Case No: HQ08X04531

Neutral Citation Number: [2011] EWHC 26 (TCC)

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 17/01/2011

Before :

THE HONOURABLE MR JUSTICE COULSON

- -

Between :

D MORGAN PLC **Cla**

- and -

MACE & JONES

(A Firm) **Defe**

[N0: 3]

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Mr Nicholas Davidson QC (instructed by **Systech Solicitors)** for the **Claimant**

Mr David Hart QC (instructed by **Beachcroft LLP**) for the **Defendant**

Hearing dates: 10 January 2011

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Judgment

The Honourable Mr Justice Coulson :

1.
At the hearing on 10 January 2011, I heard and disposed of various arguments as to costs. Although I gave a brief oral summary of my reasons, I said that, in relation to the principal argument as to whether or not Mace & Jones were entitled to indemnity costs, I would provide a fuller written note of those reasons.

2.
The background to this case is set out in my Judgment at [2010] EWHC 3375 (TCC). In that Judgment, I dismissed four out of the five allegations of negligence made by DM against Mace & Jones. I went on to find that, both in relation to the one allegation of negligence that I upheld, and in relation to the four which I had rejected, DM's case on causation failed on both of the relevant limbs. As to recoverability and damages, I found that the vast bulk of DM's claim for damages was irrecoverable in

any event. Finally, if I was wrong about liability, causation and recoverability, I concluded that any damages recoverable by DM were within the sum of £2.6 million which had already been paid out by the original co-defendant, John Hoggett QC ("JH").

3.
Although it was accepted that Mace & Jones were generally entitled to their costs, there remained three areas of dispute. First, on behalf of DM, Mr Davidson submitted that there ought to be a reduction in the extent of the costs otherwise payable by DM, to reflect their success on the one ground of negligence on which they were successful. Secondly, Mr Hart submitted that Mace & Jones were entitled to indemnity costs, either from the outset of the proceedings or at least from 19 August 2010 onwards, that being the date on which their CPR Part 36 offer had expired. Thirdly, there was the amount of the interim payment on account of costs due to Mace & Jones.

4.
As to the first issue, I reached the very clear conclusion that DM were not entitled to a reduction in the amount of costs that they otherwise had to pay Mace & Jones because of their success on one solitary ground of negligence. There were two reasons for that. First, this was a case in which the arguments of liability, causation and loss were all intertwined. It would be artificial to penalise Mace & Jones just because, out of all the numerous significant issues debated at the trial, they lost on one. Secondly, it seems to me that, even if Mace & Jones had admitted that first allegation of negligence, it would have had no or certainly no significant effect on the course of the trial or the costs incurred by either side.

5.
It is also important to appreciate that, until the summer of 2010, Mace & Jones were one of two defendants in this case, and that the principal pleaded allegations lay against JH. The criticism which I upheld was the allegation that Mace & Jones should have gone back to JH to seek clarification of his view about implied planning permission, because of the potential contradiction between his advice of November 1998 and his earlier advice of 1993 on that topic. In circumstances where JH himself had pleaded that there was no such contradiction, it does not seem to me that Mace & Jones should now be overly criticised for maintaining that this was a matter on which they were not obliged to go back to JH at all. In the end, on a full analysis of the facts and the law, I found that they should have gone back to JH but, in the round, it does not seem to me that this is a matter for which Mace & Jones should now be penalised in costs.

6.
As to the issue of indemnity costs, on behalf of Mace & Jones, Mr Hart relied on six matters which, he said, justified an order for indemnity costs in accordance with CPR 44.3(4) and 44.4(1). The appropriate test is that set out in **Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson (A Firm)** [2002] EWCA Civ. 879, where the Court of Appeal reiterated that an order for indemnity costs could only be made where there was "some conduct or some circumstance which takes the case out of the norm." In reaching that view, the Court of Appeal had regard to the judgment of May LJ in **Reid Minty (A Firm) v Taylor** [2002] 2 All ER 150 and the judgment of Simon Brown LJ (as he then was) in **Kiam v MGN Ltd [No 2]** [2002] 2 All ER 242.

7.
Whilst in **Reid Minty**, May LJ said that a claimant's refusal of a defendant's Part 36 offer, which he subsequently failed to beat, "may, subject to the court's discretion, be determinative" of his liability to pay indemnity costs, in **Kiam** Simon Brown LJ stressed that unreasonable conduct "to a high degree"

was required for an order for indemnity costs, and that **Reid Minty** "should not be understood and applied for all the world as if under the CPR it is generally appropriate to condemn in indemnity costs those who decline reasonable settlement offers."

8.
In **Excelsior** itself, the judge had ordered that the claimant should pay indemnity costs from the date of a Part 36 offer which he failed to better at trial. The claimant appealed, pointing out that the relevant sections of CPR Part 36 expressly entitled a claimant to indemnity costs if he bettered a Part 36 offer (r.36.14(3)(b)), but contained no similar provision for a defendant who achieved the same result (r.36.14(2)(a)). The Court of Appeal agreed that, on a proper interpretation of the CPR, the judge would have erred if he had awarded indemnity costs solely on the basis that a Part 36 offer had been made by the defendant which the claimant failed to beat. However they concluded that the judge had reasonably taken the view that the claim had always been speculative and the claimant had acted unreasonably by failing to take up the defendant's various attempts to resolve the dispute, of which the rejected offer was simply the most significant example. They therefore dismissed the appeal.

9.
Mr Hart relied on six factors which, he said, took this case out of the norm and justified an order for indemnity costs, as follows:

(i) This was an exaggerated claim advanced on a fundamentally flawed basis;

(ii) The case as to causation was likewise flawed;

(iii) DM's principal witness, Mr Morgan, had given wholly unsatisfactory evidence which, amongst other things, involved a number of deliberate untruths;

(iv) There had been a lack of proper disclosure by DM;

(v) There had been dilatory conduct of the proceedings by DM;

(vi) A Part 36 offer had been made by Mace & Jones in July 2010 in the sum of £1.2 million (plus costs), and that offer had not been responded to, let alone accepted by, DM.

10.
I consider that the points at (i) and (ii) above, namely the exaggerated and fundamentally flawed nature of the claim against Mace & Jones, took this case close to the boundary of what might be considered "the norm". As pleaded, DM's principal claims lay against JH, not Mace & Jones, and, as set out in my Judgment, that was an entirely understandable emphasis: this was always a case which had, at its heart, the alleged deficiencies in JH's written advices, which had nothing to do with Mace & Jones. However, I am prepared to accept that these fundamental difficulties did not (quite) render the claim against Mace & Jones so out of the ordinary that an order for indemnity costs was appropriate from the outset. Furthermore, I find that the points at (iv) and (v) above were not of any real significance to the issue of the appropriate basis of costs assessment. Accordingly, as at July 2010, I conclude that, on balance, this was not a case in which indemnity costs would have been appropriate.

11.
Thereafter, however, the position changed for three reasons. First, DM accepted the sum of £2.6 million, inclusive of costs, from JH. Thus they settled their pleaded claim, which was put in the sum of

£40 million, against the party who was, on any view, the principal defendant, for just 5% of the value of that claim, together with a contribution to costs.

12.
Secondly, in late July 2010, Mace & Jones made a Part 36 offer which expired on 19 August 2010. The exaggerated and potentially fundamentally flawed claim against Mace & Jones was now the subject of an offer which would have given DM an additional £1.2 million and their costs of pursuing both defendants. In this way, the £2.6 million which DM had already recovered from JH would have been converted into a settlement of damages only. This meant that, if Mace & Jones' offer had been accepted, DM would have recovered a total of £3.8 million by way of damages, together with all their costs of pursuing both defendants.

13.
Their refusal to accept that offer, when seen against the background of the real problems with maintaining the claim against Mace & Jones alone, was, in my view, unreasonable to a high degree. I therefore regard this case as very similar to the situation in **Excelsior**; whilst the refusal by DM of the Part 36 offer, and their subsequent failure to beat it, could not on its own justify an order for indemnity costs, the refusal of the offer, when considered against the background of the speculative nature of the claim against Mace & Jones, does in my judgment warrant such a finding.

14.
Furthermore, that conclusion is borne out by the third change in the situation, which also explains why, from 19 August 2010, I have concluded that an order for indemnity costs is appropriate. That is the factor identified in paragraph 9 (iii) above, namely the wholly unsatisfactory nature of Mr Morgan's evidence in the witness box. I have summarised that aspect of the evidence at paragraphs 6-12 of my original Judgment. Unhappily, I was driven to conclude that there was a raft of matters on which Mr Morgan's evidence was highly unreliable and that, on occasion, he told deliberate untruths in order to bolster his case. I was obliged to make numerous criticisms of the detail of that evidence in Section C of the Judgment. When the principal witness and owner of the unsuccessful claimant seeks to bolster his speculative claim in such an illegitimate way, his conduct is unreasonable to a high degree, and he inevitably lays the claimant open to the finding that the case was pursued outside any acceptable norm. That is the finding that I make in this case.

15.
For those reasons it seems to me that, whilst indemnity costs were not appropriate up until 19 August 2010 (even though there were certainly elements of the claim against Mace & Jones which might be thought to have taken DM's pursuit of it close to if not beyond the norm), I am in no doubt, that, from that date, an order for indemnity costs is justified. That is for the two principal reasons outlined above: the failure to accept the Part 36 offer despite the speculative nature of the claim against Mace & Jones, and the wholly unsatisfactory and unreliable nature of the evidence of DM's principal witness, Mr Morgan.

16.
In that event, the parties were agreed that the interim payment as to costs should be in the sum of £800,000. I therefore made an order to that effect.