Case No: HT-2016-000073

Neutral Citation Number: [2017] EWHC 2472 (TCC)

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

Royal Courts of Justice

Rolls Building, Fetter Lane, London, EC4a1NL

Date: 6 October 2017

Before :

THE HON MR JUSTICE COULSON

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Between :

(1) The Governors and Company

of the Bank of Ireland **Clai**

(2) Bank of Ireland (UK) PLC

- and -

Watts Group PLC **Defe**

- -

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Mr Paul Mitchell QC (instructed by **Elborne Mitchell LLP**) for the **Claimants**

Ms Jessica Stephens (instructed by **RPC**) for the **Defendant**

Hearing date: 3 October 2017

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Judgment

Judgment (No. 2 – Costs)

The Hon. Mr Justice Coulson :

1. INTRODUCTION

1.
The claimant Bank brought professional negligence proceedings against the defendant, Watts, arising out of the failure of a development company to whom the Bank had lent money. In a Judgment dated 12 July 2017 ([2017] EWHC 1667 (TCC)), I dismissed the claim. It has been agreed that the Bank will pay Watts' costs. At the consequential hearing on 3 October 2017, there were two principal issues between the parties: the basis of the assessment of those costs, and the amount of the interim payment on account.

2.
By way of background, I note the following:

(a)
The Bank's claim failed for a variety of reasons. I found that the allegations of negligence had not been made out but that, even if they had been, it was difficult to say that they had caused any loss to the Bank. Separately, I found that the cause of the Bank's loss was its own decision to lend the money to the developer in the first place, and the failure of its employees to adhere to its lending rules.

(b)
I was particularly critical of Mr Vosser, the expert quantity surveyor who gave evidence on behalf of the Bank. My grave concerns about his evidence were summarised at paragraphs 58-70 of the original Judgment.

(c)
Before the trial, Watts made three offers to the Bank. The first was a Part 36 offer in the sum of £75,000, made on 2 October 2015. The second was in the sum of £150,000, made on 1 August 2016, also in accordance with Part 36. The third offer, dated 6 March 2017, was inclusive of costs and was for just under £545,000.

2. ASSESSMENT ON AN INDEMNITY OR A STANDARD BASIS?

3.
As noted, the Bank accepts that it is liable to pay Watts' costs of the action. The Bank also accepts that, because of its failure to beat any of the offers, it is liable to pay interest on those costs from 23 October 2015, pursuant to CPR 36.17(3)(b). The parties agree that interest should be paid at 2% over base for the relevant period. The principal dispute between the parties concerns the basis of assessment. Watts seek an order that the costs be assessed on an indemnity basis. The Bank says that the costs should be assessed on the standard basis.

4.
It may well be that at least one of the reasons for Watts' position is the level of costs that they have incurred. Their costs budget was approved in the sum of £345,000. In addition to that, it is agreed that Watts incurred costs in respect of two additional interim applications, not included within their approved costs budget, which give rise to an additional figure of £39,424. That makes an enhanced costs budget figure of £384,424. However, it appears that Watts' actual costs are £616,000. There has been no application to amend or modify the costs budget figure.

5.
Watts' submissions in support of an order for indemnity costs rely on three main arguments. First, they say that the Bank's claim was unreasonable and hopeless and should never have been brought. Secondly, they say that they have made offers which they have beaten, another factor pointing towards an order for indemnity costs. Thirdly, they say that the evidence of Mr Vosser, and the court's criticisms of that evidence, also make this an unusual or extreme case justifying indemnity costs. In response, the Bank accepts that it lost the litigation "badly", but denies that its claim was unreasonably brought and warns of the dangers of hindsight.

6.
The relevant principles governing indemnity costs are set out in a number of cases. In **Elvanite Full Circle Limited v Amec Earth and Environmental (UK) Limited** [2013] EWHC 1643 (TCC) – a case with many similarities to the present case – I summarised those principles as follows:

"16. …

(a) Indemnity costs are appropriate only where the conduct of a paying party is unreasonable "to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight": see Simon Brown LJ (as he then was) in **Kiam v MGN Ltd** [2002] 1 WLR 2810.

(b) The court must therefore decide whether there is something in the conduct of the action, or the circumstances of the case in general, which takes it out of the norm in a way which justifies an order for indemnity costs: see Waller LJ in **Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson** [2002] EWCA (Civ) 879.

(c) The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, provided that the claim was at least arguable. 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: see, for example, **Wates Construction Ltd v HGP Greentree Alchurch Evans Ltd** [2006] BLR 45.

(d) If a claimant casts its claim disproportionately wide, and requires the defendant to meet such a claim, there was no injustice in denying the claimant the benefit of an assessment on a proportionate basis given that, in such circumstances, the claimant had forfeited its rights to the benefit of the doubt on reasonableness: see **Digicel (St Lucia) Ltd v Cable and Wireless PLC** [2010] EWHC 888 (Ch).

17. These principles have recently been restated in the judgment of Gloster J (as she then was) in **Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB** [2012] EWHC 749 (Comm).”

7.
With one partial exception, dealt with in paragraph 10 below, I do not regard this as a case in which an order for indemnity costs is justified or proportionate. In my view, this was not a claim which was or should have been regarded as hopeless from the outset. On the contrary, it was a case which was supported, at least in part, by expert evidence and the detailed witness statements of those involved in the relevant events at the Bank. Whilst it is true that there were always going to be questions about the lending arrangements, it would be wrong to conclude that those should always have been regarded by the Bank as insurmountable.

8.
Furthermore, when considering the proper basis of the assessment of costs, the court must avoid the dangers of hindsight. It must be wary of the suggestion by the successful party, in this case Watts that, in truth, the result in the case was inevitable. Amongst other things, such an approach runs the risk of unfairly denigrating the presentation of the successful party’s case at trial. This case is a good example of that. In my judgment, one of the important reasons for Watts’ success in these proceedings was the excellence of Ms Stephens’ cross-examination of the Bank’s factual witnesses. The answers she elicited in her careful and well-prepared exchanges with them were decisive of the issues on lending, and I am sure they came as a shock to the Bank’s lawyers. This was a case won at trial; it was not a foregone conclusion.

9.
Of course, the fact that the Bank refused a number of offers which, with hindsight, they should have accepted, is a factor that the court must consider when deciding on the appropriate basis of assessment. But, unlike a successful claimant (CPR 36.17(4)(b)), the fact that Watts beat the relevant offers does not give rise to an automatic entitlement to indemnity costs. I know this misalignment is considered by some to be unjustified, but it remains the law. Furthermore, I accept Mr Mitchell’s submission that the fact that Watts made three offers, all in significant sums, indicates that Watts and/

or their insurers took this claim seriously and considered that it had a commercial value. That also supports my conclusion that this was not an obviously hopeless case. So I am not persuaded that the Bank's failure to beat the offers justifies an order for indemnity costs.

10.
The exception to which I referred at paragraph 7 above concerns Mr Vosser's evidence. I consider that his conduct should be reflected in the costs order that I make. I do not consider that his conduct means that the Bank should pay the entirety of Watts' costs on an indemnity basis: they lost the case in part because of the inadequacies of his evidence, so to order indemnity costs as well would be penalising the Bank twice over for the conduct of their independent expert. It would also be disproportionate, particularly because, as Mr Vosser admitted, this was the first time he had given evidence at a trial (although it was far from the first time he had advised the Bank).

11.
There is authority for the proposition that, where a court concludes that the conduct of an expert should be marked in the costs order, it may be appropriate to order that the specific costs generated by that expert should be assessed on an indemnity basis: see **Balmoral v Borealis** [2006] EWHC 2531 (Comm) and **Williams v Jervis** [2009] EWHC 1837 (QB). Accordingly, I consider that the costs of the defendant's QS expert, Mr Whitehead, should be assessed on an indemnity basis, as should the costs of and occasioned by Mr Vosser's oral evidence at the trial. Beyond those two specific exceptions, and for the reasons that I have given, I consider that the appropriate order in this case is that costs should be assessed on the standard basis.

3. REDUCTIONS OR ALLOWANCE IN FAVOUR OF THE BANK

12.
Where there are already costs orders in favour of the Bank then obviously they remain valid, and will have to be the subject of detailed assessment. There is nothing further for the court to do in respect of such orders now. In addition, Mr Mitchell argued that, because Watts abandoned a number of contributory negligence allegations at the start of trial, the Bank should have the costs of those abandoned allegations. I do not accept that submission. I consider that it is important for the court to look at the costs in the round. The contributory negligence case was successful. The fact that some of the individual allegations of contributory negligence were deleted at the start of the trial is, in my view, simply part of the rough and tumble of the trial process. It is not a matter that should be marked by an adverse order as to costs.

4. THE INTERIM PAYMENT ON ACCOUNT OF COSTS

13.
In my view, the figure of £384,424 referred to in paragraph 4 above (namely the approved costs budget plus the additional figure for the two additional interlocutory applications) must be the starting point for any consideration of the interim payment on account of costs. That is because such a figure is also the starting point (and very possibly the end point, too) of the costs judge's assessment. CPR 3.18 provides as follows:

"3.18. Assessing costs on the standard basis where a costs management order has been made

In any case where a costs management order has been made, when assessing costs on the standard basis, the court will—

(a) have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings;

(b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so; and

(c) take into account any comments made pursuant to rule 3.15(4) or paragraph 7.4 of Practice Direction 3E and recorded on the face of the order."

14.
This approach to interim payments has been endorsed by the Court of Appeal in **Harrison v University Hospital Coventry and Warwick NHS Trust** [2017] EWCA Civ. 792 when Davis LJ said at paragraph 40:

"Such a conclusion also accords with authority (albeit none binding on this court): not only in the form of the decisions in **Merrix** and **Collins** but also in the form of the remarks of Coulson J in **McInnes v Gross** [2017] EWHC 127 (QB). In that case, in the context of considering an interim payment on account of costs, Coulson J in terms said, at paragraph 25, that the significance of CPR 3.18 "cannot be understated" and meant that, where costs are assessed, the costs judge "will start with the figure in the approved costs budget." He roundly rejected the argument of the paying party that detailed assessment "will start from scratch." I agree with those observations of Coulson J."

15.
In those circumstances, I consider that the interim payment on account of costs must be based on the £384,424. On any view, the interim payment cannot be in excess of that figure, despite the fact that Watts' costs are said to be £616,000. That is firstly because I have not been asked to approve an increase in the budget and, as per the reasoning in **Elvanite**, it may now be too late for such an application anyway. Secondly, other than the discrete matters referred to in paragraph 11 above, I have not ordered an assessment on the indemnity basis, so that cannot be a mechanism by which the relevant amount could be increased beyond the approved costs budget figure in any event.

16.
There was an argument as to whether, if I had been minded to order an assessment on the indemnity basis, I could have awarded a sum by way of an interim payment that was in excess of the approved costs budget figure. That does not arise on the facts. But I repeat what I said at paragraphs 27-30 of my judgment in **Elvanite**: it seems to me that there are great difficulties in arguing that, because the successful party is entitled to indemnity costs, the approved costs budget figure becomes irrelevant and no longer acts as a cap. I think the approved figure should be the starting point for an assessment of costs on an indemnity basis, as well as for an assessment on the standard basis. At paragraph 30 in **Elvanite** I said:

"…this would provide the benefits of both consistency and certainty. There is a concern that, if an order for indemnity costs allows a receiving party to ignore the costs management order, then that will encourage successful parties to argue for indemnity costs every time. That would be unfortunate, and would leave an unacceptable doubt hanging over even approved costs budgets, all the way through to judgment and beyond. A paying party will have fought the trial assuming that, even if it loses, its opponent will be unlikely to recover more than the amount recorded in the costs management order, unless there is good reason for any departure. That is the certainty that the new regime provides. Even if the paying party has to pay costs on an indemnity basis, that does not seem

to me automatically to justify an abandonment of that certainty, and the encouragement of a costs free-for-all."

17.
Mr Mitchell argued that I should award 70% of the £384,424 figure to reflect the fact that the assessment was to be on a standard basis. It seems to me that that also falls into the trap of ignoring the significance of the approved costs budget and the importance of r.3.18. The court has already assessed a proportionate and reasonable figure for Watts' costs. It is not appropriate to make a 30% reduction to that same figure merely because this is 'only' a payment on account of costs.

18.
Ms Stephens said that the reduction should be no more than 15%. I agree with that. It gives proper effect to r.3.18. A reduction of 15% from £384,424 would give a figure of £326,760. I therefore conclude that the appropriate figure for the interim payment on account of costs is £326,760.