Neutral Citation Number: [2021] EWHC 314 (Ch)

Case No: PT-2019-000099

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 17 February 2021

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

CRITERION BUILDINGS LTD	**Claimant**
- and -	
(1) MCKINSEY & COMPANY INC (UNITED KINGDOM)	**Defendants**
(2) MCKINSEY & COMPANY INC	

- -
- -

Nicholas Trompeter and Alice Hawker (instructed by **Simkins LLP**) for the **Claimant**
Stephen Jourdan QC and Philip Sissons (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendants**

Consideration on paper

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 2 pm.

HHJ Paul Matthews :

Introduction

1. On 11 February 2021 I handed down judgment in this matter. I had earlier directed that submissions on consequential matters should be made in writing. I duly received such (initial) submissions on Thursday, 11 February 2021 and (in reply) on Friday, 12 February 2021. Three matters were argued. It was accepted by the defendants that in principle they should pay the costs of the claimant. Moreover, there was agreement between the parties as to the appropriate sum to order on account of such costs. What was not agreed was the *basis* of assessment. The second matter related to permission to appeal, and the third was the question of an extension of time for lodging an appellants' notice. I deal with all of these matters here.

Basis of assessment of costs

2. The costs rules are well known. So far as relevant, CPR rules 44.2, 44.3 and 44.5 provide:

> "44.2(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.

[…]

44.3(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –
(a) on the standard basis; or
(b) on the indemnity basis,
but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(Rule 44.5 sets out how the court decides the amount of costs payable under a contract.)

(2) Where the amount of costs is to be assessed on the standard basis, the court will –

(a) only 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; and

(b) 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.

(Factors which the court may take into account are set out in rule 44.4.)

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

[…]

44.5 (1) Subject to paragraphs (2) and (3), where the court assesses (whether by summary or detailed assessment) costs which are payable by the paying party to the receiving party under the terms of a contract, the

> costs payable under those terms are, unless the contract expressly provides otherwise, to be presumed to be costs which –
>
> (a) have been reasonably incurred; and
>
> (b) are reasonable in amount,
>
> and the court will assess them accordingly.
>
> (2) The presumptions in paragraph (1) are rebuttable. Practice Direction 44 – General rules about costs sets out circumstances where the court may order otherwise.
>
> […]"

3. In relation to the question of the basis of assessment of costs, the claimant relied firstly on contractual provisions in the various lease documents, but secondly on the conduct of the defendants, which they said took the matter out of the norm for the purposes of the indemnity costs basis. The defendants denied both that there was any contract to pay indemnity costs, and that there was any other basis upon which indemnity costs could be ordered.

The contractual basis

4. The claimant referred me to clause 3.22 of the underlease, clause 5.2 of the supplemental lease and clause 3.22 of the further lease, to show that the first defendant had covenanted to pay all the lawyers' costs of proceedings to recover arrears of service charge. Those clauses indeed contain covenants to pay such costs and expenses, including solicitors' costs. But they use slightly different terminology. In relation to the underlease and the further lease, the reference is to expenses "properly incurred" by the landlord. In relation to the supplemental lease, there is no limitation to expenses "properly" incurred. Instead, the covenant is to pay "all costs, charges and expenses which the Landlord may from time to time incur …" But the supplemental lease was for a term of only a little more than six months, so the amount of sums claimed in these proceedings attributable to that lease will be modest.

5. The claimant relies on the decision of the Court of Appeal in *Macleish v Littlestone* [2016] 1 WLR 3289, where a decision as to the assessment of costs on the standard basis was in issue. Briggs LJ (with whom Black and Gloster LJJ agreed) said:

> "38. … It is well settled that when exercising discretion as to the basis of assessment of costs under the CPR, the court should normally do so in a way which corresponds with any contractual entitlement agreed between the parties: see *Gomba Holdings (UK) Ltd and Others v Minories Finance Ltd and Others (No 2)* [1993] Ch.171 at 190-1 and 194-5. In that case, the relevant contractual basis was set out in a mortgage deed between the parties, and was better reflected in an indemnity rather than standard basis of assessment. But the contractual basis may equally appear from a lease between the parties, as in the present case.

> […]
>
> 40. Clause 2.12 of the Lease provides, so far as is relevant, the following covenant by the defendants as Lessees:
>
> > 'To pay to the Lessor all costs and expenses (including legal costs and fees payable to a surveyor) which may be incurred by the Lessor
> > 2.12.1 in or in contemplation of any proceedings under Sections 146 and 147 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court or
> > 2.12.2 the recovery or attempted recovery of arrears of rent or other sums due from the Lessee or
> > …'
>
> 41. In my judgment, although that phraseology does not refer expressly to an indemnity, it corresponds more closely with assessment upon the indemnity basis than upon the standard basis. This is because of the obligation on the lessee to pay '*all* costs and expenses …. which may be incurred'. The principal difference between the standard basis and the indemnity basis is that, on the standard basis, costs are recoverable only if proportionately incurred and proportionate in amount, whereas the indemnity basis is not concerned with proportionality and nor is the contract.
>
> 42. The contract is silent as to the reasonableness of the costs and expenses which are to be paid but I do not think this adds to or detracts from this analysis. By virtue of CPR 44.3(1), costs will not be allowed if they were unreasonably incurred or unreasonable in amount, whether the court is assessing them on the standard or the indemnity basis. Where the court assesses costs which are payable by the paying party to the receiving party under the terms of a contract, CPR 44.5(1) provides, subject to certain exceptions, that the costs payable under those terms are, unless the contract expressly provides otherwise, to be presumed to be costs which have been reasonably incurred, and which are reasonable in amount."

6. This decision was followed in *Alafco Irish Aircraft Leasing Sixteen Ltd v Hong Kong Airlines Ltd* [2019] EWHC 3668 (Comm) by Moulder J, where the covenant required the lessee to pay to the lessor on demand "all reasonable costs and expenses (including reasonable legal expenses) incurred by the Lessor…" The judge said that "the presence of the word 'reasonable' in the relevant clause does not preclude a conclusion that costs should be ordered on the indemnity basis".

7. The defendants resist this approach, arguing that the wording in this case is indistinguishable from that considered in the decision of HHJ Esyr Lewis QC in *Primeridge Ltd v Jean Muir Ltd* [1992] EGLR 273. In that case the tenant's covenant included the words "to pay the landlord all proper costs charges and expenses are as… incurred by the landlord … in connection with … the recovery of arrears of rent due from the tenant." The judge held that costs should be awarded on the standard basis, because of the presence of the adjective 'proper' in relation to costs.

8. The defendants say the present case that the words "properly incurred" in the covenants for the underlease and the further lease effectively mean the same thing as the "proper costs" in the *Primeridge* case.

9. I do not accept that the decision of the Official Referee in *Primeridge* nearly 30 years ago should govern the decision in this case. First of all, that decision was made on the basis of the procedural rules then in force, namely the Rules of the Supreme Court 1965, as amended. The present case is governed by the Civil Procedure Rules 1998, as amended. This is a new procedural code. The terms of the functionally equivalent rules are not the same, and nor is the context in which those rules exist and are applied. The need for a sanction to discourage unnecessary litigation is greater than ever today.

10. Secondly, the phrase "proper costs" is not the same as "costs properly incurred". Something may be a "proper cost", in the sense that it would be appropriate in *some* circumstances to incur it, and yet not "properly incurred", in the sense that the circumstances pertaining were not such as to make it appropriate to incur it.

11. Thirdly, and with all respect to HHJ Esyr Lewis QC, I do not understand why the existence of the word 'proper' should make all the difference anyway. No *improper* cost can have been *reasonably* incurred, and yet the assessment of costs on the indemnity basis is restricted to costs which have been not unreasonably incurred. So the contract here is consistent with an indemnity costs award. In *Macleish v Littlestone* Briggs LJ considered that the absence of a statement as to the reasonableness of costs made no difference. In *Alafco Irish Aircraft Leasing Sixteen Ltd v Hong Kong Airlines Ltd*, Moulder J agreed, saying that adding 'reasonable' to costs did not preclude an indemnity costs award. I take the same view about 'proper'. The thing which *did* matter to Briggs LJ was proportionality, because that was and is the main difference between standard and indemnity basis costs. But, just as in that case, in the present lease there is nothing restricting costs to what is proportionate.

12. Accordingly, I regret to say that I consider that the decision in *Primeridge Ltd v Jean Muir Ltd* was wrong, and I decline to follow it. In my judgment, the terms of this lease are such that an award on the indemnity basis would best reflect the contract between the parties. That is not conclusive, but I see nothing here to justify a departure from that contract. I will therefore order indemnity costs.

Non-contractual basis

13. However, in case I am wrong, I will go on to consider the matter on the basis that *Primeridge Ltd v Jean Muir Ltd* should be applied so as to preclude an indemnity costs award based merely on the contract. Nevertheless, the fact remains that there is a contract between the parties that certain costs will be paid by the tenant to the landlord. It is a factor to be taken into account in considering whether, in the exercise of the court's discretion, there should be an order for costs on the indemnity basis. In so considering, I am invited to take into account the conduct of the defendants. Indeed, under CPR rule 44.3(4) the court must take into account (inter alia) the parties' conduct and any admissible offer to settle the proceedings.

14. The conduct of the defendants is said to include conduct which takes the case out of the norm. It includes an unrealistic perception of the strength of the defendants' defence to the claim, the pursuit of the External Works issue up to the morning of the first day of trial, when it was abandoned, the abandonment at trial of the Fire Lifts issue and the Miscellaneous Items issue, and the alleged weaknesses of the defendants' case on the four issues on which they fought and lost. In addition, there was a time-limited Part 36 offer which the defendants did not accept.

15. In relation to the four issues that went to trial and on which the defendants lost, I accept first of all that the defendants did not even raise a prima facie case to justify the allegation that the claimant's apportionment was unfair. I also accept that the defendant never sought to adduce any expert evidence in relation to the sinking fund issue, and raised two new arguments had not been put before. Thirdly I accept that there was no basis on the pleadings for the defendant to oppose the claimant's Goods Lifts contractual claim. Lastly, I accept that none of the invoices tendered qualified for reimbursement, and that this must have been obvious to everyone.

16. In my judgment the weaknesses of the defendants' case do not in themselves justify an award of indemnity costs, because by themselves they do not take the case out of the norm. It is trite that defendants defend cases and sometimes lose. That is the nature of litigation. It cannot be right to order losing defendants to pay indemnity costs merely because they have lost, even when they lose badly.

17. On the other hand, I do accept that the conduct of the defendants' case, in raising points but not producing expert evidence to support them, and raising arguments that had not been put before, and not pleading opposition to the Goods Lifts issue demonstrated failings in the conduct of the litigation. By themselves, however, they too, whilst regrettably common today, would not be enough to justify indemnity costs. But, taken together with weaknesses discussed above, the time limited settlement offer which was not accepted, and the contractual point discussed earlier, I am of the view that, in the exercise of the court's discretion, if I had not already decided to do so, it would overall have been appropriate here to order indemnity costs against the defendants.

Permission to appeal

18. I turn to consider the question of permission to appeal. The defendants apply for permission on five grounds, dealing with two only of the four issues decided at trial. These are the apportionment issue (Grounds 1 and 2) and the sinking fund issue (Grounds 3, 4 and 5). The five grounds are:

> 1. The court "was wrong to conclude that what is a 'fair proportion' for the purposes of paragraph 2 of Section 1, Part IV of the Schedule to the Lease is a wholly subjective question for determination by the landlord as opposed to imposing an objective standard of fairness".
>
> 2. It "was wrong to conclude … that the Defendants have failed to raise a prima facie case that, applying this objective standard, the decision as to apportionment was unfair".

> 3. It "was wrong to conclude … that the landlord was entitled to make demands to operate the sinking/reserve fund provisions in respect of expenditure which it intended to incur in the same service charge year as the demands are made".
>
> 4. It "was wrong to conclude … that the claimant only demanded contributions to sinking/reserve funds under paragraph 6 in respect of expenditure to be incurred in subsequent years".
>
> 5. It "was wrong to conclude … that the 'landlord' protection' provision at paragraph 8.3 of section 1 of Part IV of the Schedule prevented the Defendant from challenging the operation of the service charge/sinking fund unless it could be shown that the Claimant's decision were unreasonable or involved a manifest error".

19. Under CPR rule 52.6, the court (whether the lower or the appellate) may not grant permission for a first appeal unless *either* there is a real prospect of a successful appeal *or* there is some other compelling reason why an appeal should be heard. The phrase 'real prospect' does not require a *probability* of success, but merely means that the prospect of success is 'not unreal': *Tanfern v Cameron-MacDonald* [2001] 1 WLR 1311, [21], CA; *R (A Child)* [2019] EWCA Civ 895, [29]-[31]. If the application passes that threshold test, however, the court is not *obliged* to give permission to appeal; instead it has a *discretion* to exercise. I will deal with each ground in turn.

20. As to Ground 1, this does not state the relevant part of the decision correctly. Paragraph [45] of the judgment says (in part): "the decision given in the present case to the landlord is subjective rather than objective, albeit subject to rationality and (in a case where it is pleaded) the *Braganza* implied term". And paragraph [39] says (in part): "the question of what is a 'fair' proportion is to be determined by the landlord, *taking into account* use made and benefit received by the tenant concerned. It is not for the court to determine it" (emphasis supplied). Moreover, it does not arise for decision unless Ground 2 succeeds.

21. As to Ground 2, the defendants do not challenge the law as stated in paragraph [34], nor the facts found in paragraph [38]. They instead rely on two factors to show objective unfairness: (i) the nature of the space occupied by the theatre not being a valid reason for reducing its share of service charges, and (ii) the absence of an explanation for the reduction based on measurements of the floor areas. Neither was pleaded, and there was no evidence led to establish them. The reliance on the answer from Mr Chapman in cross-examination on Day 2 at page 33 lines 20-22 is misplaced, as he was dealing with a different point. In these circumstances, Ground 2 is bound to fail. Therefore, so is Ground 1.

22. Ground 3 does not arise on the facts found, and cannot succeed unless Ground 4 (challenging the relevant factfinding) is made out. But, even on its own terms, Ground 3 is unreal. There is nothing in the wording to show that the sinking/reserve funds provisions in this lease cannot apply to intended expenditure in the same year as the

demand. Within public policy limits, the parties can contract what they like. The defendants' argument requires words to be written in which are not there and for the implication of which there is no justification advanced.

23. Ground 4 is a challenge to factfinding. But a finding of fact is a matter for the appreciation of the judge in taking account of all the evidence tendered. An appellate court will not interfere unless it is satisfied that the finding of the court below was plainly wrong: *McGraddie v McGraddie* [2013] 1 WLR 2477, SC. And it makes no difference whether the evidence tendered was oral or written, or whether it involved an element of evaluation or appreciation: *R(Z) v Hackney LBC* [2020] 1 WLR 4327, [56], SC. Where there is evidence before the court entitling the judge to conclude as found, it is irrelevant whether another judge (including one in the appellate court) would reach the same conclusion. There is no real prospect of success on this ground. Even if there were, it would not arise unless the defendants were to succeed on Ground 5.

24. Ground 5 complains that, where the landlord fails to operate the contractual machinery in the lease, there can be no entitlement to recover sums demanded, and hence the protection clause has no effect. But the protection clause is *part* of the contractual machinery, and does not stand outside it. In any event, it is not realistic to suppose that the clause was intended to protect the landlord in relation to *estimates of amount* of service charge but not in relation to whether there should be one in the first place. The limits on the protection clause (unreasonableness and manifest error) are apt to protect the tenant against unjustified resort to the clause in either case.

25. In my judgment, none of the Grounds put forward reaches the threshold in CPR rule 52.6, and I must therefore refuse permission to appeal.

Extension of time

26. Finally, the defendants seek an extension of time of seven days in which to lodge an appellants' notice with the Court of Appeal. I agree with the claimant that by 4 March 2021 the defendants will have had the draft judgment for a month, and that professional engagements of leading counsel are not normally a good reason for an extension. But the defendants have expressed an understandable wish for their leading counsel to have input into any appellants' notice, and the extension sought is not long. Importantly, it will not cause any real delay in the prosecution of any appeal. I will therefore extend time to 11 March 2021.

Conclusions

27. I award costs on the indemnity basis and refuse permission to appeal. I extend time for lodging an appellants' notice to 11 March 2021. I ask counsel please to lodge an agreed minute of order for my approval.