Neutral Citation Number: [2006] EWHC 1628 (TCC)

Case No: HT 04 322

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 29/06/2006

Before :

HIS HONOUR JUDGE PETER COULSON QC

- -

Between :

	INTENSE INVESTMENTS LTD	**Claimant**
	- and -	
	DEVELOPMENT VENTURES LTD	**First Defendant**

- -

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Mr Nicholas Peacock (instructed by **Speechly Bircham**) for the **Claimant**

Mr Christopher Pymont QC (instructed by **Walker Morris**) for the **Defendants**

Hearing date: 2**9** June 2006

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JUDGMENT (No 3)

HIS HONOUR JUDGE PETER COULSON QC:

Background

1.
Following the handing down of my Judgment on the Preliminary Issues on the 29th June 2006, there was a major dispute between the parties as to the costs order that I should make. The Claimant sought an order that the First Defendant pay 85% of its costs, because it had won three of the four Preliminary Issues. The First Defendant, on the other hand, sought an order that, because the Claimant was in no better position now than it would have been if it had accepted the First Defendant's offer of the 17th October 2005, the Claimant should pay the First Defendant's costs from that date. In addition, both sides recognised that, in view of the uncertainties as to how the remaining issues between them might be resolved, I might conclude that, in all the circumstances, the costs should be reserved.

2.
At the conclusion of the oral submissions on the 29th June on the question of costs, I indicated to the parties that the right order was, indeed, to reserve the costs of the Preliminary Issues until the conclusion of the proceedings. I said that I would provide brief reasons for that decision in writing. These are the reasons for that conclusion.

Principles

3.
CPR 44.3 gives the Court a wide discretion as to costs. The relevant parts of that order are as follows:

"(1) The Court has discretion as to –

(a) whether the costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the Court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the Court may make a different order.

(4) I deciding what order (if any) to make about costs, the Court must have regard to all the circumstances including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case even if he has not been wholly successful; and

(c) any payment into Court or admissible offer to settle made by a party which is drawn to the Court's attention (whether or not made in accordance with Part 36). "

4.

Following the introduction of the Civil Procedure Rules judges are encouraged to make specific issue-related orders as to costs. In an much-cited passage in his judgment in **Phonographic Performance Ltd v AE Rediffusion Music Ltd** [1999] 1 WLR, 1507, Lord Woolf MR said:

“The most significant change in emphasis of the new rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new rules are reflecting a change of practice which has already started. It is now clear that too robust an application of the ‘follow the event principle’ encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all of your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so.”

5.
Despite this, it can be difficult, as a matter of practice, to do anything other than reserve the costs incurred by the parties in dealing with Preliminary Issues in advance of the main trial. In **Amec Process and Energy Ltd v Stork Engineers and Contractors BV** [2000] B.L.R. 70, the Claimants were substantially successful on a series of Preliminary Issues. However, His Honour Judge Hicks QC held that, in circumstances where there may be a payment in, it was appropriate to reserve the costs of the preliminary issues until the trial. Similarly, in **HSS Hire Services Group Plc v MBM Buildings Merchants Ltd and Anor** [2005] 3 All ER 486, the judge at first instance split the issues of liability and quantum. On the trial of the liability issues, he found in favour of the Claimants. Quantum remained to be decided. When he came to address the costs of the liability issues, the judge was informed that a Part 36 payment had been made by the Defendants, but the amount of the payment in was not disclosed to him. The judge awarded the Claimants their costs of the hearing of the liability issues. The Court of Appeal allowed the appeal against this order. They confirmed that it had been correct, in the circumstances, for the judge to be told of the fact that there had been a payment into court, and it was also right that the judge had not been told of the amount of that payment. However they concluded that, having been told that there had been a payment into court, the judge should then have reserved the costs until after the determination of quantum. Waller LJ said:

“If, however, it [the court] is told that there has been a payment in then, in any but perhaps the most exceptional case, I find it very difficult to think that there could be circumstances where, if the issue of damages remains to be decided, the judge can do otherwise than to reserve the question of costs until after the determination of that issue.”

6.
It will often be the case that, even without the existence of offers or payments into Court, the Court will conclude that any order as to the costs of Preliminary Issues should be reserved in any event. An example is the Court of Appeal decision in **David de Jongh Weill v Mean Fiddler Holdings Ltd** [2003] EWCA Civ 1058. There the Defendant lost a Preliminary Issue as to whether or not there was a binding contract between the parties, but the judge at first instance reserved the costs of that issue, because the Defendant had a separate point, which had not yet been canvassed, to the effect that any claim was valueless and would only attract an order for nominal damages. The appeal failed. In a judgment with which both Tuckey and Ward LJJ agreed, Lightman J said:

“The fact that only nominal damages are awarded after a single trial of the issues of liability and damages in the circumstances of a particular case may constitute grounds for refusing the Claimant his costs or his full costs of the issue of liability. There is much to be said for the view that the incidence of costs should be the same whether or not for case management reasons there has been an

order for a split trial, whether or not the order for a split trial was made on the initiative of the claimant or the defendant. If this is so, in the case where there is a split trial and it is left uncertain until the conclusion of the trial on quantum whether the Claimant will recover more than nominal damages, it may be proper for the trial judge to defer making any order for the costs of the trial of the issue of liability until the final outcome of the action is known. This may be the case whenever the judge considers that there is a real possibility that the outcome of the assessment of damages may affect the merits of the parties' entitlement to the costs of the issue of liability. If the judge forms the view that it does, he must consider carefully whether justice to the defendant requires him to postpone any decision on costs until the final outcome of the action is known. I do not think that the judge's decision in the exercise of his discretion to follow this course in this case and postpone the decision on costs can or should be disturbed."

Relevant Facts

7.
The Claimant alleged that there was a binding agreement between itself and the First Defendant pursuant to which the First Defendant would pay the Claimant 50% of the profit made on the sale of the site to the Toynbee Housing Association ("Toynbee"). Prior to the commencement of proceedings, the Claimant's solicitors sought an account of the sale transaction in order to see what profit had been made. The First Defendant's solicitors in their pre-action correspondence did not appear to dispute that there was a binding agreement between the parties pursuant to which the Claimant had an entitlement to such profit. As to the account that had been sought, in their letter of the 18th May 2005 they stated that:

"There is no obligation on the part of our client to provide you with the documents requested by your letter of the 26th April 2005."

8.
It is fair to say that in this letter of the 18th May (and, indeed, in other letters written during the same period) the First Defendant's solicitors were also taking the points that:

(a) Tax fell to be deducted from the gross profit made on the sale of the site to Toynbee.

(b) The amount of the tax liability had not yet been determined.

(c) Any tax liability was likely to wipe out or, at the very least, significantly reduce any profit and thus any share of that profit to which the Claimant might be entitled.

9.
Following the commencement of proceedings in late May 2005 the First Defendant's solicitors changed tack and made the point, for the first time, that there was no binding agreement between the parties. Thereafter, when judgment was entered in default of defence, the First Defendant's solicitors, in their letter of the 29th June 2005, wrote to say this:

"Further to our fax of the 28th June 2005, in order to progress matters, if your client is prepared to consent to judgment being set aside, our client is prepared to produce an account showing the profit made on the transaction.

The account will be produced within the next 14 days and will be served on [the] basis that it is without prejudice to our client's position that it is not obliged to pay your client anything further or to

produce the account, but will nevertheless be available for use in the matter generally and for production to the court."

10.
Judgment in default was set aside, but no account was provided thereafter, either by the First Defendant or the solicitors. A Preliminary Issues hearing was ordered to deal with the dispute as to whether or not there was a binding agreement between the parties and, if so, the terms thereof.

11.
In the 17th October 2005 the First Defendant's solicitors wrote a lengthy letter to the Claimant's solicitors setting out their position. Although it was marked 'Without Prejudice save as to costs' the parties are agreed that I can see and refer to that letter. The letter rehearses the First Defendant's case that there was no binding agreement. Importantly, it then goes on to say this:

"Our client has consistently stated that notwithstanding its position that no agreement was ever reached, it is prepared to pay your client 50% of the profit on the transaction after deducting the tax, and to provide your client with details of the ultimate tax position and, therefore, the overall profit on the deal, once it is available

Our client understands the litigation risk involved in all such cases and feels it has already wasted considerable time and resource dealing with your client's ill-founded and unnecessary claim. Consequently, in order to resolve this matter before trial it repeats its offer to pay your client 50% of the profit on the transaction after deducting the tax once this sum has been calculated and agreed by Smith and Williamson with the Revenue. It will, of course, deduct £25,000 already paid to your client from any sums due

If this offer is acceptable our client will pay its own legal costs to date."

12.
This was not an offer in accordance with CPR Part 36. It was, however, an admissible offer and, therefore, one that I must take into account pursuant to CPR 44.3(4)(c).

13.
The Claimant's solicitors replied the following day. They said:

"We appreciate that what, in fact, separates the parties is the issue of tax. You will appreciate that our clients have no information about the incidence of taxation or its likely quantum and, accordingly, our clients are not in a position to take any sort of commercial view of the offer of settlement that your client has now extending.

Nevertheless our clients recognise the importance of the parties working together to seek to narrow the issues that separate them and, with that in mind, we suggest that the parties reach a partial compromise whereby your clients concede that the Agreement dated the 6th April 2004 and signed by the parties is the agreement that governs their relationship and to leave over the question of the treatment of tax to the taking of an account. That would leave your client free to contend that taxation ought to be taken account of in the calculation of profit and it would enable our client to note what practical and commercial difference the incidence of taxation makes to the calculation and whether or not it is necessary, beneficial or cost-effective to take any point in relation to taxation."

14.

Thereafter little happened until May 2006 when, belatedly, the Claimant made preparations for the Preliminary Issues hearing. On the 9th May the First Defendant's solicitors wrote to make a further offer, involving the dismissal of the Claimant's claim. It is clear that the First Defendant's attitude to the claim had hardened since the previous October.

15.
At the hearing of the Preliminary Issues the Claimant won on three issues, as follows:

(a) that there was a binding agreement between the parties;

(b) that that agreement had not been terminated;

(c) that Mr Lafayeedney could not avoid his liability to pay 50% of the net profit to the Claimant by arranging the sale through another company which was not a party to the binding agreement between the Claimant and the First Defendant.

16.
The Claimant lost on the final issue as to tax. Contrary to the Claimant's case, I found that its entitlement was to 50% of the net profit, which had to be calculated by deducting any tax liability that had been incurred by the First Defendant (or any related company) in connection with the sale to Toynbee. Since no account had been provided by the First Defendant showing the impact of any such tax liability or, indeed, any other deductions, I ordered that such an account, showing all the alleged deductions from the gross profit, was to be provided within 14 days.

Who is the Successful Party?

17.
The most important question for me to answer is: Who is the successful party as a result of my Judgment on the Preliminary Issues? The Claimant contends that it is the successful party, because it won three of the four issues at stake (see paragraph 15 and 16 above). Moreover, the Claimant submits that, on the issue on which it lost, little time was taken up either during the preparation for the hearing or the hearing itself. Accordingly, on the basis of this rough-and-ready apportionment, the Claimant seeks an order that it recover 85% of its costs of the Preliminary Issues against the First Defendant.

18.
The immediate problem with that position is the First Defendant's offer of the 17th October 2005 (paragraph 11 above). That offered to pay 50% of the profit on the transaction after deducting tax. I have held in my judgment that that is precisely what the Claimant is entitled to. Thus there is considerable force in the submissions of Mr Pymont QC that, by reason of the offer of the 17th October, it is the First Defendant who is clearly the successful party. Putting the point another way, it can be said that the Claimant has not gained by the preparation for and hearing of the Preliminary Issues, because it could have achieved exactly the same result if it had accepted the offer of the 17th October.

19.
On behalf of the Claimant, Mr Peacock submitted that the letter of the 17th October still did not offer an account of the transaction, did not explain how the profit was to be calculated, did not offer the Claimant its costs, and was not a proper Part 36 offer. I consider that all those points may well be correct, but I do not believe that any of them deal with the fundamental point that, following my Judgment on the Preliminary Issues, the Claimant is no further forward than it would have been if it

had accepted what was, on any view, the clear and admissible offer contained in the letter of 17 October. To the extent that Mr Peacock was submitting that, by reason of these so-called deficiencies, the offer could not be accepted as a matter of law, I consider that his submission was wrong. It clearly was capable of being understood and accepted by the First Defendant.

20.
For these reasons, therefore, my initial view was that, by reference to the letter of the 17th October, it was the First Defendant who was the successful party; it was the First Defendant who had been (at the very least) more successful than the Claimant. This, of course, was because the outcome of the Preliminary Issues hearing was the same, in real terms, as that offered by the First Defendant's letter of the 17th October.

21.
However, there is a further point that should now be made. The Claimant's solicitors' response of the 17th October assumed that tax was the principal matter between the parties, because that is what they had been told by the First Defendant's solicitors. In the absence of an account of the sale to Toynbee, the Claimant's solicitors were in difficulty in considering the commercial value of the offer that had been made. Their response, also of the 17th October (paragraph 13 above), made that quite clear: they said that they do not know what "practical and commercial difference the incidence of taxation makes to the calculation and whether or not it is necessary, beneficial or cost-effective to take any point in relation to taxation".

22.
In other words, the Claimants' solicitors were saying that, without knowing what the tax position was (and, by implication, without knowing what other points might arise out of any account of the sale to Toynbee), they could not come to a concluded view as to the commercial merits of the offer. It seems to me that that was a reasonable point. Without the account, who knew what the tax point (or any other point about the deductions from the gross profit that may be taken by the Claimant) was actually worth?

23.
Moreover, this uncertainty remains unchanged today. I have ordered an account to be provided within 14 days. That will allow the Claimant to decide what, if any, points it wishes to take on the account. If there are none, and the tax has, as the First Defendant maintains, wiped out any profit that would otherwise have been made, then that is probably the end of the action. In those circumstances, the result on costs would be very likely to be in accordance with my initial view expressed in paragraphs 18 and 20 above. In other words, because of the terms of the letter of the 17th October, if the Claimant does not recover any sums from the First Defendant then, prima facie, it seems to me that the Claimant would have to pay at least a significant proportion of the First Defendant's costs from the 17th October onwards, including, of course, the costs of the Preliminary Issues.

24.
If, on the other hand, other substantive points are taken on the account and/or it becomes clear that, notwithstanding its loss of the tax issue, the account demonstrates that, because of my finding that there was a binding contract between the parties, the Claimant is entitled to something other than a nominal sum arising from the sale to Toynbee, then my approach to costs would be rather different. In that situation, the Claimant would have a much better chance of persuading me that, in the action overall, it had been the successful party.

25.

In other words, on the assumption (which may be wrong) that there is nothing due to the Claimant on the account, it is the First Defendant who will be the more successful of the two parties, and any costs order should reflect that. However, if the binding agreement, and the account which I have ordered arising out of it, leads to a non-negligible recovery by the Claimant of their share in the profits, then I might adopt a completely different approach on costs. In those circumstances, therefore, I consider that it would be wrong to make an irretrievable costs order now, without knowing what, if anything, the Claimant might be able to recover following its receipt of the account.

26.
At one point in his careful submissions, Mr Pymont QC said that the Claimant was trying to have it both ways, by arguing, on the one hand, that I should deal with the question of costs by reference to the outcome of the Preliminary Issues, and then maintaining that I should, effectively, put the offer of the 17th October to one side because no one knew then (and no one knows now) how the figures will eventually pan out. I accept that submission. It is, therefore, another reason why I have concluded that it is not appropriate for me to decide the question of costs at this stage.

27.
Finally, I should note that my conclusion, that the costs should be reserved, is the same as the conclusion reached by the judge at first instance in **Weill**. Moreover, I have reached the same conclusion for broadly the same reasons, namely that there is a real possibility that the outcome of the accounting exercise ‘may affect the merits of the parties’ entitlement to the costs of the issue of liability’.

28.
In all those circumstances, therefore, I consider that I should reserve the costs until after the service of the certified account, and after the First Defendant has had an opportunity to consider that account and its implications. Thereafter I will determine all remaining issues, including the issue of costs. I make it clear that my starting point for any such consideration of costs will be the general points indicated above.