Neutral Citation Number: [2015] EWHC 33 (TCC)

Case No: HT-14-311

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 15th January 2015

Before

MR JUSTICE AKENHEAD

- -

Between:

SAVOYE and SAVOYE LIMITED **Clai**

- and -

SPICERS LIMITED **Defe**

- -

- -

Anneliese Day QC (instructed by **Reed Smith LLP**) for the **Claimant**

Jonathan Acton Davis QC (instructed by **Olswang LLP**) for the **Defendant**

Submissions in writing

- -

JUDGMENT

Mr Justice Akenhead:

1.
I handed down judgment in this matter on 15 December 2014 ([2014] EWHC 4195 (TCC)). The parties have exchanged written submissions concerning costs. It is common ground that this Court should summarily assess the costs. I will not set out the facts which are fully set out in the earlier judgment.

2.
Essentially, Savoye “won” in that it secured its judgment for the full sum claimed (about£889,300) and successfully secured the enforcement of the adjudicator’s decision. The case was a “one issue” case, that issue being whether the work done and to be done by Savoye amounted to "construction operations" as defined in Section 105 of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") in the context of the facts and the contract between the parties. The issue broke down still further into a consideration of whether as a matter of fact and degree the conveyor system (installed by Savoye) as a whole could be said to “form part of the land” as called for in Section 105(1) (a) to (c) of the HGCRA.

3.

Savoye's costs bills total £201,790.66, this covering the hearings on 8 and 14 October, 13 November and 3 December 2014. Savoye seeks its costs on an indemnity basis saying that Spicer's acted "unreasonably to a high degree both in raising an unmeritorious defence and/or jurisdictional challenge and subsequently maintaining such a challenge to the adjudicator's decision on the basis of evidence which turned out to be misleading" (Paragraph 10 of Ms Day QC's Submissions on Costs). Spicers respond by saying that this is not a case for indemnity costs as there was always a genuine area of factual dispute between the parties which could only be resolved by a trial rather than by way of a summary judgment application and by challenging the overall costs bill in effect as excessive, unreasonable and disproportionate.

4.
It is accepted, rightly, by Mr Acton Davis QC that his client, Spicers, in principle has to pay the costs as it "lost" the case but argues that the summary judgment application was or at least became misguided and that therefore his client should not have to pay for all or a substantial part of costs of the summary judgement application.

Indemnity Costs

5.
There are numerous authorities on the principles or criteria applicable to justify an award of indemnity costs. In **The Board of Trustees of National Museums and Galleries on Merseyside v AEW Architects and Designers Ltd** [2013] EWHC 3025 (TCC), this Court reiterated those, based on an earlier decision:

"12. The principles upon which indemnity costs may be awarded have been addressed in numerous cases and in broad terms, this Court in **Igloo Regeneration (GP) Ltd v Powell Williams Partnership** [2013] EWHC 1859 (TCC) broadly summarised the position:

"2 The authorities are now well established and I do not intend to repeat them. There is largely, if not entirely, an overlap between what both counsel are putting forward as the appropriate basis: cases such as Excelsior Commercial& Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (a firm) [2002] EWCA Civ 879, per Waller LJ, in which he said:

"Is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?"

3. There are also the well known cases of Kiam v MGN Ltd (No 2) [2002] 2 All ER 242, in particular the judgment of Simon Brown LJ (as he then was), Gloster J (as she then was) in Euroption Strategic Fund Ltd v Skaninaviska Enskilda Banken AB [2012] EWHC 749 (Comm), and this Court in Walter Lilly & Co Ltd v Mackay & Anr [2012] EWHC 1972 (TCC), although this was on obviously on different facts and considerations, when the Court referred to yet more authority, in particular Andrew Smith J in Fiona Trust & Holding Corporation v Yuri Privalov [2011] EWCR 664 (Comm) and The Mayor & Burgesses of the London Borough of Southwark v IBM UK Limited [2011] EWHC 653 (TCC). I do not intend to repeat the summary of principles and considerations to be taken into account. Obviously, the fact simply that one parties loses the case, and maybe loses it on the basis of a firm judgment, does not mean, as such, that the losing party should pay costs on an indemnity basis. There must be some conduct which takes the case out of the normal run of the mill."

The conduct of the party against which indemnity costs are sought does not have to be lacking "in moral probity or deserving of moral condemnation" but the conduct should generally be unreasonable to a high degree."

6.
What one is therefore seeking to find is whether or not, in this case, there has been conduct on the part of Spicers which takes its conduct in or during this case out of the norm such that it can be considered as unreasonable to a high degree.

7.
I have formed the very clear view that this is not a case in which Spicer's conduct is such as to justify an award of indemnity costs against them. One needs to bear in mind that, apart from significant differing areas of emphasis between the parties on the precise legal tests and criteria to apply, there were differences between the parties on the facts. Indeed, both Leading Counsel accepted that the primary underlying issue involved a question of fact and degree, namely the extent to which, looked at overall, the conveyor system to be installed by Savoye could or could not be considered as forming part of the land. As set out in Paragraph 37 of the earlier judgment, there were substantial pieces of equipment which were not physically attached to the underlying concrete floor and, at two thirds of the fixing plates on much of the conveyor racking, there was no connection of them to the concrete floor. Based on that, it was not unreasonable let alone out of the norm for a defendant such as Spicers to seek to argue that, looked at overall, it being a matter of fact and degree, the conveyor system did not or was not to form part of the land.

8.
It is right to observe that Mr Michael in his first witness statement (submitted after the first summary judgment hearing) made several factual assertions which were either misleading or at least wrong. For instance, he said at Paragraph 5 that the racking was not installed by Savoye and pre-dated the installation by Savoye; that was accepted (by Mr Acton Davis QC to be wrong during the third summary judgment hearing), albeit that it emerged that some of the racking (pale yellow in colour) was original, it being refurbished and re-fixed by Savoye along with the new blue racking. Paragraph 9 of the statement was to the effect that it was only at the end of the racking lanes that a bolt had sometimes been placed into one or two of the holes in the square feet attached to the racking. This was wrong because all along the racking lanes the rear uprights every 2 or 3 metres were bolted to the floor. However, having seen Mr Michael in the witness box, I did not begin to draw any impression that he was dishonest or had been consciously trying to mislead.

9.
The reality was that it was only during the site visit and the subsequent oral evidence at the trial that I was able to form a clear view as to whether overall the conveyor system was to form part of the land for the purposes of Section 105(1) of the HGCRA. I was particularly impressed by the evidence submitted for the purposes of the trial by Savoye and in particular by the evidence, tested in cross-examination, about the numbers and robustness of the M12 and M8 bolts which were used to fix the system to the floor.

10.
Costs therefore should be assessed on a standard basis.

The Summary Judgment Application

11.

I do not consider that it was unreasonable of Savoye to have issued a summary judgment application. It had secured an adjudicator's decision in its favour and the adjudicator had given a reasoned (albeit not binding) view on the issue which taxed the Court, namely whether the conveyor system formed part of the land; it was non-binding because it went to his jurisdiction. In the light of the evidence submitted by Spicers before the first hearing on 8 October 2014, it might well have been sensible for Savoye then to have taken stock; there would have been at least some litigants who might have decided on or by the first hearing that it would be better to have an expedited and short trial on the issue given that it involved a question of fact and degree which it might well be difficult for the Court to resolve on a summary judgment application. Although I had started to write my judgment on the summary judgement application within several days, I had not at that stage formed a concluded view on the evidence and arguments as to whether it was going to succeed; it would not be unfair to say that the position was finely balanced, which might well have pointed me towards refusing the application. At the next hearing, on 14 October 2014, at which I granted Spicers permission to adduce further evidence (substantively from Mr Michael), I recall saying to the parties that they might like to consider the possibility of simply moving to a trial which the TCC would be able to accommodate in late November or early December 2014, rather than pursuing the summary judgment application any further. I thought however that it was appropriate for Savoye to consider its position and decide whether or not it wanted to pursue the application. Due to various logistic difficulties, the resumed summary judgement hearing did not take place until 13 November 2014. At that hearing, I refused the summary judgment application on the basis, in effect, that there were factual issues which could not readily be resolved on a summary judgment application but could more readily be resolved following a site visit and a (short) trial. I made it clear, in reserving the costs, that the imposition of costs might depend on whether (and if so to what extent) the Court had been misled by the written evidence.

12.
For the reasons given above, I do not consider that there was any or any inappropriate misleading of the Court by or on behalf of Spicers. That said, and on reflection, the costs of and occasioned by Spicer’s application to adduce the further evidence should be borne by Spicers because the further evidence could and should have been adduced in time before the first hearing. The evidence at trial suggested that it was Mr Michael, in effect on his own initiative, who decided that his further evidence should be deployed, this being said to be by way of reaction to the way in which Ms Day QC put her client's case in closing at the first summary judgment hearing on 8 October 2014; however, I do not consider that the way in which she had closed the case was significantly different from the case as presented initially. However, its costs of the third summary judgment hearing on 13 November 2014 should be borne by Savoye because it took the risk that by that stage it should have been clear that there was a factual issue which it would be difficult for the Court to decide on a summary judgment application.

13.
A complication, as a matter of costs assessment, arises because the costs of and occasioned by putting together the witness evidence which was available for the three summary judgment hearings would need to have been collated for the purposes of the trial which eventually took place. It would therefore be wrong to say that Savoye should not have those parts of its costs of and occasioned by the summary judgment application which it would have had to have incurred in any event in relation to the trial.

Proportionality

14.

The Overriding Objective (CPR Part 1) identifies the overriding objective as "enabling the court to deal with cases justly and at proportionate cost". CPR Part 1.3 requires the parties "to help the court to further the overriding objective". CPR Part 44.3(2)(a) requires the court on a standard assessment of costs only to:

“allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred"

Part 44.3(2)(b) requires the court to:

“resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party."

15.
CPR Part 44.3(5) states:

“Costs incurred are proportionate if they bear a reasonable relationship to –

(a)
) the sums in issue in the proceedings;

(b)
the value of any non-monetary relief in issue in the proceedings;

(c)
) the complexity of the litigation;

(d)
any additional work generated by the conduct of the paying party; and

(e)
any wider factors involved in the proceedings, such as reputation or public importance."

16.
CPR Part 44.4 requires the Court to have regard to all the circumstances with Part 44.4(3) identifying specific factors such as "conduct before, as well as during, the proceedings", "the amount or value of any money or property involved", "the importance of the matter to all the parties", "the particular complexity of the matter…raised", "the skill, effort, specialised knowledge and responsibility involved" and "the time spent on the case".

17.
In the light of the above, and for the purposes of costs assessment, the Court should have regard when assessing proportionality and the reasonableness of costs, in the context of the current case or type of case, to the following:

(a)
The relationship between the amount of costs claimed for and said to have been incurred and the amount in issue. Thus, for example, if the amount in issue in the claim was £100,000 but the costs claimed for are £1 million, absent other explanations the costs may be said to be disproportionate.

(b)

The amount of time said to have been spent by solicitors and barristers in relation to the total length of the hearing(s). For example, if 3,000 hours of lawyers time is incurred on a case which involves only a one day hearing, that might well point to a disproportionate incurrence of time spent.

(c)
In the context of time spent, the Court can have regard to the extent to which the lawyers for the party claiming costs and the party itself has incurred cost and spent time before the Court proceedings in connection with any other contractual dispute resolution machinery agreed upon between the parties. Here, for instance, there was provision for adjudication, in which the parties were required to pay their own costs of that process. If and to the extent that the work in connection with the adjudication duplicates the work done in the Court proceedings, or, put another way, if the same issue arises and was addressed in the Court proceedings as in the adjudication, it may be disproportionate to expend anew what is repetitious effort and time in the later proceedings.

(d)
The extent to which the case is a test case or in the nature of a test case.

(e)
The importance of the case to either party. If for instance an individual or a company is being sued for everything which he, she or it is worth, it may not be disproportionate for that individual to engage a QC even if the amount in issue is objectively not very large.

Discussion

18.
Some basic facts are as follows:

(a)
The total hearing time for the four hearings was about 7 hours whilst the site visit excluding travelling time was just over an hour.

(b)
The amount of time claimed for by Savoye's solicitors was:

(i) PC (partner):	111.2 hours @ £520
(ii) JO (associate):	223.5 hours @ £370
(iii) Trainee:	4 hours @£205
(iv) Paralegal:	16.2 hours @ £205
(v) Costs lawyer:	9.6 hours @£220.

(c)
Counsel's fees were £27,800. There were various relatively minor other disbursements such as the court fee, copying charges and interpreter charges.

(d)
The total claimed as costs by Savoye is £201,790.66.

19.

Whilst there can be no complaint that that Leading Counsel was deployed (both parties considering it necessary to retain specialist QCs), the case revolved around a relatively narrow issue which was largely dictated by the words used in Section 105(1) of the HGCRA about the need for the particular construction operations to "form part of the land" to bring them within the statute. What primarily needed to be investigated was the extent to which and manner by which the conveyor system and equipment were attached to the floors; once that could be established, it was for the Court to draw a conclusion, as a matter of fact and degree, whether they were forming part of the land. Although 20 or more cases were cited to the Court, there were limited issues of principle to be resolved, including whether the real property law relating to fixtures was incorporated, lock, stock and barrel, by the words of Section 105(1) and the extent to which the Court should have regard to the subjective or objective intentions of the parties. Whilst these legal issues were, I hope, helpfully clarified and, I hope again, will be of use to practitioners in the field of construction adjudication, I do not consider that case can be considered as a test case, on which dozens, scores or hundreds of other cases depend. Similarly, whilst this case was of commercial importance to each party, both sides are reasonably substantial commercial entities and there is no hint of suggestion that their commercial existence depended on the outcome of this case.

20.
It is also clear from reading the adjudication documentation that the exact same point raised in the Court proceedings was raised and argued before the adjudicator with extensive written witness evidence being provided by each party, from Mr Garate for Savoye and Mr Arnold for Spicers (both of whom gave similar evidence in the Court proceedings). The arguments were essentially the same and a number of the same legal authorities were cited to the adjudicator as were cited to the Court. The same solicitors were retained in the adjudication by Savoye as in the Court proceedings. Essentially, the Court proceedings involved a re-run of the same arguments and evidence, albeit I do accept that the later proceedings went into somewhat greater detail and in some respects had a different emphasis. Of course, each party in the adjudication had to pay its own costs. This context would lead to the inference that the costs of the Court proceedings could have been relatively modest, taking into account that the legal team knew exactly what the issue was about and what evidence needed to be deployed in the Court proceedings to counter the likely jurisdictional challenge.

21.
In the light of the foregoing, I am led to the inevitable conclusion that a costs bill of over£200,000, albeit in relation to a claim worth just under £900,000, must be considered to be disproportionate. Savoye was dealing with an issue in the Court proceedings which it had addressed (at its own cost) in detail in the adjudication; it was deploying the same solicitors and principal factual witness as it had deployed in the adjudication. The issues raised in the Court proceedings were not complex, as is at least partly evidenced by the fact that the overall hearings ran to less than two court days. Of course, some of the costs, such as those occasioned by Spicer’s application to adduce further evidence, were incurred as a result of something which was not in any way Savoye’s fault.

22.
If no other information was available other than the headline costs figure, I would have been minded to identify a figure of about half of the costs some claim as proportionate.

23.
However, on a summary assessment, I can and do take into account the following factors which should reduce the figure claimed very substantially in any event:

(a)
Although a party is entitled to spend whatever it wants on litigation, a standard assessment should fix what it is reasonable and proportionate for the paying party to pay, with any doubt being resolved in favour of the paying party, Spicers in this case.

(b)
There is a very large amount of partner's time claimed for at a substantial rate, it being clear that the partner, a very experienced construction law solicitor, did much more than simply supervise a competent associate and liaise with the client; he got involved in drafting pleadings and witness statements. It can not be reasonable or proportionate for Spicers to have to pay anything like 111 hours' worth of partner's time at partners' rates. I would have thought that something like 20 hours was justifiable at that rate.

(c)
The total amount of solicitors' time booked at some 364 hours equates to about 8 to 9 weeks of time. It is not reasonable or proportionate for anything like that to be payable by Spicers, particularly when the basic issue had already been ventilated and investigated in the adjudication. Just on time alone, I would have assessed as reasonable and proportionate a total of about half of this. For instance, the spending of up to about 150 hours on witness statement evidence seems to be excessive (particularly, when one looks at the relatively short witness statements and the fact that the ground covered was not new); it is not reasonable to expect Spicers to have to pay for the attendance at all four hearings of both partner and associate solicitor; the spending of some 43 hours preparing the Claim Form, Particulars of Claim, summary judgment application and witness evidence can properly be said not to be reasonable and proportionate particularly for experienced construction lawyers who seek to justify large hourly rates.

(d)
The summary judgment application, albeit reasonably contemplated and issued, was one which at least by the time of Spicer's application to adduce further evidence should not have been pursued, particularly when the Court invited consideration of moving straight to the expedited trial process. Whilst I do not suggest that it was unreasonable for Savoye to go on with the summary judgment application, it took the risk of there being a finding that there was a triable issue and I do not see why in those circumstances it is reasonable that Spicers should be expected to pay for that risk taking approach.

(e)
Counsel's brief fee for the final trial at £12,000, given her extensive involvement beforehand, could well be considered as too high for it to be reasonable and proportionate for Spicers to have to pay; half of this is reasonable.

24.
Taking into account all the above factors, I summarily assess Savoye's costs as follows:

Partner's time:	20 hours @£520	£10,400
Associate's time:	160 hours @£370	£59,200
Paralegal/Trainee:	10 hours @£205	£2,050
Costs drafting:	6 hours @ £220	£1,320
Counsel's fees:	13.11.14 hearing excluded	£18,800
Other disbursements:	Only one hotel/travel	£4,695

Total		£96,465

Decision

26.
Accordingly, Spicers should pay the sum of £96,465 as costs within 14 days from the date that this judgment was sent in draft to Counsel (13 January 2015).