summary judgment/strike out application. The first question is whether I should reserve costs or whether there should be a cross order in the Claimant's favour. The second and third questions are, if I don't reserve the costs, where costs should fall and whether should be on the standard or indemnity basis, judged by reference to the principles I have outlined.

13. In my judgment, costs should not be reserved. Even though, as Ms Garrett pointed out, a reservation of costs following summary judgment is not particularly unusual, I do not regard this as the type of case in which the trial judge would be in better position than I am to judge the success of the application that I have heard. Even if the Defendants succeed in their construction of the contract, I do not consider that this would change the position in relation to the summary judgment application brought, which to a large part turned on whether it was appropriate to be asking the questions posed, summary or not. This is so even if it is right that bringing the summary judgment led to some changes in the way the Claimant put its case (which is disputed by the Claimant).

14. In addition, it seems to me in circumstances where one party is seeking indemnity costs, it would be particularly appropriate for me to consider the application rather than to leave the matter to the trial judge in due course who will not have heard the application itself.

15. In terms of where the costs should fall, it seems to me straightforward that the Claimant should get its costs of the summary judgment application. They won the application and there is nothing to persuade me to depart from the usual position.

16. I therefore turn to the question of the basis of costs, should it be standard or indemnity. In their written submissions and expanded upon orally, the Claimants say that the

summary judgment application was indeed out of the norm, justifying indemnity costs for the following six reasons.

17. First, the application should never have been brought.

18. Second, it was futile.

19. Third, it was unarguable and doomed to fail. And in this context, it is pointed out that the 'grasp the nettle' aspect of the argument, which had not been part of the original application, was also something that was doomed to fail.

20. Fourth, it is said that the Defendants unreasonably and incorrectly relied on an allegation of abuse of process in that an allegation was made that the legal argument was being deployed knowing it was bound to fail with a collateral purpose of obtaining documents as to Defendants' intentions. This it is said is an allegation which should never have been made.

21. Fifth, perhaps picking up on the wording of the tests in the authorities that I have identified, the Claimant says there was a collateral purpose to the hopeless application which was so that the Defendants might avoid disclosure which it was always bound to give; and in correspondence but absent from written submissions, but hinted at in oral submissions before me, there was potentially a second collateral purpose to the summary judgment application of delaying the trial.

22. Sixth and finally, it is said by the Claimants that none of the points are made with hindsight, they were made in correspondence in advance of the application.

23. I note also that the Claimant concludes in its written submissions - and this was repeated orally by Mr Catchpole this morning - that there is no basis or principle upon which his clients should have to bear any part of the costs of having to respond to the conduct it describes from the Defendants. In relation to this point, I note only that of course the basis of recovery of costs, irrespective of standard or indemnity, is that the successful party recover their reasonable costs. The only costs not recovered are those deemed unreasonable. An order for indemnity costs does not of course mean that all costs, whether reasonably or unreasonably incurred, are indemnified by the paying party. The difference between standard and indemnity costs merely shifts the burden of how the question of reasonableness is to be assessed. In this sense, whatever the outcome of this debate, the Claimant will not, by definition, be bearing any part of their reasonable costs of having to respond to the Defendants.

24. The first three of the six issues, coupled with the sixth itself, are it seems to me essentially different ways of saying the same thing. If the application was hopeless, whether in relation to whether the Claimant's construction had a reasonable prospect of success basis, or in relation to whether the Court should a grasp the nettle and determine the construction summary, it is said that it should never have been made and could and should have been seen by the Defendants from the outset.

25. I disagree. The parties, it seems to me, are entitled to adopt a range of strategies in order to advance their position in litigation as they see best. Generally speaking, as correctly pointed out by Mr Catchpole, if they fail they pay the costs. And whilst it might be right to regard the attempt to persuade the court to determine the issues as

they had been framed by the Defendants as somewhat ambitious, and I agree it was never likely to be successful, this is not, of itself, on the basis of the authorities and in the exercise of my discretion in this particular case, enough to warrant the label of unreasonable behaviour to a high degree. It has not delayed the substantive action, and I do consider it to be an overstatement of the position to suggest that even bringing the application somehow has brought the legal profession into disrepute.

26. As to the fourth point, I do regard it as mildly unhelpful that the Defendants asserted that the construction contended for by the Claimant was purposefully being so contended for knowing that it was unarguable and being advanced for a collateral purpose of obtaining particular disclosure. Whilst no express allegation of professional misconduct was advanced, I accept that it is at least possible to have implied this from the allegation. However, as an allegation, the fifth point advanced by the Claimants in this application before me in respect of indemnity costs is really no different in substance, it being said that the summary judgment applications were advanced with no proper basis of thinking that they could possibly succeed in order for collateral purposes, i.e., to avoid disclosure or to delay the trial.

27. Whilst also it seems to me that is also a mildly unhelpful approach, it was not and is not improper for Mr Catchpole to have made that assertion in this application before me, even in circumstances where I do not accept it might have been that the motivation for summary judgment was in any way improper.

28. I do not consider that experienced litigators should, in reality, think that assertions about the parties' motivation in adopting a particular position will usually add much to the overall analysis, or that they necessarily imply professional misconduct. I also consider that those same litigators should generally have a thick enough skin to cope with perhaps unwarranted expression or speculations as to motive without undue distress. In my view, the allegation going to motive by the Defendants was at best a minor sideshow, and it was not one that I even considered important enough to address in my judgment. I certainly do not think that that aspect alone is sufficient to warrant justifying the costs of the application being assessed on an indemnity basis when otherwise, as I have found, indemnity costs would not be justified.

29. As to the fifth of the six points, it is right that the potential for limiting disclosure was a reason the Defendants brought the summary judgment/strike out application, it being suggested that the nettle should be grasped, but that was not a nefarious reason or a tactical one unconnected with any belief in merit. Instead it was openly advanced in argument by the Defendants as a transparent and positive reason as to why the court should grasp the nettle (i.e. there were case management implications). Again, in my judgment this in no way justifies the making of an order of indemnity costs.

30. Therefore the application for indemnity costs in relation to the summary judgment/strike out application fails and the Claimant should recover its costs in relation to the summary judgment/strike out application on a standard basis.

31. I now turn to the costs of the application to strike out.

32. The first period is the period to the service of the Amended Reply. The Claimant says the order should be its costs in the case, and the Defendants say they should get their costs.

33. In my view, the Defendants are correct. It is correct that in my judgment I made the point that infelicities in pleadings should not generally lead to an application to strike out. However, I was saying that principally in the context of the application as it remained after the Amended Reply had been served. There is ultimately no getting away from the fact that there were valid reasons to criticise the original document. Waksman J formed that view, albeit, as I said in my judgment, most likely on a superficial basis. I had time to consider the Reply in more detail, and as I found at paragraph 82 of my judgment, the original Reply was unnecessarily prolix in places, it comprised argument, submission, and included some elements of tendentiousness. Faced with the application, and the observations of Waksman J, the Claimant made significant amendments, and I regard them as improvements.

34. For the reasons I made clear in my judgment, the Defendants were justified in at least some respects in the application that they made. Whilst, for the reasons set out in my judgment, they should have stopped whilst they were ahead, the Defendants were successful following issue of their application and should, in the ordinary way, get their costs of that application.

35. As for the period leading up to the application before me, post the Amended Reply, it is, in my view, equally clear that the Claimant should recover its costs. The Defendants pursued their further complaints, and they were unsuccessful.

36. Miss Garrett has argued before me that there were various aspects in which the Defendants secured some success from the pursuit of the application, or the continued pursuit of the application, namely the costs of amending the particulars of claim and RRS's costs of amending its replies. However, it is not in any way right in my view to regard this as an equal measure of success. In reality, the principal battle was very much about whether the Claimant's pleading as it stood after amendment should in various respects be struck out. The vast majority of the time was spent on that issue and the Defendants lost on it.

37. I do not regard the continued pursuit of the complaints about the pleading, however, as unreasonable to a high degree. It is obvious that Mr Catchpole feels very strongly about the issue, and it is understandable that this may be the case when it is one's own pleading that is being criticised and criticised as it turned out (after the Amended Reply) in a way that ultimately did not justify the order sought. However, in my view, this was objectively just a strategy in litigation which was not, of itself, highly unreasonable. It was just not successful.

38. The Defendants should therefore pay the costs on the standard basis. They should not otherwise be penalised.

This transcript has been approved by the Judge