Neutral Citation Number: [2010] EWHC 98 (TCC)

Case No: HT-08-97

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 26th January 2010

Before :

THE HON MR JUSTICE COUL

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Between :

FITZROY ROBINSON LIMITED **Cla**

- and -

MENTMORE TOWERS LIMITED **Defe**

(A company incorporated in Jersey)

And

FITZROY ROBINSON LIMITED Cl

- and -

(1) GOOD START LIMITED

(2) ANGLO SWISS HOLDINGS LIMITED Defe

-No. 4/COSTS-

- -

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Mr Peter Fraser QC (instructed by **Laytons**) for the **Claimant**

Mr Paul Darling QC (instructed by **Mishcon de Reya**) for the **Defendants**

Hearing date: 14 January 2010

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Judgment

Mr Justice Coulson:

1. INTRODUCTION AND ISSUES

1.
This is the Costs Judgment in this case. It follows on from my judgment on all liability issues dated 7th July 2009 [2009] EWHC 1552 (TCC), and my judgment on all quantum issues dated 21st December 2009 [2009] EWHC 3365 (TCC). It sets out my detailed reasons for the oral answers to the costs issues that I gave to the parties at the end of the hearing on 14th January 2010.

2.

The overall outcome in this case can be summarised in the following way. The Claimant, FRL, issued proceedings claiming unpaid fees against the three related defendant companies arising out of architectural work done on the Defendants' scheme to develop a series of properties in Piccadilly and in Buckinghamshire. The original claim was in the region of £1.5 million. The Defendants defended that claim in its entirety and also pursued a counterclaim which involved allegations of fraudulent misrepresentation, professional negligence and misrepresentation.

3.
FRL have recovered a total of £871,900 by way of unpaid fees, including VAT and interest. The allegations relating to professional negligence and delay brought by the Defendants failed in their entirety. The allegation of fraudulent misrepresentation was upheld but, on the evidence, led only to a modest reduction in the amount of the fees otherwise due to FRL.

4.
The issues that arise between the parties on costs are as follows:

4.1
As at 21.7.09, the agreed date for the end of the liability trial, which party should be regarded as the successful party?

4.2
What effect, if any, should the Defendants' success on the fraudulent misrepresentation allegation have on the appropriate costs order to be made?

4.3
Although it is common ground that FRL are entitled to their costs after 21.7.09, should those costs be assessed on the standard or on the indemnity basis?

2. COSTS/PRINCIPLES

2.1. The CPR

5.
CPR 44.3 sets out the court's discretion as to the making of costs orders. Rule 44.3(2) makes plain that "the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, although a different order can be made."

6.
Rules 44.3(4) and (5) are concerned with conduct and provide as follows:

"(4) In 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 and which is not an offer to which costs consequences under Part 36 apply.

(5)
The conduct of the parties includes –

(a)
conduct before as well as during the proceedings.....

(b)
whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c)
the manner in which a party has pursed or defended his case or a particular allegation or issue;

(d)
whether a claimant who has succeeded in his claim, either in whole or in part, exaggerated his claim"

7.
The wide variety of orders that can be made under CPR 44.3 is set out in some detail in Rule (6) which provides as follows:

"(6) The orders which the court may make under this Rule include an order that a party must pay –

(a) a proportion of another party's costs;

(b)
a stated amount in respect of another party's costs;

(c)
costs from or until a certain date only;

(d)
costs incurred before proceedings have begun;

(e)
costs relating to particular steps taken in the proceedings;

(f)
costs relating only to a distinct part of the proceedings; and

(g)
interest on costs on or until a certain date, including a date before judgment."

8.
For present purposes, it is unnecessary to set out all of the provisions relevant to costs that arise in CPR Part 36 dealing with offers to settle. It is, however, important to note that CPR 36.14(1) deals with the position where a judgment against the defendant "is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer". In those circumstances, pursuant to r. 36.14(3)(b), the court will, unless it considers it unjust to do so, order that the claimant recover his costs on the indemnity basis from the date on which the offer should have been accepted.

2.2. Authorities

9.

The approach to be adopted by the court on issues of costs in cases of this kind was summarised by Jackson J (as he then was) in **Multiplex Construction (UK) Ltd v Cleveland Bridge UK Ltd** [2008] EWHC 2280.He said:

"(i) In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.

(i)
In considering how to exercise its discretion, the court should take as its starting point the general rule that the successful party is entitled to an order for costs.

(ii)
The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.

(iii)
Where the circumstances of the case require an issue-based costs order, that is what the judge should make. However, the judge should hesitate before doing so, because of the practical difficulties this causes and because of the steer given by Rule 44.3(7).

(iv)
In many cases the judge can and should reflect the relative success of the parties on the different issues by making a proportionate costs order.

(v)
In considering the circumstances of the case the judge will have regard not only to any Part 36 offers made but also to each party's approach to negotiations (insofar as admissible) and general conduct of the litigation.

(vi)
……..

(vii)
In assessing a proportionate costs order the judge should consider what costs are referable to which issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs."

10.
There are a number of authorities concerned with the overlapping issues as to which party might be regarded as the successful party in all the circumstances; the effect of offers, whether made pursuant to Part 36 or otherwise; and the making of issue-based costs orders. With due deference, I refer to paragraphs 62-89 of the judgment in **McGlinn v Waltham Contractors Ltd and others (No 5)** [2007] EWHC 698 (TCC), in which a number of these authorities are set out in some detail. Of particular relevance to the present case, as it seems to me, are the following principles:

(a)
"In what may generally be called commercial litigation….the disputes are ultimately about money. In deciding who is the successful party, the most important thing is to identify the party who is to pay money to the other. That is the surest indication of success and failure….": see Longmore LJ in **A L Barnes v Timetalk(UK) Ltd** [2003] EWCA Civ 402; [2003] BLR 331.

(b)
If the court is minded to make an issue-based costs order, that will usually be translated into percentage terms. However, it is only in exceptional cases that such orders will result in an otherwise successful party paying the otherwise unsuccessful party's costs of a particular issue: see **Summit Property Ltd v Pitmans (a firm)**[2001] EWCA Civ 2020.

3. COSTS/CONCLUSIONS

3.1. Who Is The Successful Party?

11.
In accordance with the approach recommended in both **Barnes**and **Multiplex** noted above, I am in no doubt at all that FRL must be regarded as the successful party in these proceedings. They sought a large sum by way of unpaid fees. The Defendants denied that FRL had any entitlement to any further fees, and also brought a counterclaim. The counterclaim failed in its entirety and FRL recovered a substantial sum by way of fees, albeit in a lesser amount than that originally claimed.

12.
On behalf of the Defendants, Mr Darling argued that, up until the end of the liability hearing (21.7.09), FRL were not the successful party. He offered two reasons for this conclusion. Firstly, he said that FRL's original claim had been put forward simply by reference to the sums invoiced, and that it was only following the liability trial that they advanced an alternative claim, by reference to a different provision in the contracts, dealing with the entitlement to fees following suspension of the project. Secondly, he said that the finding of fraudulent misrepresentation against FRL at the liability trial meant that they had effectively lost the principal issue with which that first trial had been concerned.

13.
I do not accept either of these submissions. The argument about the basis of FRL's fee claim is, it seems to me, demonstrably bad. As I pointed out in the quantum judgment, FRL were originally entitled to be paid the sums invoiced because those sums were expressly set out in the contracts between the parties, and no withholding notices had been served by the Defendants. The fact that, subsequently, the Defendants suspended the work on the project, thereby leading to a change in the contractual basis of the fee claim, seems to me to be neither here nor there. We have, I think, moved on from the days when, for costs purposes, an ultimately successful claim brought under the wrong contract provision could somehow be regarded as invalid and hopeless until the necessary amendment to the pleaded claim was made.

14.
The fraudulent misrepresentation argument has more force, because that was an important issue which took up more than a minimal part of the liability hearing in May 2009. For the reasons set out in the next section of this Judgment, I am in no doubt that a deduction from FRL's costs is required to reflect their failure (and the Defendants' success) on that important issue. However, the outcome of that issue does not mean that, in some way, FRL should not be regarded as the successful party in these proceedings, or that this is one of those exceptional cases in which the successful party should pay some element of the unsuccessful party's costs. The reason for that, so it seems to me, is simple: the allegation of fraudulent misrepresentation only arose at all because it was part of the reasoning put forward by the defendants so as to justify their refusal to pay any further sums to FRL, and that attempt at justification failed.

15.
Although the allegation of fraudulent misrepresentation was upheld, as I pointed out at the time, the likely effect of that finding, based on the particular evidence in this case, was always going to be modest. So it proved: despite its seriousness, the allegation turned out to be worth no more than about £40,000 by way of reduction in the fees otherwise due to FRL.

16.
It seems to me that it would be contrary to all of the principles set out above to conclude that the otherwise successful party (FRL) should pay the Defendants' costs of an issue which, at most, resulted in a 5% reduction in the fees that the otherwise successful party recovered in the litigation. Accordingly, I consider that, notwithstanding their failure on the fraudulent misrepresentation issue, FRL were the successful party in these proceedings and are therefore prima facie entitled to their costs both before and after 21.7.09.

3.2. <u>The Finding of Fraudulent Misrepresentation</u>

16. Originally, it appeared that FRL maintained the stance that they were entitled to 100% of those costs, notwithstanding their failure on the fraudulent misrepresentation issue. However, in his oral submissions, Mr Fraser quite properly accepted that their failure on that issue needed to be reflected in the costs order that I made. The dispute therefore came down to the appropriate percentage deduction from FRL's costs up to 21.7.09, to reflect that failure.

17.
As I informed the parties at the conclusion of the hearing on 14.1.10, I have concluded that a deduction of 25% from FRL's costs is appropriate to reflect this failure. That percentage reduction is made in accordance with the principles as to issue-based costs orders noted above. It is calculated by reference to:

(d)
the time taken up at the hearing in May on the fraudulent misrepresentation issue;

(e)
the importance of the allegation itself to both parties, and in particular to Mr Thompson, FRL's CEO.

18.
Mr Fraser gently pointed out that the upshot of this conclusion was that FRL were being penalised to the tune of 25% of their costs for an issue which was worth only about 5% of their fee recovery. But it seems to me that this simple comparison does not take into account either of the matters noted above, namely the extensive time that the issue took at the liability trial (it was, for example, the principal focus of the cross-examination of Mr Thompson, which lasted more than a day), and the overall importance properly attached by both sides to the serious nature of the allegation. In those circumstances, and in the round, I consider that a 25% reduction is a fair percentage assessment.

3.3. <u>Costs up to 21.7.09</u>

19.
Accordingly, for the reasons set out above, I consider that the Defendants, the unsuccessful party, should pay 75% of the costs of FRL, the successful party, incurred up to 21.7.09.

3.4. <u>Costs from 21.7.09 to today</u>

(a) The Issue

20. There was no dispute that the Defendants should pay FRL's costs from 21.7.09 to today. The issue was whether those costs should be paid on an indemnity basis or on the standard basis. FRL claimed those costs on an indemnity basis for the entire period; the defendants maintained that the costs should be on the standard basis for the entire period. At the conclusion of the hearing on 14.1.10, I concluded that the costs should be assessed on the standard basis up to the PTR on 20.11.09, and that thereafter FRL were entitled to those costs on an indemnity basis. The reasons for that conclusion are set out below.

(b) Conduct

21. I consider that the Defendants' conduct after 21.7.09 was, in many respects, unreasonable and, whilst giving them the benefit of the doubt for the period up to 20.11.09, I consider that it would be unjust if I did not reflect that conduct in an indemnity costs order from that date on. I note briefly below the particular aspects of the Defendants' conduct which has led to that conclusion.

22. It is plain to me that, following the judgment on liability and the hearing on 21.7.09, the Defendants knew (or should have known) that they were liable to pay substantial sums by way of fees to FRL. All the allegations that founded the cross-claims, except for the allegation of fraudulent misrepresentation, had failed. Moreover, my judgment in July had expressly pointed out that the likely financial effect of the allegation of fraudulent misrepresentation, on these particular facts, was "modest". As the parties began to prepare for the quantum hearing between the end of July and November 2009, I consider that the Defendants should have realised their likely liability and taken steps to protect their position. They failed to do so.

22. In reality, the Defendants not only failed to take a realistic view of their likely liability, but they embarked on a course of conduct that appeared to be designed to put off for as long as possible the quantification of that liability. First, although they had briefly involved a second expert, Mr Miers, in September, they then dis-instructed him so that, by the time of the pre-trial review on 20.11.09, Mr Miers had had no detailed involvement in the case at all. That conduct was contrary to the court's orders and, in view of the earlier events involving the first expert, Mr Salisbury, which was the subject of criticism in my July judgment, was wholly unacceptable.

23. Secondly, the Defendants then sought to adjourn the trial of the quantum hearing at the pre-trial review despite having no substantive grounds for so doing. The short judgment that I produced following that hearing - [2009] EWHC 3070 (TCC) - made plain that, in my view, the Defendants were determined to avoid the quantum trial at all costs. Their desire to avoid the quantification of their liability, which had begun when they refused FRL's offer of mediation in the summer, and which continued with the dis-instruction of Mr Miers, therefore became apparent to the court at the pre-trial review. It was confirmed by the Defendants' failure to comply with the orders made at the PTR, and the subsequent need for an unless order, the costs of which the Defendants have failed to pay.

(c) Offers

24. Immediately following the PTR, there were, unsurprisingly, attempts to settle the case. In particular there were three offers made without prejudice save as to costs. Although these offers were not strictly in accordance with CPR Part 36, I am, of course, obliged to have regard to them when considering the appropriate costs order. They can be summarised as follows:

(i) The Defendants offered £500,000, together with some costs, on 24.11.09;

(ii) FRL offered to accept £750,000 + VAT on 25.11.09;

(iii) FRL offered to accept £700,000 + VAT on 2.12.09.

None of these offers was accepted by either side.

25. On analysis, it can be seen that FRL did better than all of these offers. Accordingly, whilst r.36.14 does not strictly apply – these offers not being in accordance with Part 36 – it seems to me that, when considering the appropriate order to make, I can and should take into account the provision that, if the latter two offers noted above had been made under Part 36, indemnity costs would have been payable as a matter of course.

(d) Conclusions

26. For these reasons I have concluded that, whilst it would not be appropriate to require the Defendants to pay FRL's costs on an indemnity basis prior to the pre-trial review on 20.11.09, it would be entirely appropriate to make them do so from that date on. From well before that date, the Defendants knew that they were going to be found liable for a considerable sum. On that date, their attempt to put off the quantum hearing failed and offers were made. The only reason that there was a quantum hearing at all must be because the Defendants believed that their liability would be quantified at less than the amount of the offers. They were wrong to reach that conclusion. They should have realised that, on any view, they would be found liable for much more than the sum of £500,000, which was the most that they had been prepared to offer.

27. In addition, I consider that these errors of judgment on the part of the Defendants were entirely self-inflicted. I say that because, at the time that the various offers were made, Mr Miers' report seemed to suggest that the percentage completion actually achieved by FRL (which was after all the Defendants' primary case as to how the unpaid fees should be quantified), was far less than was claimed by FRL. By the time of the trial itself, Mr Miers had come round to a different view and the percentage completions which were ultimately agreed were at levels much closer to the FRL claim than the original levels adopted by the Defendants. Thus, the Defendants' conduct in relation to their expert(s) was not only unacceptable, but it also rebounded to their detriment, because they pitched their own offer too low, and refused the reasonable offers put forward by FRL, as a result of the absence of any expert input at the critical time. They thus had an incorrect and incomplete understanding of the true position on completion, because of their own defaults.

28. For all those reasons, therefore, I conclude that the Defendants should pay FRL's costs on an indemnity basis from 20.11.09 onwards.

3.5. Summary

29. Accordingly, I find that the Defendants must pay 75% of FRL's costs up to 21.7.09, such costs to be assessed on the standard basis if not agreed. I find that, thereafter, the Defendants must pay 100% of FRL's costs up to 20.11.09, again to be assessed on the standard basis if not agreed. From 20.11.09 onwards, I find that the Defendants must pay 100% of FRL's costs to be assessed on an indemnity basis if not agreed.

4. PAYMENT ON ACCOUNT

30. In accordance with CPR 44.3(8) and the decisions in **Mars UK Ltd v TeKnowledge Ltd** [1999] 2 Costs LR 44 and **Beach v Smirnov** [2007] EWHC 3499,it is appropriate to make an order requiring the Defendants to make a payment on account of FRL's costs without delay.

31. The figures before me indicate that FRL's costs are in the region of £600,000 and that therefore, taking into account the 25% reduction up to 21.7.09, a total figure of about £500,000 will eventually be sought by way of costs. The difficulty is that there is no breakdown of this figure, so that it is difficult for the court to undertake any sort of detailed assessment, such as happened in **Mars.**

32. However, I would be most reluctant for the parties to incur further costs in this case just to arrive at a slightly more accurate assessment of the costs which, on any view, FRL will recover in these proceedings. Accordingly, it seems to me that the right course is to take a very conservative approach to the figure of £500,000, but to keep in mind that, because of the Defendants' failure to pay any part of these fees, FRL have been put to not one but two High Court trials in order to recover the sums due. Adopting that approach, I conclude that FRL would recover on a detailed assessment at least £250,000. That, therefore, was the sum that I ordered by way of interim payment at the conclusion of the hearing on 14.1.10. In arriving at that conclusion, I took some comfort from the fact that, before the first trial, the Defendants were themselves estimating their own costs until the end of the proceedings at a figure similar to that allegedly incurred by FRL.

5. OTHER MATTERS

33. Although there were a number of other matters canvassed at the hearing on 14.1.10 it is only necessary to refer to one additional issue. FRL have made it plain that, if the sums due to them by way of costs are not paid, they will seek to join Mr Halabi into these proceedings, so as to seek an order that costs be paid by him personally. Pursuant to CPR 48.2, I allowed FRL until 5.2.10 to decide whether or not to join Mr Halabi as a defendant for that purpose. Mr Fraser made plain that, if the outstanding sums were paid by the Defendants, then there would be no need for such proceedings. I would urge the parties to make every effort to agree the figure payable to FRL by way of costs and to agree when those costs are to be paid.