

Neutral Citation Number: [2011] EWHC 2694 (TCC)

Case No: HT-11-14

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/10/2011

Before :

THE HON. MR. JUSTICE RAMSEY

Between :

MEARS LIMITED
- and -
LEEDS CITY COUNCIL

Claimant

Defendant

Parishil Patel (instructed by **Trowers & Hamlins LLP**) for the **Claimant**
Christopher Baker (instructed by **The Solicitor, Leeds City Council**) for the **Defendant**

Judgment (Number 2)

Mr Justice Ramsey :

Introduction

1. In these proceedings between the claimant (“Mears”) and the defendant (“LCC”) Mears brought claims as a result of being one of the unsuccessful tendering contractors for a public procurement relating to social housing in the Leeds area.
2. I have handed down two judgments in these proceedings and on 25 May 2011 I gave directions for the trial of quantum following my decision that Mears were entitled to damages, with the quantum to be assessed. The parties also wished the costs of the proceedings to be dealt with at this stage and I gave directions for the exchange of written submissions.
3. In those submissions Mears sought an order for costs in their favour, alternatively an order for no lower than 80% to 90% of their costs and accordingly sought a payment on account of costs of £70,000, their costs inclusive of VAT being some £145,000. LCC, on the other hand, contend that Mears should pay 90% of LCC’s costs up to 22 December 2010 and 80% of LCC’s costs after 23 December 2010, save that Mears should pay all the costs of and occasioned by the amendment to the Particulars of Claim. LCC also seek certain other orders and seek an order for a payment on account of costs of £85,000, LCC’s costs being some £217,000 excluding VAT.

Principles for the award of costs

4. In this case there is little difference between the parties as to the principles to be applied. They differ on the way in which those principles should be applied to the facts.
5. Many of the authorities prior to the decision of Jackson J, as he then was, in Multiplex Constructions (UK) Limited v Cleveland Bridge UK Limited [2008] EWHC 2280 (TCC) were cited by him in that judgment. They included the observations of Lord Woolf MR in AEI Rediffusion Music Limited v Phonographic Performance Limited [1999] 1 WLR 1507 at 1522 to 1523; the judgment of Chadwick LJ, with whom the other members of the Court of Appeal agreed, in Johnsey Estates (1990) Limited v Secretary of State for the Environment, Transport and the Regions [2001] 1 All ER (D) 135 and in Aspin v Metric Group Limited [2007] EWCA Civ 922 at [22] and the judgement of Ward LJ in Burchell v Bullard [2005] EWCA Civ 358 at [29].
6. The consideration of those decisions led to Jackson J summarising the position as follows in eight principles at [72]. Those principles are as follows:

(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.

(ii) 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.

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

(iv) 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 which this causes and because of the steer given by Rule 44.3(7).

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

(vi) 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.

(vii) If (a) one party makes an order offer under Part 36 or an admissible offer within Rule 44.3(4)(c) which is nearly but not quite sufficient, and (b) the other party rejects that offer outright without any attempt to negotiate, then it might be appropriate to penalise the second party in costs.

(viii) In assessing a proportionate costs order the judge should consider what costs are referable to each 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.

7. I was also referred to a number of other decisions as follows:

- (1) the decision of the Upper Tribunal (Warren J and Judge Sadler) in Commissioner for HM Revenue and Customs v Marks and Spencer Plc [2010] UKUT 296 where the Court made a reduction of 25% to the costs of Marks and Spencer to reflect its lack of success on certain issues but held that, on the facts, HMRC was entitled to recover 25% of its own costs to reflect its success on certain issues. The net result was an order that Marks and Spencer should receive 50% of its costs.
- (2) the judgment of the Supreme Court given by Lord Neuberger in Manchester City Council v Pinnock (2) [2001] UKSC6 in which the Council had succeeded in obtaining an order for possession in the county court, in the Court of Appeal and in the Supreme Court but Mr Pinnock had been successful in establishing a fundamental general principle that Article 8 could be relied on by someone whose home was the subject of a possession claim. The Supreme Court ordered Mr Pinnock to pay the costs in the county court but made no order for costs on the two appeals.
- (3) the decision of Akenhead J in Enterprise Managed Services Limited v Tony McFadden Utilities Limited [2010] EWHC 1506 where, amongst other things, he considered how a proportionate order for costs should be approached and reduced costs by 20% in relation to Part 8 Proceedings which had raised a number of issues. He held that one party had been successful as a result of those proceedings.
- (4) my decision in BSkyB Limited v HP Enterprise Services UK Limited [2010] EWHC 862(TCC) where at [13] I considered the circumstances in which a proportionate costs order might be appropriate.
- (5) the judgment of Tomlinson LJ in Pindell Limited v AirAsia Berhad [2010] EWHC 3238 (Comm) at [12] and [19] recognising that in almost every case the winner is likely to fail on some issues and that the court's assessment of the appropriate proportion must be just and right in all the circumstances.

Application of the Principles to the facts of the case

8. The starting point in the exercise of the Court's discretion as to costs is the general rule in CPR 44.3(2)(a) that the unsuccessful party will be ordered to pay the costs of the successful party. As Jackson J said in Multiplex at [72(i)] in commercial litigation where each party has claims and asserts that a balance is owing in its favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action. In this case Mears submits that it has obtained judgement for damages to be assessed, albeit only on part of its claims, but did so in the face of a strongly asserted defence by LCC.
9. LCC, on the other hand, contend that they has been the overwhelmingly successful party because they succeeded in striking out Mears' claim in paragraphs 20(1) and (2) of the original Particulars of Claim; the Court rejected Mears' allegation pleaded in paragraph 20(4) (b) of the Amended Particulars of Claim concerning the Scoring Table; the court rejected Mears' allegations in paragraph 20(3) of the Amended Particulars of Claim in respect of all but two of the allegations concerning the Model Answers and held that Mears risk of loss in respect of those two Model Answers would not provide a route to the recovery of damages and, finally, that Mears did not succeed in obtaining an order setting aside the award of the relevant contract under the Procurement.
10. This is a case where Mears made a number of claims that LCC had failed to comply with the Public Contracts Regulations 2006 ("the Regulations") in respect of the Procurement. They succeeded on one part of their claim but failed on the other parts and obtained an order for damages to be assessed but not for the Procurement to be set aside which would have led to a new procurement process.
11. I consider that, in exercising my discretion, the appropriate starting point should be based on the fact that, overall, Mears were the successful party in obtaining a judgment against LCC for damages to be assessed. Whilst it might be said that LCC was successful in their defences to a number of claims and to the relief claimed, they were not successful in defending the claim on which Mears succeeded. I therefore consider that the starting point is that Mears as the successful party would be entitled to have their costs paid by LCC, under the general rule.
12. That is the general position and forms the starting point but in this case there are essentially two matters which are relied upon in support of LCC's contention that the Court, in exercising its discretion, should make a different order. The first is the extent to which LCC were successful as set out above. Whilst I do not characterise Mears conduct as being unreasonable in pursuing the claims on which they failed and I accept that generally parties are rarely wholly successful in their contentions, this is a case where Mears have failed on a substantial part of the case and a part of the case on which clearly both parties have spent significant time and costs.
13. The second matter relied upon by LCC is the conduct of Mears and, in turn, Mears rely on the conduct of LCC. It is therefore necessary to review the various aspects of conduct relied upon by both parties.
14. First LCC says that Mears was clearly wrong to make the allegations under paragraphs 20(1) and 20(2) of the original Particulars of Claim which, in the first judgment, I held had not been brought within the three month period under regulation 47(7)(b) because the proceedings commenced on 12 October 2010 were not commenced within the three month period and there were no grounds for extending that period.
15. The claim by Mears was that LCC had made changes to pricing aspects of the Outline Solution Submission on 14 May 2010 and had done so having opened Mears' submission and whilst evaluating it and also that LCC had not provided Mears with an adequate period to respond to those changes. These were matters which were raised in the Particulars of Claim

on 2 November 2010. In the Defence dated 13 November 2010 at paragraph 27.1 LCC took the general point in respect of all Mears' allegations that the proceedings had not been brought within the period of three months required by regulation 47(7)(b).

16. That issue was then raised specifically in relation to paragraphs 20(1) and (2) of the Particulars of Claim and dealt with at the hearing on 10 December 2010, together with Mears' application for disclosure of the Model Answers. That date had originally been fixed to deal with Mears' application for an interim injunction to suspend the Procurement. However, Mears then applied for disclosure of the Model Answers. The parties then agreed that the issue of whether paragraphs 20(1) and (2) were time-barred would be dealt with at the hearing, together with Mears' application for disclosure. In the meantime LCC agreed to give undertakings in respect of the continuation of the Procurement. Whilst I do not consider it was unreasonable for Mears to raise those claims the response by Mears to the allegations that the claims were time-barred was weak as set out in the first judgment.
17. Secondly LCC say that it was unreasonable for Mears to delay issuing proceedings and delay making an application for an interim injunction when it knew that the Procurement was continuing towards completion. LCC referred to the fact that from 22 July 2010 Mears sought an undertaking that no contract award would be made by LCC and yet delayed until 12 October 2010 before bringing proceedings, with Particulars of Claim being served on 1 November 2010 and the application for interim relief being issued on 3 November 2010.
18. Whilst the timing of proceedings is not in dispute, I do not consider that the timing gives rise to conduct which should affect the order for costs. There was correspondence between the parties in which Mears was seeking and LCC were providing further information relevant to the failure of Mears' tender. There was a period from mid September until mid October 2010 when there was little apparent progress and I accept that in public procurement disputes, particularly where relief is sought in the form of setting aside the procurement process, unsuccessful tenderers should proceed diligently with any claim. However, in this case I do not consider that Mears can be fairly criticised for delay whilst they were considering the next step and preparing proceedings or that there is any conduct in terms of delay during this period which merits being taken into account in considering the appropriate costs order.
19. Thirdly LCC criticise Mears for pursuing its application for the setting aside of the Procurement which I rejected in the second judgment and which, LCC say, disrupted the process of the procurement. Whilst I came to the conclusion that, on the basis of my findings on the breach of the Regulations balanced against the other factors, the appropriate remedy was damages, I do not consider that it was unreasonable for Mears to seek the relief of setting aside the Procurement or that there was conduct, other than the failure in obtaining that relief, which merits being taken into account in considering the appropriate order for costs.
20. Fourthly LCC refers to the fact that, although Mears succeeded in their application for disclosure of the Model Answers which was one of the matters dealt with at the hearing on 10 December 2010, in the end Mears only succeeded in relation to two allegations based on those Model Answers and I held that there was no risk of loss caused by that breach. As a result, as LCC point out, Mears did not succeed in obtaining any relief based on the Model Answers.
21. However, LCC resisted giving disclosure of the Model Answers and the result of the first judgement was that LCC had to make disclosure of them, but within a confidentiality ring. In general I consider that Mears would be characterised as the successful party on that application and, although in the end they did not succeed in obtaining relief based upon the Model Answers, they succeeded on the disputed application for disclosure.

22. Fifthly Mears criticises LCC for the way in which they dealt with feedback about the procurement process and provided information to Mears in the period from July 2010 onwards. I have again reviewed the correspondence and consider that the general picture is one of LCC co-operating by providing information to Mears although, in the end, an application for disclosure of the Model Answers was necessary. I do not consider that LCC's conduct can be criticised in this period. Mears were able to articulate their case in their Particulars of Claim and subsequently in their amendments to the Particulars of Claim.
23. Finally, Mears complains about the way in which LCC responded by defending Mears' contentions that there had been breach of the Regulations. Again, as an element of conduct, separate from success or failure on the allegations themselves, I do not consider that there is anything in such conduct which affects what would otherwise be the appropriate order for costs.
24. In summary, therefore, I do not consider that there is anything in the conduct of the parties which should affect my discretion on costs and which does not depend on the issue of success or failure of one of the parties on an issue, including the question of the striking out of paragraphs 20(1) and (2) of the Particulars of Claim and the application for disclosure of the Model Answers.
25. As a result I consider that the aspects to take into account in this case are the relative success and failure of the parties on particular issues which have been raised in this case.

The effect of relative success and failure

26. In summary Mears succeeded on one aspect of the claim, the allegations relating to the Evaluation Table at paragraph 8.2.1 of the ITPD. They failed in relation to their allegations relating to the Scoring Table and in relation to the Model Answers I held that they had limited success, which did not found a claim for damages or other relief. I found that Mears' success on the Evaluation Table gave them a right to damages but not to have the Procurement set aside. It follows that LCC have had considerable success in their defence on a number of the claims and in avoiding the need to re-run the Procurement. In my judgment, whilst Mears can be properly characterised as, overall, being the successful party this is a case where, as I set out in the BSkyB case at [13] a proportionate costs order is appropriate to reflect the extent to which a successful party has not been selective in the points they have taken and should not recover all of their costs.
27. In this case, as I have said, significant time and costs were spent in dealing with claims on which Mears did not succeed and I do not consider that it is just, fair and reasonable that Mears should recover the costs of dealing with those claims or that LCC should bear those costs.
28. In coming to a decision on what is the appropriate proportionate costs order I take into account the following matters. First as set out in Multiplex at [72(viii)] the fact that Mears has succeeded on one claim and obtained relief carries with it not only the costs of that claim but also the common costs which Mears had to expend in order to pursue these proceedings. Secondly, there is no simple formula for establishing the percentage based on the number of issues, pages of evidence or paragraphs of submissions or judgments. The decision must to some extent be impressionistic based on my knowledge of the case. Thirdly, allowance should be made in arriving at the proportionate cost order for the fact that if an approach based on issues won or lost had been adopted in a case such as this, LCC would have recovered the costs of certain issues as would Mears.
29. Taking all those matters into account I consider that a substantial discount is required in this case to reflect the significant costs which relate to issues on which LCC have succeeded and Mears have not succeeded but balancing this against the fact that, overall, Mears is properly

characterised as the successful party. In my judgment a discount of 65% is appropriate so that Mears recovers 35% of their costs.

30. LCC also raised particular issues on costs which I can deal with briefly. First, in relation to the order for Mears' costs in the case made on 12 November 2011, on the basis of my overall decision on costs, I consider that Mears are entitled to 35% of their costs under that order.
31. Secondly, in relation to the costs of the parties' submission on costs, neither party has succeeded fully, and in all the circumstances, I consider there should be no order for costs.
32. Thirdly, LCC seek an order that Mears should pay the costs of and caused by the amendment to the Particulars of Claim. The amendments were partly consequent upon the application to strike out paragraphs 20(1) and (2) of the Particulars of Claim and partly as a result of Mears introducing further matters. I see no reason to depart from the general principle that Mears should pay LCC the costs of and caused by those amendments to the Particulars of Claim.

Conclusion

33. In summary I consider that Mears is properly characterised as the successful party. I do not consider that there is any conduct in this case, other than the relative success and failure of the parties, which justifies a different order for costs. This is a case where the substantial success of LCC on a number of the allegations on which significant costs were spent justifies a proportionate order for costs and a substantial discount of 65%.
34. Accordingly the appropriate costs Order in this case is that LCC should pay Mears 35% of their costs of the proceedings up to 25 May 2011, such costs to be assessed on a standard basis, if not agreed.
35. Both parties sought an order for costs at this stage and these proceedings will now proceed to a quantum hearing, which unless resolved by the parties, will lead to the court needing to consider the question of costs from 25 May 2011. In circumstances where further costs will be expended and given the level of costs, the fact that costs put forward by Mears include VAT and that a significant discount has been applied to Mears' costs, I do not consider that a payment on account of those costs should be made at this stage.
36. I would ask the parties to draw up an appropriate order and, subject to any submissions from the parties I would propose to hand down this judgment without the need for any attendance and to adjourn any matters arising from this judgment to be dealt with at the Pre-Trial Review on 28 October 2011.