[2023] EWHC 1490 (TCC)

HT-2020-MAN-000048

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 19 June 2023

Before:

His Honour Judge Pearce

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Between:

LEIGHTON DENNY

Claimant

- and –

(1) KAMBIZ BABAEE
(2) CONNOR CONSTRUCTION (WATFORD) LIMITED
(3) K10 DEVELOPMENTS LIMITED

Defendants

- -

JUDGMENT

This judgment was handed down remotely at 9.30 am on Monday 19 June 2023 by circulation to the parties or their representatives by email and by release to the National Archives

INTRODUCTION

1. This is my judgment on the Claimant's application for some or all of its costs of the action to be assessed on the indemnity basis; and for consideration of the Defendants' argument that the Claimant's costs should be reduced to have regard to the fact that the valuation of his claim changed during the course of the proceedings.

2. The claim arises from the purchase by the Claimant of a house at 91 Wellesley Road, Chiswick. The house, a new property, was sold by the First Defendant. The Claimant contended that there was significant defect causing dampness and affecting the property's fitness for habitation. He brought the claim against the First Defendant as vendors and developer of the property; against the Second Defendant as the building contractor who designed and built the property for and on behalf of the First Defendant; and against the Third Defendant (in the alternative) as a developer. In the event, the claim was not pursued against the Second Defendant. Since the Second Defendant therefore drops out of the picture and is of no relevance to this judgment, I use the term "Defendants" herein to mean the First and Third Defendants only.

3. The Claimant's claims against the First Defendant were in breach of contract and under the Defective Premises Act 1972; and against the Third Defendant, under the 1972 Act. The Claimant obtained default judgment against both Defendants on the claim under statute and elected not to proceed with the claim against the First Defendant in breach of contract.

4. Accordingly, when the matter came before me for trial on 18 April 2023, the only issues were as to causation and quantum. Prior to that hearing, the First Defendant sought an adjournment to give him an opportunity to obtain legal representation. I refused that application for reasons given at the time and the trial proceeded with the First and Third Defendants as Litigants in Person.

5. Following that trial, I ordered as follows:

    5.1. Judgment was entered for the Claimant against the First and Third Defendant in the sum of £549,773.90 inclusive of VAT;

5.2. The Claimant was ordered to be paid his costs of the proceedings by the First and Third Defendant and to be paid the sum of £180,000 on account of his costs of the proceedings;

5.3. No Order for Costs was made as regards the costs reserved by paragraph 10 of the Court's Order of 14th October 2022;

5.4. The sums ordered under paragraphs 1 and 2 above were required to be paid by the First and the Third Defendant and received by the Claimant's solicitor by 5pm on 3rd May 2023;

5.5. The issues of whether the Claimant is entitled to indemnity costs and whether the Claimant's costs should be reduced to have regard to the fact that the valuation of his claim changed during the course of the proceedings to be heard by me at 10.00am on 15th June 2023;

5.6. Permission was given to both parties to lodge and exchange evidence in respect of the issues identified in the previous paragraph by 5pm on 17th May 2023.

5.7. Permission to Appeal was refused.

6. I understand that, as of the time of handing down this judgment, no Appellant's Notice has been filed.

7. Though the trial had been listed for four days I heard all evidence and gave judgment within two days. Towards the conclusion of submissions on indicated that his client was seeking indemnity costs. The First Defendant, Mr Babaee, resisted that application and contended that the Claimant's costs should be reduced to reflect a change in valuation of the claim during the proceedings.

8. Given that it was late in the day and that Mr Babaee told me that the proper preparation to deal with these issues required longer than the time available if I adjourned the issue to the following day, I determined that the outstanding issues should be considered at a hearing on 15 June 2023, as recorded above. I directed the filing of evidence at paragraph 5.6 above. There was no direction for the provision of skeleton arguments, but had any party wish to rely upon

one, service would have been required in accordance with paragraph 6.5.5 of the Technology and Construction Court Guide by 4pm on 13 June 2023.

9. The Claimant filed written submissions in accordance with my directions but the Defendants failed to do so. Further, they did not file a skeleton argument. It therefore appeared that they were not intending to engage in the process. That lack of engagement is of a piece with the earlier conduct of the Defendants in this litigation as noted below.

10. The Claimant sought an order vacated the hearing on 15 June 2023 on the basis that the issues could be determined on paper. I acceded to this application and hence deliver this judgment on the basis of the written submissions are to be filed.

11. It is convenient to deal with the Defendants argument Claimant's costs should be reduced to reflect the change in its valuation the claim first, since, if there is any merit in this argument, it might bear on the application for indemnity costs sought by the Claimant.

THE RELEVANT LAW

12. The Court has a very broad discretion in respect of costs. The Civil Procedure Rule provide:

> "***44.2— Court's discretion as to costs***
> *(1) The court has discretion as to—*
> *(a) whether costs are payable by one party to another;*
> *(b) the amount of those costs; and*
> *(c) when they are to be paid.*
> *(2) If the court decides to make an order about costs—*
> *(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but*
> *(b) the court may make a different order.*
> *...*
> *(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—*
> *(a) the conduct of all the parties;*
> *(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and*
> *(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.*

(5) The conduct of the parties includes—
(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction—Pre-Action Conduct or any relevant pre-action protocol;
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.
(6) The orders which the court may make under this rule include an order that a party must pay—
(a) a proportion of another party's costs;
(b) a stated amount in respect of another party's costs;
(c) costs from or until a certain date only;
(d) costs incurred before proceedings have begun;
(e) costs relating to particular steps taken in the proceedings;
(f) costs relating only to a distinct part of the proceedings; and
(g) interest on costs from or until a certain date, including a date before judgment.
(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead."

13. The Defendant's oral argument at the end of the trial that the Claimant's costs should be reduced to reflect the fact that the claim was originally based on a valuation that was subsequently significantly reduced suggest an argument based on exaggeration of the claim (a specific factor referred to at CPR 44.23(d). In Widlake v BAA Ltd [2009] EWCA Civ 1256, the Court of Appeal considered exaggeration in the context of a personal injury claim setting out certain general principles that are likely to be of relevance when the court is considering such an argument. As the authors of the White Book put it at paragraph 44.2.23:

"The Court explained that

(1) the manner in which the court is to "have regard" to conduct of the variety referred to in paras (b) and (d) of r.44.2(5) is principally to enquire into its causative effect, in particular, to the extent to which the conduct caused the incurring or wasting of costs;

(2) in determining such effect there may be no need for the court to determine which party was the "winner" on a particular point falling for decision by the trial judge;

(3) where the causative effect of an exaggerated claim by a successful party is to put the other party to the incurring or wasting of costs, some compensation to that other party should be granted; and

(4) in addition, where the court finds that the misconduct was so egregious that a penalty should be imposed, it may deprive the offending party of costs by way of punitive sanction. In the instant case there was, as the judge found, gross exaggeration by the successful claimant, and that was conduct to be taken into account in disapplying the general rule as to entitlement to costs."

14. The court will of course assess costs on the standard or the indemnity basis (CPR44.3). The Claimant argues that Defendant's conduct in this litigation justifies an order for assessment on the indemnity basis. In Excelsior Commercial and Industrial Holdings Ltd [2002] EWCA Civ 879 the Court of Appeal considered earlier authorities on the question of indemnity costs. The Court declined to give detailed guidance as to the principles to be applied, taking the view that they should not replace the language of the rules with other phrases and that the matter should be left so far as possible to the discretion of judges at first instance. The Court held that the making of a costs order on the indemnity basis would be appropriate in circumstances where the conduct of the parties or other particular circumstances of the case (or both) was such as to take the situation "out of the norm" in a way which justifies an order for indemnity costs. There are many examples, in particular at first instance, of the courts considering whether indemnity costs are suitable in a particular case. It is unhelpful to cite large number of cases own what is very much an issue to be judged on the particular facts of the case.

15. It is however helpful to note paragraph 4.3.9 of the White Book on the exercise of this discretion:

"*The weakness of a legal argument is not, without more, justification for an order for costs to be assessed on the indemnity basis. The position might be*

different if proceedings or steps taken within them are not only based on a plainly hopeless case but are motivated by some ulterior commercial or personal purpose or otherwise for purely tactical reasons unconnected with any real belief in their merit (*Arcadia Group Brands Ltd v Visa Inc [2015] EWCA Civ 883; [2015] Bus. L.R. 1362, CA, per Sir Terence Etherton C, at [83]). Such an order should not be made simply because the paying party has been found to be wrong or his evidence has been rejected in preference to that of the receiving party."*

THE DEFENDANTS' ARGUMENT FOR A REDUCTION OF COSTS BASED ON THE CHANGE IN VALUE OF THE CLAIM

16. The parties each relied on expert evidence. The Claimant's initial expert evidence came from a surveyor, Mr Guy Freeman. In his first report, he valued the cost of repairs and reinstatement of the hose based on his scheme of proposed works at £474,148 including VAT (see paragraph 5.38 of his first report). In his second report, he revised his opinion of the necessary works and revised the cost upwards to £721,557.58 plus VAT (see paragraph 6.3 of his second report).

17. In the event, the Claimant relied on the report of a quantity surveyor, Mr Bhudia, who valued the cost of the necessary works at £484,479 including VAT. For reasons given in my judgment at trial, this figure formed the basis of my award of damages.

18. The Defendant advanced the argument at the end of trial that the initial overstatement of the value of the case reflecting Mr Freeman's costings should cause the court to disallow some of the Claimant's costs.

19. Since the Defendant has not filed evidence or submissions on this issue, it is not entirely clear what the basis of its argument is. Most obviously it would be one or both of:

    19.1. An argument that the Claimant should be penalised for relying earlier in the case on the higher figures of Mr Freeman when in the event they were not relied on at trial;

19.2. An argument that additional costs were incurred because the Claimant initially put its case on exaggerated figures.

20. I do not consider that, in the absence of submissions for the Defendant, I have proper grounds to accede to either argument:

20.1. As to the court taking the line of penalising the Claimant's conduct, it would be necessary to consider how egregious the conduct was, for example whether the overstatement of the valuation was deliberate or reckless conduct and whether the overstatement flowed from any misconduct of the Claimant himself. I simply do not have the material to judge that. In the absence of such material, the Defendants do not demonstrate a ground for punishing the Claimant. After all, it has to be recognised that, in relatively complex litigation, it is likely to be the case that parties win on some issues and not others, or that they win in whole on some and only in part on others..

20.2. Whilst the Defendant might have been able to argue that he has incurred avoidable costs because of the exaggerated value put on this aspect of the claim (for example through the costs of their Quantity Surveyor, Mr Bird, considering this aspect of the case), the Defendant has not come before the court with material that shows this is in fact the case. It is not self-evidently true that any significant increased costs have been incurred because of the Claimant's reliance on Mr Freeman's evidence on quantum and there is simply no material from which the court could judge the amount of any increased cost.

20.3. IN any event (and on either point), without a coherent argument advanced on behalf of the Defendant, it is not possible for the Claimant to know the case he has to meet and to respond to it.

21. In those circumstances, it is not appropriate to make the order that the Defendant has previously sought. However, in my judgment, the reliance on the evidence of Mr Freeman is capable of being a factor relevant to the Claimant's application for indemnity costs and I consider it further below.

THE CLAIMANT'S ARGUMENT FOR INDEMNITY COSTS

22. The Claimant's argument has two limbs:

    22.1. That the Defendant has been uncooperative in the litigation, failing to engage and/or to deal with the case in a realistic manner, thereby incurring additional costs;

    22.2. That the Defendants engaged in mediation and came to an agreement in principle but then failed to see that settlement agreement to completion.

23. On the first issue, my attention is drawn to:

    23.1. The failure to respond to pre-action correspondence;

    23.2. The failure to engage with the proceedings early on such that summary judgement was entered;

    23.3. The failure to identify the weaknesses of their own case and the corresponding strength of the Claimant's expert evidence, leading to the failure to realise the true value of the case;

    23.4. The failure to meet costs order that have been made on an interlocutory basis until enforcement was threatened.

24. Whilst all of these may be legitimate criticisms of the Defendant, I am not satisfied that taken individually or indeed together, they justify the making of an indemnity costs order. The Defendants' position on quantum, though weak, was only rendered hopeless by the failure to call the experts whose evidence it has served. There were reasons for that which were not sufficiently weighty to persuade me to adjourn the case. Nevertheless, the Defendant considered himself in a position where he could not call his expert witnesses, and it was that, rather than a failure to appreciate the weakness of his case which made his defence of the Claimant's case on quantum unsustainable.

25. Moreover, the lack of cooperation on his part and (for example) the failure to engage with proceedings such that judgment was entered, are, like the change in value of the Claimant's case, features of the rough and tumble of litigation. The Defendants were penalised for this by having costs orders made against them. I

do not see that this conduct merits the further penalty of those costs being assessed on the indemnity basis.

26. I turn to the second potential ground for an indemnity costs order. The parties engaged in mediation in November 2022. They entered into a settlement agreement dated 29 November 2022 signed by the Claimant and the First Defendant. It was not possible to reach a binding agreement for the sale of the land because of the provisions of section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989, but the settlement agreement provided in essence for the house to be subject to independent valuation followed by the purchase by either the First or the Third Defendant (or their nominee) at the valuation price. In addition the Third Defendant was to pay the Claimant the sum of £200,000 by way of damages. The Claimant contends that, notwithstanding the obtaining of a joint valuation in accordance with the agreement on 6 December 2022, which valued the house at £1.3 million, the Defendants did not fulfil their side of the bargain by purchasing the house.

27. The Claimant evidences the making of the agreement by production of the deed It does not produce the valuation or give evidence by way of witness statement to verify that it was obtained, though in fact Mr Babaee accepted this a valuation had been obtained.

28. His explanation for not completing the purchase was that he had wanted to obtain his own valuation in order to raise funds to buy the house. The difficulty with this explanation for his conduct was that the agreement is clear on its terms. The Defendants had contracted to buy the house at the figure in the independent joint valuation without reservation. If he had wished to reserve the right to obtain his own valuation, he should not have agreed to these terms. Had he not agreed to these terms, time and cost would not have been wasted on the assumption that he would comply with them.

29. In my judgment, this is ample grounds to conclude that, at least in respect of costs incurred after the Defendants reneged on the agreement, an order for indemnity costs should be made. This would penalise the Defendants for agreeing terms then not carrying them out, conduct which I well outside of the

norm and sufficient to justify the censure of the court. There is no evidence of the additional costs incurred because of the Defendants' change of stance on this issue but the purpose of the order is to mark disapproval of conduct that its likely to incur unnecessary costs rather than compensating the party who ahs actually incurred those costs.

30. It may be that the brief submission made by the First Defendant at the hearing in May did not fully do justice to the argument that he sought to advance on why he did not complete the purchase. If this is so, he is the cause of his own misfortune through failing to engage with the costs issue. If Mr Babaee had wished to address the court or to adduce evidence on this issue, he could have done so. In fact he has declined to engage.

31. Since the purchase of the property by the Defendants would have taken some little time from receipt of the valuation in any event, it is appropriate to order indemnity costs from 1 January 2023; to order them from an earlier date would threaten giving a Claimant a windfall as to costs such that he would be better off than would have ben the case had the Defendants performed their side of the bargain.

CONCLUSION

32. Accordingly I conclude that:

    32.1. The Defendants should pay the Claimant's costs on the standard basis up to and including 31 December 2022.

    32.2. The Defendants should pay the Claimant's costs on the indemnity basis from 1 January 2023.