Case No: HT-09-325

Neutral Citation Number: [2011] EWHC 653 (TCC)

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date:21st March 2011

Before :

MR JUSTICE AKENHEAD

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Between:

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF SOUTHWARK **Cla**

- and -

IBM UK LIMITED **Defe**

- -

- -

Nicholas Stewart QC (instructed by **the Legal Services Department of the London Borough of Southwark**) for the **Claimant**

Jeremy Nicholson QC and Terence Bergin (instructed by **Blake Lapthorn**) for the **Defendant**

Hearing date: 17 March 2011

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JUDGMENT

Mr Justice Akenhead:

Introduction

1.
On 17 March 2011, I handed down judgement in this case. I will not repeat the facts save to record that Southwark's claim was dismissed and there was judgement for IBM, the Defendant. Essentially, Southwark had retained IBM under three Contracts to provide software and services. The primary complaint was that software manufactured and installed by Orchard (but contractually supplied by IBM (via the Arcindex Contract)) was not suitable for purpose in that it was unable to achieve de-duplication of Southwark's data in as efficient a way as it was claimed it should have done.

2.
This judgement is concerned with the costs in that, although Southwark accepts that it must pay IBM's costs, IBM claims that it should have all of its costs on an indemnity basis.

The Principles

3.
The principles to be applied are derived from CPR Part 44.4 which provides that the Court will assess costs on a standard or indemnity basis and Part 44.3 which provides that the Court, in deciding what order to make about the costs, should have regard to the conduct of the parties (both before and during the proceedings), success, any admissible offer to settle, whether it was reasonable for a party to raise or pursue particular claims and the manner in which the party has pursued its case or particular allegations or issues.

4.
The following are unexceptionable propositions.

(a) An award of costs on an indemnity basis is not intended to be penal and regard must be had to what in the circumstances is fair and reasonable: **Reid Minty v Taylor**[2002] 1 WLR 2800, Paragraph 20.

(b) Indemnity costs are not limited to cases in which the court wishes to express disapproval of the way in which litigation has been conducted. An order for indemnity costs can be made even when the conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation: **Reid Minty,** Paragraph 28.

(c) The court's discretion is wide and generous but there must be some conduct or some circumstance which takes the case out of the norm: **Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (A Firm)** [2002] C.P. Rep. 67, Paragraphs 12, 19 & 32

(d) The conduct must be unreasonable to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight: **Kiam v MGN Ltd (No2)**[2002] 1 WLR 2810, Paragraph 12.

(e) The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, but the pursuit of a hopeless claim, or a claim which the party pursuing it should have realised was hopeless, may well lead to such an order: "[T]o 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": **Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd** [2006] BLR 45, Paragraph 27 and **Noorani v Calver**[2009] EWHC 592 (QB), Paragraph 9.

(f) There is no injustice to a claimant in denying it the benefit of an assessment on a proportionate basis when the claimant showed no interest in proportionality in casting its claim disproportionately widely and requiring the defendant to meet such a claim: **Digicel (St Lucia) Ltd v Cable & Wireless plc** [2010] 5 Costs L.R. 709, Paragraph 68.

(g) If one party has made a real effort to find a reasonable solution to the proceedings and the other party has resisted that sensible approach, then the latter puts himself at risk that the order for costs may be on an indemnity basis: **Reid Minty**, Paragraph 37.

(h) Rejection of a reasonable offer to settle will not of itself automatically result in an order for indemnity costs but where the successful party has behaved reasonably and the losing party has behaved unreasonably the rejection of an offer may result in such an order: **Noorani**, Paragraph 12.

(i) Rejection of 2 reasonable offers can of itself justify an order for indemnity costs: **Franks v Sinclair (Costs)** [2006] EWHC 3656

Material Considerations in this Case

5.
As is clear from the earlier judgement, Southwark had by the end of the trial abandoned its claims in relation to over half, numerically, of the defects or manifestations of unsuitability upon which it had relied throughout the proceedings and, either then or earlier during the trial, its claims based on an overarching contract, misrepresentation, negligence and collateral warranty and for breach of the two Contracts previously relied upon. Essentially, its claim came down to assertions that in two respects the Arcindex software was not fit for purpose in that, so it was asserted, it did not achieve the requirements notified to IBM prior to the Arcindex Contract in February 2007.

6.
In summary, Southwark primarily failed in the litigation because it did not establish that its requirements as communicated pre-contract were for anything other than those which the Arcindex software could and would provide. Surprisingly, it did not call as a witness any one of six possible people who were involved in the pre-contract period for or on behalf of Southwark. Southwark therefore had no oral evidence to support its claim that there was an oral over-arching contract, or that, if there was a material misrepresentation anyone of relevance within Southwark had relied upon it or to support any real substratum of fact to demonstrate that there might have been a collateral warranty. The other difficulty facing Southwark was that it could only rely on contemporaneous documentation pre-contract to seek to prove what its requirements for the software which it was proposing to acquire from IBM were. There was, as explained in the judgement, the SAP Brief which certainly identified what its requirements for another supplier would have been and there was no factual issue that this Brief was made available to IBM. The overall difficulty however was the emerging factual evidence from IBM's witnesses by way of statements to the effect that Southwark's staff were shown by way of demonstrations and written material what Arcindex could do and what it could not do. The clear inference at that stage therefore was that Southwark's key staff knew exactly what they were likely to get from Arcindex and were happy with that. However, whilst the statements from all other witnesses were exchanged by 17 December 2010, Mr Leventhal's statement was not served until about 21 January 2011; that statement casts some additional light on his demonstrations of Arcindex to and the exchange of information about Arcindex with Southwark staff.

7.
Whilst a formal Pre-Action Protocol process was not embarked upon by the parties before proceedings, there had been an exchange (of two letters each) between the parties broadly setting out their claims and defences respectively in 2008. When proceedings were issued in August 2009, there was no hint or suggestion by either party that the Protocol process should be gone through.

8.
Pleadings were closed by November 2009 and in January 2010 a mediation took place between the parties (the mediator being David Blunt QC) which was unfortunately unsuccessful. I have, properly, not been told about what the parties' respective positions were in that mediation. Between June and September 2010, various draft amendments were made to the Particulars of Claim by Southwark, which culminated in it being given permission to amend its fourth and final version by Mr Justice Ramsey on 3 September 2010. It was in that version that Southwark put forward the over-arching oral contract basis of claim.

9.
Between August and December 2010, IBM's solicitors pursued Southwark for an opportunity to inspect the software which Southwark had retained. Unwittingly, Southwark gave the impression that the system was available for inspection but by 8 December 2010 Southwark made it clear that the

software had been removed from its servers. This was to form the basis of an application by IBM in effect seeking to strike out the claim against it on the basis that material evidence had been destroyed; this application was mooted at the Pre-Trial Review on 17 December 2010, adjourned until 17 January 2011 (which had been the second trial date but which was adjourned to early February 2011) and then ultimately not pursued. Southwark had only appointed its expert, Ms Hughes in mid-November 2011 and IBM's expert, Mr Coyne, was appointed shortly thereafter. The two experts met on several occasions and indeed produced a very useful joint statement which was of great help at the trial. They also produced reports in January 2011 and it is fair to say that Ms Hughes' report and indeed evidence were fair and honest, albeit based on what turned out to be a misunderstanding as to what Southwark's pre-contract requirements were.

10.
At the Pre-Trial Review, I raised the question with Counsel as to how Southwark intended to establish its case in relation to the oral over-arching contract and reliance for misrepresentation purposes without the oral evidence of any member of Southwark's staff involved in the pre-contract stage. It was put very much as a question to invite Southwark to consider its position and certainly not by way of any pre-judgement. The indication was given by Junior Counsel that Southwark would obviously consider its position in relation to the point which I had raised.

11.
On 7 January 2011, IBM's solicitors wrote an open letter to Southwark, whose legal services department was handling the litigation. The letter gave detailed reasons why IBM considered that Southwark's claim had "no reasonable prospect of success". It set up a number of points which ultimately found favour with me, albeit that for example the allegation of an oral contract was hopeless. On 12 January 2011, they also wrote to Southwark highlighting the fact that Ms Hughes appeared not to support Southwark's claims for a number of the deficiencies which were pleaded. These two letters were unequivocally rejected by Southwark by letters dated 13 January 2011.

12.
On 10 January 2011, IBM's solicitors wrote a "without prejudice save as to costs" letter to Southwark, essentially offering to settle on the basis that each side pay their own costs. The offer was to remain open until 4 PM on Friday at 14 January 2011. The letter refers to an e-mail of 23 December 2010 from Southwark, which I have not seen, but which obviously raised the possibility of another mediation meeting. IBM's solicitors said that in the light of what had happened at the earlier mediation in January 2010 they had "no reason to think that another mediation meeting will serve any useful purpose." Southwark rejected this offer as well saying that its "Finance Director was disappointed to hear of your clients' refusal to attend mediation but was not surprised in light of your clients' conduct throughout this litigation."

13.
The matter then proceeded to trial which lasted over seven working days.

14.
In summary, the factors upon which IBM relies in seeking indemnity costs are as follows:

(a) Pursuit of the action by Southwark without any evidence to support its allegations.

(b) Pursuing a case consisting of wide-ranging and shifting allegations, most of which were abandoned by the end of the trial.

(c) Failing to set out any proper case in a Letter of Claim, contrary to ordinary requirements for pre-action conduct.

(d) Disposing of the system at a time when Southwark clearly intended to pursue claims, and resulting in extensive and unnecessary costs in relation to expert evidence and generally.

(e) Failing to review the merits of the action, despite repeated opportunities, indications by the Court, and suggestions from IBM that this should be done.

(f) Rejecting IBM's offer of 10 January 2011 and in terms which were themselves unreasonable.

15.
As to these points, my comments in relation to the specific sub-paragraphs above are as follows:

(a) In my judgement, it would be wrong to say without qualification that Southwark pursued its claim without any evidence to support its allegations. It had some documentary evidence which, depending on the witness evidence, might have supported its case as to what Southwark's pre-contract requirements for the IBM and Orchard software were; it also had the evidence of Ms Troy which covered the period after the software was installed and the events leading to the shutting down of the project. However, by the end of 2010, it should have been beginning to become apparent to Southwark that its case was seriously weakened in the light of the witness statements which had by then been served.

(b) Although the case was put in a variety of ways, the essential case was always that the software was not fit for purpose. The over-arching contract, misrepresentation, negligence and collateral warranty arguments were other ways of supporting the complaint about unsuitability. It is true that by mid-January 2011 at the latest Southwark was aware that over half of its complaints about unsuitability were unsupported by its expert and it was or should have been aware that its case relating to the over-arching contract, misrepresentation, negligence and collateral warranty were at best very weak indeed in the light of the witness statements.

(c) I attach no importance to the complaints about Southwark's alleged failure to set out its case prior to the issue of proceedings. It broadly did set out its case in correspondence in 2008. If IBM had thought that more detailed compliance with the TCC Pre-action Protocol process would have been helpful, it could have raised that at the first Case Management Conference, but it did not.

(d) I also attach little weight to the disposal of the software systems. The complaint never was that Arcindex was badly installed. It was that it was inherently unsuitable for Southwark's purposes. It was never going to be absolutely essential that the parties or their experts examined what had been installed; the exercise was to analyse what Arcindex was capable of and then compare it with what were established to be Southwark's requirements. That said, it is somewhat surprising that the software was not retained given that it was to be the subject matter of litigation. I am certainly satisfied that there was no malicious or untoward conduct on the part of Southwark in disposing of it; I suspect that no one really thought about it at all. Certainly some time and effort was wasted by Southwark unwittingly misleading IBM's solicitors in the autumn of 2010 as to whether the system had been retained and was available for inspection.

(e) In my view there is some justification in the complaint that there was a failure effectively to review the merits of the Claim. In my view however that this relates to a period following the exchange of witness evidence before Christmas. In my view, given that the trial was pending in early February 2011, this review should have been complete no later than mid-January 2011, even allowing for the

Christmas break. The very fact that substantial elements of the Claim were readily abandoned during the trial goes to show that a proper review would at the very least have led to large elements being abandoned much earlier. However, the real gap in any analysis, even assuming that one was done prior to mid-January 2011, was the failure to appreciate that there was a very real difficulty in establishing that its requirements for Arcindex were anything other than that which Arcindex could provide in any event.

(f) The offer of a "walk away" settlement on 10 January 2011 was a good one and, given the difficulties which Southwark at the very least ought to have appreciated that it faced, there is no good reason why it was not accepted.

16.
One other matter was raised by Mr Stewart QC on behalf of Southwark which was the rejection in January 2011 by IBM of the Southwark request that the mediation be resumed. It can of course be the case that, even or particularly where a party has a weak case, mediation can help to resolve disputes. However, the Court cannot and here does not know what any previous without prejudice positions were as between the parties. Thus, it may be that Southwark had been holding out for a minimum payment of, say more than £1 million or that it had indicated a willingness to settle at a level closer to the "walk away" basis advanced by IBM in its solicitor's letter dated 10 January 2011. It is therefore difficult to form any view that a further mediation stood any chance of success, particularly given the failed mediation about a year before. If anything, Southwark's approach to the litigation in January 2011 and throughout the trial suggested an unjustifiably upbeat assessment of its chances; if that is right, mediation would probably have failed. It would also have taken some time to set up, whilst costs continued to be incurred.

Decision

17.
All in all, and taking the above matters into account, I have formed the view that the fair order is that IBM should have its costs to be assessed on a standard basis up to 4 PM on 14 January 2011 and thereafter on an indemnity basis. I have taken that time as the dividing point to reflect the facts that in my judgement the offer made by IBM's solicitors on 10 January 2011 should have been accepted by then and that by then at the latest Southwark could and should have done the analysis which would have shown that it was facing very real difficulties.