Case No.: HT-03-392

Neutral Citation No. [2005] EWHC 2174 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Court 10 St. Dunstan's House

London EC4

Date: Monday 10th October 2005

BEFORE

HIS HONOUR JUDGE PETER COULSON Q.C.

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WATES CONSTRUCTION LIMITED **Part 20 Clai**

-and-

HGP GREENTREE ALLCHURCH EVANS LIMITED **Part 20 Defe**

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(Transcript of the Digital Recording of

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Official Shorthand Writers to the Court)

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MR. ANDREW NICOL (instructed by Plexus Law) appeared for the Part 20 Claimant

MS JOANNE SMITH (instructed by Squire & Co) appeared for the Part 20 Defendant

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JUDGMENT

Introduction

(1)
On the morning of Sunday, 26 May 2002, the roof of a large retail unit in Salisbury collapsed, causing considerable damage. The unit was owned by Waitrose Limited and leased to Powerhouse Limited, a company selling electrical goods. It is agreed that the collapse was due to the build up of rainwater on the roof.

(2)
The unit had been built for Waitrose, in 1997, by Wates Construction Limited. The work had been carried out pursuant to a design and build contract: in other words, Wates had a contractual liability to Waitrose in respect of both the design of the unit, and its subsequent construction in accordance with that design.

(3)

Wates engaged various professionals to carry out design work on their behalf. HGP Greentree Allchurch Evans Limited, ("HGP"), were engaged as their architects, and they designed the drainage for the flat roof of the unit that collapsed.

(4)
On 11 November 2003, Waitrose commenced proceedings against Wates for damages for breach of the design and build contract. The particulars of the breaches relied on by Waitrose were set out in paragraph 6 of the Particulars of Claim. They were, broadly speaking, formulated as allegations of negligent design of the drainage system for the flat roof. The claims made included the cost of repair, assessed at £550,000, various loss of profit claims and an indemnity in respect of any claims from Powerhouse.

(5)
Wates denied the claim. Notwithstanding that, on 4 June 2004, they issued Part 20 proceedings against HGP. The Part 20 proceedings have continued until today, the first day of the trial. This morning, Mr Nicol, who appeared for Wates, informed me that Wates were discontinuing the claim against HGP. In accordance with CPR 38.6, Mr Nicol very properly accepted that Wates must pay HGP's costs. As to the basis for the assessment of those costs, Mr Nichol submitted that such costs should be assessed on a standard basis.

(6)
Therein lies the remaining dispute between the parties which I must now resolve. The primary submission of Miss Smith, who appeared for HGP, was that I should order all of HGP's costs to be assessed on an indemnity basis. Her secondary submission, if I was against her first, was that, on any view, the costs after 10 August 2005 should be assessed on an indemnity basis, even if the costs before that date fell to be assessed on the standard basis. Behind both submissions lay a detailed attack on the way in which Wates and/or their solicitors, Plexus Law, had conducted the Part 20 litigation from its commencement.

Principles

(7)
The conduct of litigation may, in certain circumstances, justify an award of indemnity costs. The leading recent authorities on this point are Reid Minty v Taylor2002 1 WLR 2800 and Kiam v MGN Limited No 22002, 1 WLR 2810. In Reid Minty, Lord Justice May said, at paragraphs 28 and 32:

"If costs are awarded on an indemnity basis in many cases there will be some implicit expression of disapproval of the way in which the litigation has been conducted, but I do not think that this will necessarily be so in every case. What is, however, relevant, at the present appeal, is that litigation can readily be conducted in a way which is unreasonable and which justifies an award of costs on an indemnity basis, where the conduct could not properly be regarded as lacking moral probity, or deserving moral condemnation…

There will be many cases in which, although the defendant asserts a strong case throughout and eventually wins, the Court will not regard the claimant's conduct of the litigation as unreasonable and will not be persuaded to award the defendant indemnity costs. There may be others where the conduct of a losing claimant will be regarded, in all the circumstances, as meriting an order in favour of the defendant of indemnity costs. Offers to settle and their terms will be relevant, and if they come within Part 36 may, subject to the Court's discretion, be determinative."

(8)
In Kiam v MGN No 2 Lord Justice Simon Brown explained that reasoning in this way:

“I for my part understand the Court there [in Reid Minty] to have been deciding no more than that conduct, albeit falling short of misconduct deserving a moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree. Unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under Part 44, unlike one made under Part 36, does, I think, carry at least some stigma. It is, of its nature, penal rather than exhortatory.”

(9)
Another relevant decision, relied on by Mr Nicol, was the judgment of Mr Justice Rattee in Atlantic Bar & Grill Ltd v Posthouse Hotels [2000] CP Reports 32. That was a case in which the third defendant successfully sought an order that the costs of the claim for an injunction against him, once it was discontinued on the second day of trial, should be assessed on an indemnity basis. Mr Justice Rattee said:

“I should say that one of the striking features of this case, having regard to the claim for an injunction which has been made throughout by the claimant against the third defendant, is that at no stage was any attempt made to obtain from the Court any interim injunction. The result of that, of course, has been inevitably that by the time the trial of this action started at the beginning of this week the defendant’s business had been up and running for nearly a year, certainly nearly 11 months, and Mr Dowding, on behalf of the claimant, realistically accepted that, as a result, any claim he might otherwise have had for an injunction was seriously undermined, given that there had been no attempt by his client, in the meantime, to seek interim injunctive relief from the Court.

I do not find this an easy question but, on balance, I think the claimant should have to pay the third defendant’s costs on an indemnity basis. I am concerned by the way in which this litigation has been conducted on the part of the claimant against the third defendant, culminating in the notice of discontinuance today.”

(10)
Sadly, despite the CPR, there are plenty of cases which are run in a way that, certainly with hindsight, could be described as “unfortunate”, or worse. Further, there are many claims which are discontinued and, although it is unusual for a claim to be discontinued on the first day of trial, the mere fact that discontinuance occurred so late does not, of itself, mean that an order for indemnity costs is justified. The real question for me is: was the conduct of the Part 20 claim, by Wates and/or their solicitors, so unreasonable that HGP’s costs should be assessed on an indemnity basis?

History up to Early August 2005

(11)
Miss Smith made a variety of points about the early history of the Part 20 claim and invited me to say that the conduct of Wates, and/or their solicitors, during this part of the claim was so unreasonable that I should order indemnity costs. She relies, amongst other things, on the following:

(a)
Wates’ failure to comply with the pre-action protocol;

(b)

Wates' failure to deal with disclosure properly, which necessitated an order from the Court;

(c)
Wates' failure to plead a proper case which led to amendments and requests for further information which, themselves, were not properly answered and which, again, led to further orders of the Court;

(d)
Wates' failure to address the fact that they had deviated from HGP's design;

(e)
Wates' failure to pay the costs ordered on at least one occasion by the Judge who was case-managing the Part 20 claim.

(12)
I am not sure that any of these matters, even when taken together, can amount to the sort of conduct that would ordinarily justify an order for indemnity costs. Of course, that is not to say that I in any way condone these various failings on the part of Wates and/or their solicitors; in my judgment, they are indicative of a relatively weak claim kept going with the minimum of expenditure. But they are not, in my view, examples of conduct which would ordinarily justify the draconian order sought.

(13)
I deal briefly with each category of complaint below.

(14)
As to (a), the protocol point, I have some sympathy with Wates' failure to comply with the precise requirements of the pre-action protocol, given that there was already ongoing litigation involving Waitrose and Wates. It is often difficult for a defendant who wants to bring Part 20 proceedings to comply with the requirements of the court in the litigation, on the one hand, and the protocol on the other.

(15)
As to (b), the disclosure point, this was dealt with by the Judge dealing with the case at the time, and, as I understand it, an adverse costs order was made against Wates. It seems to me, therefore, that no further sanction is appropriate.

(16)
As to (c), the complaint about the inadequacy of the pleadings, I regret that such failings are not uncommon. I am quite sure that, in this case, the deficient nature of Wates' pleaded case was not part of a deliberate strategy on their part. In addition, the costs of the amendments that were subsequently made have been awarded against Wates in any event.

(17)
As to (d), the allegation that Wates failed to acknowledge that they deviated from HGP's design, it seems to me that Wates did address that point, albeit in rather opaque terms, in their answer to the request for further information.

(18)
The final criticism, namely the failure to pay within 14 days the costs which were ordered against them, was conduct that was unjustified and inexcusable, but that does not, of itself, warrant the wide order sought.

History from Early August 2005

(19)
As I see it, therefore, the situation in early August 2005 was this: it was, or should have been, apparent to Wates, and their solicitors, that this was a relatively weak case, which, at that stage, had very little going for it. In particular, Wates, and their solicitors, would have known that, because they deviated from HGP's design, allegations which had looked, on their face, to be allegations of inadequate design were, in fact, allegations concerned with workmanship. Therefore, the exchange of witness statements, and the views of the experts, was going to be critical to Wates' decision to continue with this Part 20 claim or not.

(20)
The witness statements were exchanged in early August 2005. Those exchanged by HGP demonstrated that their design complied with the relative standards and that the problems were caused by Wates' failure to build to that design, and the failure by Waitrose, or their tenants, Powerhouse, to put in hand a proper maintenance programme. Neither matter could be attributed to HGP. Wates' witness statements were much briefer and contained, in at least one important respect, a basic factual error. It is clear from the face of those statements that some of the relevant Wates' personnel, such as Mr Andy Clark, who was involved in the detailed events of 1997, were not available to Wates to give evidence. The statements, therefore, would, or certainly should, have confirmed to Wates that this Part 20 claim was not going to succeed.

(21)
The absence of any case against HGP would have been confirmed, beyond doubt, on 10 August, when the experts discussed the allegations and reached an agreement in writing that each signed and sent, I am told that night, to their respective solicitors. The net effect of that agreement was that the defects in the roof drainage system were identified as being problems with the construction of the drainage system, and not its design. Serious problems were also attributed by the experts to the failure to maintain. This, therefore, confirmed that there was no case against HGP in respect of the design, and Wates and their solicitors should finally have realised that the Part 20 claim had to be abandoned.

(22)
It may well be that they did realise the grave difficulties that they were in because, thereafter, Wates, and their solicitors, spent some time reviving a suggestion originally made by Waitrose that there were inadequacies with the inspection regime. Of course, given the fact that the critical allegations were, in truth, failures of workmanship rather than design, inspection was going to be the only way in which, at least theoretically, the deficiencies could have been laid at the door of the designer in any event. The problem for Wates was, not only had they disavowed an inspection case against HGP earlier in the proceedings, but that HGP's retainer by Wates was expressly limited to design services and did not, on any view, include any sort of inspection obligation.

(23)
On 27 September 2005, by reference, amongst other things, to the experts' agreement to which I have already referred, HGP's solicitors wrote to Plexus Law to say that they believed that the claim was doomed to fail. The final paragraph of the letter read:

"In the circumstances we invite you to discontinue your claim against HGP and to pay our costs on the standard basis if not agreed. In the event that you fail to do so, we will be inviting the Court to award us our costs of the trial on the indemnity basis."

(24)

The good sense of the suggestion in the letter to discontinue was, of course, confirmed this morning when the Part 20 claim was in fact discontinued.

Decision

(25)
I do not regard the conduct of Wates and/or their solicitors, up to early August 2005, as so unreasonable as to justify an order for indemnity costs. I believe my reasons for that decision have been set out clearly in paragraphs (11)- (18) above.

(26)
Equally, I regard the conduct of Wates, and/or their solicitors, from 11 August 2005 onwards, as being so unreasonable that the costs incurred from that date should be assessed on an indemnity basis. Even if the conduct up to early August did not justify the order sought, Wates and their solicitors knew by then that the Part 20 claim could only be saved if helpful material emerged from the statements and the discussions between the experts. In fact, the statements and those discussions made clear, beyond any doubt, that it was impossible for Wates' claim against HGP to succeed. Accordingly, the claim should have been discontinued on 11 August 2005.

(27)
I accept Mr Nicol's point that in a number of the authorities, the unreasonable conduct of litigation involved an extraneous reason for pursuing the doomed litigation, such as the entirely commercial considerations identified by Langley J in Amoco UK Exploration Company v British American Offshore Limited 2002 BLR 135. But I do not believe that unnecessary or unreasonable pursuit of litigation must involve an ulterior purpose in order to trigger the court's discretion to order indemnity costs. I consider that to maintain a claim that you know, or ought to know, is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs. Here, if that was not the position before 10 August 2005, it certainly was the position from 10 August 2005 onwards.

(28)
In addition, I note that May LJ, in Reid Minty, placed a particular emphasis on offers, and their terms, in the context of applications for indemnity costs. The offer made by HGP on 27 September was reasonable, and it should have been accepted immediately by Wates. That is not just hindsight; as I have already pointed out, the offer was made on the basis that the claim was unarguable, a position which Wates, and/or their solicitors, should have known no later than 10 August 2005.

(29)
In the context of offers made, I have been referred to an offer by Wates' solicitors, on 21 September, of a possible mediation. Mr Nichol wisely did not push that point too hard. The mediation was proposed far too late for it to have any prospect of success, particularly given the impregnable position in which HGP found themselves so close to the start of the trial. Too often, in my recent experience, solicitors facing costs difficulties try to avoid them by making belated offers of mediation. That is not what mediation is for, and it is not a practice in accordance with the CPR.

Conclusion

(30)

Accordingly it seems to me that, for the reasons which I have given, HGP's costs up to 10 August 2005 should be assessed on a standard basis. HGP's costs from 11 August 2005 onwards will be assessed on an indemnity basis.