Neutral Citation Number: [2019] EWHC 921 (Ch) Case No: PT-2018-000505

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
PROPERTY, TRUSTS AND PROBATE LIST

Rolls Building
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 01/03/2019

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

- -

Between:

CANARY WHARF (BP4) T1 LIMITED
CANARY WHARF (BP4) T2 LIMITED
CANARY WHARF MANAGEMENT LIMITED

Claimants

- and -

EUROPEAN MEDICINES AGENCY

Defendant

- -
- -

MS JOANNE WICKS QC, LORD ANDERSON OF IPSWICH KBE QC, and MR JONATHAN CHEW and MS ZAHRA AL-RIKABI (instructed by **Clifford Chance LLP)** for the **Claimants.**
MR JONATHAN SEITLER QC, MR THOMAS DE LA MARE QC, MS EMER MURPHY, and MR JAMES SEGAN (instructed by **DLA Piper UK LLP)** for the **Defendant.**

Hearing date: 1 March 2019

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Approved Judgment

Mr Justice Marcus Smith:

Introduction

1. This ruling deals with various matters consequential upon the judgment in this matter that I handed down on 20 February 2019 under Neutral Citation Number [2019] EWHC 335 (Ch) (the "Judgment"). This ruling takes the Judgment as read, and adopts the terms and abbreviations used in the Judgment.

Indemnity costs

2. The first matter concerns whether CW should have their costs on the standard basis or on an indemnity basis. I say nothing, at this point, about the question an issues-based/non-issues based approach to costs, which is another matter I will have to deal with later on in this judgment.

3. CW advance three grounds as to why indemnity costs should be ordered. The first of these is that whilst such an order is not mandated by the terms of the Lease, the Lease entitles CW to recover its costs on an indemnity basis, and this court have regard to the provisions of the Lease in all the circumstances.

4. I have been referred to CPR 44.5, which provides that, whilst the court always has an overriding discretion in terms of the costs orders that it makes, it should take into account the costs provisions in any contract between the parties before it and assess costs on that basis. It does seem to me in principle to be right that, where a contract clearly makes provision for the payment of costs and/or for the amount of costs, that is something that ought to be taken into account by the court when it exercises its discretion.

5. The issue here, however, is that the two provisions in the Lease that are referred to and relied upon by CW, namely clauses 4.24.3 and 4.31 of the Lease, both turn on the existence of either arrears of rent or sums due from the EMA to CW or a breach of the tenant's covenants.

6. In this case, because the frustration issue was litigated before the withdrawal of the United Kingdom from the European Union and where there is, at the moment, no arrears of rent, it seems to me that it cannot be said that there is a breach of the Lease. There may be or there may not be a future breach of the Lease but that, as it seems to me, is not enough to engage these provisions of the Lease.

7. It was suggested that certain statements by the EMA in the course of these proceedings amounted to a repudiatory breach of the Lease which was itself capable of constituting a breach triggering the two provisions of the Lease that I have referred to. I reject that contention. It seems to me that the point about the English law doctrine of anticipatory breach is that even an unequivocal

statement that a contract will not be complied with is a thing writ in water unless and until it is accepted by the innocent party to the contract. Here, the innocent party to the contract – CW – has not, for obvious reasons, accepted what may or may not be an unequivocal statement by the EMA not to perform. I make it clear that I have made no finding one way or another as to whether there is in this case such an unequivocal statement. What is clear is that assuming an unequivocal statement by the EMA not to perform the contract, it is absolutely clear that CW have not accepted the repudiation and that the Lease remains on foot. That being the case, I reject the first ground on which indemnity costs is sought.

8. I can deal with the second and third grounds rather more quickly. The second ground is that there was an inefficient management of the disclosure process on the part of the EMA resulting in both too many and too few documents being produced by the EMA. This, in turn, resulted in considerable additional work and effort on the part of CW's solicitors, both in terms of identifying documents that should have been disclosed and were not and in reviewing documents that were in fact irrelevant.

9. Both the non-disclosure of relevant documents and the disclosure of irrelevant documents are matters which obviously should not occur in litigation before this court. Assuming, for the sake of argument, that the EMA's disclosure was unsatisfactory in the manner suggested by CW, this can in the present case best be dealt with when CW's costs are assessed. If the EMA's disclosure was unsatisfactory in the manner suggested by CW, then CW's costs will be significantly higher in relation to disclosure than perhaps they otherwise would be. This is not a case where there is a costs budget and so it seems to me that the difficulties in disclosure, to the extent that there were difficulties, are matters that should be taken into account on a detailed assessment of costs and should not result in a sanction by way of indemnity costs. It seems to me that difficulties over disclosure are not such as to take matters "out of the norm", which is the broad test for indemnity costs articulated by Tomlinson J in *Three Rivers District Council v The Governor & Company of the Bank of England* [2006] EWHC 816 (Comm).

10. The *Three Rivers* case was expressly relied upon by CW in support of the third ground for indemnity costs, which was that the EMA's case was so weak that it took matters out of the norm, such that an award of costs on the standard costs was inappropriate and that costs on the indemnity basis were indicated.

11. The broad-brush test as regards indemnity costs is framed by Tomlinson J at [25] of his *Three Rivers* judgment. I will take the relevant points of Tomlinson J's judgment as read, and I will not read them out. It does seem to me that, whilst this is in many respects a piece of litigation that is out of the norm, it cannot be said that the conduct of the EMA in pursuing or arguing its case was out of the norm. The EMA took a number of points, and I disposed of them in the manner set out in the Judgment. As is clear from the terms of my Judgment, I did not then consider and I do not consider now that the conduct of the EMA should result in any outcome on costs other than an order on the standard basis.

An issues-based costs order

12. The second matter before me for my determination relates to the nature of the costs order that I should make. It is trite that costs ordinarily follow the event. But, increasingly, these days there is debate about whether the successful party, instead of simply having an order for its costs, should have those costs cut-back in one of two related ways. The first way is by way of what is described as an "issues based" approach, whereby if the overall winning party has lost on one or more discrete issues, the court can make a costs order based upon the issues, so as to reflect more accurately or in a more nuanced way who really has won in relation to what issues. In other words, there is a costs order in favour of the winning party in respect of certain issues and a countervailing costs order going the other way in respect of the losing side's winning issues. This approach unsurprisingly causes considerable difficulties in relation to the assessment of costs. As a shortcut, what often occurs is that the issues-based order is translated into a "proportional" costs order, whereby the winning party, instead of recovering all of its costs on the standard basis, recovers a percentage of those costs. But it is important to note that the proportional costs order derives its basis from the rationale for making an issues based costs order, and should only be made where an issues-based costs order would be appropriate, but in substitution for that order.

13. The difficulty in this case is that however one parses the issues, it seems to me that the EMA has lost. There are various ways in which the issues can be parsed.

    i) One could say that there were five frustrating grounds advanced by the EMA and that the EMA lost in relation to all five.

    ii) One could say that there were two forms of frustration as found by the court in the Judgment – supervening illegality frustration and frustration of common purpose – and the EMA succeeded on neither.

    iii) One could take a scenario-based approach: various withdrawal scenarios were mapped out in the Judgment as to how the United Kingdom might, in due course, leave the European Union. But in relation to each, the EMA again lost.

    iv) One could take a thematic approach, grouping together points relating to the EMA's EU capacity, the private international law in relation to frustration, frustration by supervening illegality and frustration of common purpose. But in relation to each of these themes, the EMA also lost.

14. The fact that, however the issues are analysed, the EMA is substantially the loser does provide me with a very helpful indicator that this is not, so far as most of the issues are concerned, a case where an issues based approach is appropriate. I note the point at point (5) on p.1358 of the 2018 edition of *Civil Procedure* that the courts recognise that in any litigation, especially complex commercial litigation but including personal injury litigation, any winning party is likely to fail on one or more issues in the case. That is particularly true in a case such as this where the issues were significantly intertwined.

15. My *prima facie* view is that unless there is an issue which so starkly stands out as being separate and on which CW lost, I should not make an issues based costs order. It does seem to me, however, that the question of expert evidence is such a "stand-out" point. I accept, of course, that the question of experts went solely to the question of the foreseeability of Brexit and that that question was simply one factor that needs to be taken into account in the context of assessing whether there was a frustration of common purpose. However, it is a point that could have been taken out of play by Canary Wharf by simply admitting that Brexit was unforeseeable, which was the conclusion that I reached. That would have meant that all of the debate regarding the utility of experts – and I found their efforts very useful – and the preparation of their reports and the lawyers' time spent in analysing them would not have been spent. It does seem to me that I should reflect this particular issue in the costs order that I make.

16. I do not consider that I should reflect the other issues where it can be said that the EMA succeeded, such as the Land Registration Act 2004 point and the other points raised in argument by Mr Seitler, QC because they are, in their nature, entwined with the points on which CW won, and where it would be impossible rationally to apply an issues-based approach.

17. But the costs spent on experts is a matter that I regard as separable and I am going to take these costs into account when framing the costs order in this case. It seems to me that it was a fairly substantial exercise. I am therefore going to reduce the recoverable costs on the part of CW by some 15 per cent. After an assessment of costs on the standard basis, the amount recoverable by CW will be reduced by that percentage.

Payment on account of costs

18. Thirdly, I have before me an application for an interim payment on account of costs. I have before me CW's schedule of costs, which has a grand total of just over £2 million of costs. I take the view that that figure is the appropriate starting point for the assessment of costs, rather than the EMA's own costs. However, I do bear in mind – for broad-brush comparison purposes – that the EMA's costs were £1.2 million.

19. It seems to me that I need to make a deduction, first, to take account of the assessment process. The extent to which costs are reduced on a standard assessment varies, but I do not consider that a deduction of 50 per cent is appropriate. Normally, a recovery of somewhere between 65 and 70 per cent is applied, which would imply a deduction of 30 to 35 percent. In this case, I am going to apply a discount of 40 per cent and allow assumed recovery of 60 per cent. The reason I am deducting more than usual is because it does seem to me that quite a lot of time has been spent on the case. Just doing a quick addition of the hourly time billed by some of the lawyers, not counsel, one gets to something like 225 ten-hour days having been spent in preparing this case, which does seem to me a lot.

20. Applying a 40 per cent discount to £2 million gives £1.2 million. I then deduct £180,000 to represent the 15 per cent deduction that I have ordered to make a recovery of just over £1 million. Rounding this, I am going to order £1 million

be paid within fourteen days by the EMA by way of interim payment on account of costs.

Permission to Appeal

21. The EMA seeks permission to appeal both because an appeal would have a real prospect of success and because that case raises an important point of principle or practice.

22. I am going to grant permission to appeal in this case. I am very grateful for the indication by the EMA that it is going to behave as, indeed, one would expect it to behave, in terms of its obligations going forward, subject, of course, to a *Woolwich* statement that if the case goes differently on appeal, the rent it pays over will be the subject of a restitution claim to recover any overpaid rent. It seems to me that it is appropriate that that be embodied in the order, to make clear that any future payments are on that contingent basis so the matter is appropriately recorded both to give comfort to CW and, indeed, to give some comfort to the EMA.

23. I give permission on both grounds. First, it does seem to me that there is some other compelling reason to grant permission to appeal. This case has, as Mr de la Mare, QC has explained, significant ramifications, not simply in terms of the effect of the withdrawal of the United Kingdom from the European Union on contracts, which is one thing, but also in terms of how one approaches the question of frustration in the context of detailed and commercially sophisticated leases. It seems to me that even if it were not a case concerning the withdrawal of the United Kingdom from the European Union, this would nevertheless be a case of wide-ranging importance.

24. I also consider that an appeal would have a real prospect of success. I am not going to expand in any way on what I have said in the Judgment, which stands or falls as it is written. Of course, I bear in mind that it is orders that are appealed, and not judgments. It would be possible for the order in this case – namely that the Lease is not frustrated – to remain unchanged even if the EMA were to succeed on a number of points. This is because, as I noted in paragraph 13 above, however one parses the issues, the EMA loses.

25. That is a point I have borne in mind, but to which I attach less weight than I ordinarily would. That is because, although there were different stages in my analysis beginning with EU capacity, moving through to private international law as it applies to the law of frustration and then to the forms of frustration alleged – supervening illegality and common purpose frustration – because those points to an extent linked, I can see that were a higher court to take a different view, there might very well be an unravelling of the entire reasoning process, which I consider is, in the case of this judgment, quite interconnected.