IN THE HIGH COURT OF JUSTICE
TECHNOLOGY AND CONSTRUCTION COURT
QUEEN'S BENCH DIVISION
2010 EWHC 3233 (TCC)

HT-10-160.

Royal Courts of Justice,
Strand,
London WC2A 2LL.

Friday, 19th November 2010.

Before:

HIS HONOUR JUDGE WILCOX

MRS FRANCESCA FRANK
MR RICHARD FRANK — Applicants

- v -

CHLORELLE CONSTRUCTION LTD *(in liquidation)* — Respondents

MISS R JACKSON QC *(instructed by GSC Solicitors LLP, 31-32 Ely Place, London EC1N 6TD)* appeared on behalf of the Applicants.

MISS J LEMON *(instructed by Colman Coyle, Wells House, 80 Upper Street, Islington, London N1 ONU)* appeared on behalf of the Respondents.

MR HARRISON *(instructed by Wilkins Beaumont Suckling, 150 Minories, London EC3N 1LS)* appeared on behalf of the Respondent Architects.

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JUDGMENT
(As Approved)

Friday, 19th November 2010.

JUDGMENT:

JUDGE WILCOX:

01 My starting point in relation to this application is to stand back and look at the litigation and the size of what is hoped to be recovered by the parties, then to look at the present costs and then to look at proportionality. What troubles me in this case when I come to consider the costs to date, should the matter proceed to trial, and the money to be recovered, that the outlay starts to look grossly disproportionate. Secondly, I have looked at this matter in the round and I look to the risks that are posed to each of the parties in costs now and should this matter proceed to an expensive hearing at some time in the future. It is the risks of both parties and the burden to both parties that I must look and I must consider. Chlorelle has brought an action. There has been a great deal of dispute as to the description of their approach to this, whether it is *bona fide* or not, whether it is a specious claim, it is clearly a claim that is warranted, according to those that started the action. It is not a claim that can be described as a sham – that is really not an issue in this case and I dismiss such a suggestion. But nonetheless it is a claim that must be seen against the backdrop of the costs situation in this case and the ultimate outcome when the final judgment be given if we get to that stage.

02 The second matter that I consider here is this. Chlorelle have gone into voluntary liquidation. I have a list before me of many creditors ranging from modest amounts and many which are for substantial amounts, and I would call a substantial amount anything above £10,000 – £10,000, £20,000, £30,000 – the list is littered with details of such creditors. The liquidator represents the creditors. He is not some official removed from reality having a special position of his own; he owes his position to the creditors. He is representing the creditors' interests here. I am told by the liquidator that he has taken steps to raise money for disbursements – £50,000 odd – that there is a CFA in place, and there is now an insurance policy – an 'After the Event' policy – that is proposed. A CFA arrangement now puts a Claimant in a very advantageous position when it comes to litigation. It puts the Defendants in a disadvantageous position in litigation should they not succeed. I must bear that in account.

03 I am told that if I were to consider any security for costs in this case then it would have the effect of oppressively stifling this litigation and preventing Chlorelle from pursuing a just and proper claim. I must examine that with care. I examine it with care against the background of the two helpful decisions that have been cited before me in relation to this matter **Trident International Freight Services v Manchester Ship Canal Co and another**, a decision of the Court of Appeal of 27th July 1989, and also the helpful decision of the Court of Appeal in **Spy Academy Ltd and Sakar International** [2009] EWCA Civ 985. These are cases of course which turn essentially on their own facts but do have helpful statements of principle that will give some guidance as to the ingredient of this application that is important, namely, would an order for security for costs oppressively stifle this litigation? My attention was drawn to para. 19 in **Spy Academy** in the judgment of Lord Justice Tuckey.

"Mr Price has produced the documents with a skeleton argument and Mr Quirk has analysed those documents with skill, making the point that many of them do not show what the state of affairs is at the present time and go back as long ago as 2007. Mr Price points out it is difficult for a party in his position to prove a negative. Having listened carefully to Mr Quirk's arguments on this aspect of the case, I am not persuaded there is any realistic chance of the Claimant being able to raise money to provide security personally. I appreciate the cases show that the onus is on him to show that he cannot, but looking at the totality of the material which is now before us I think he has satisfied that onus. It follows that any worthwhile order in favour of the Defendant would have the effect of stifling the Claimants' claim. This factor is not determinative of the matter but obviously points strongly against making an order for security."

04 But of course that is not the only consideration. I remind myself what is said at para. 14 of the judgment:

> *'The authorities establish that the factors to be taken into account when exercising the discretion include whether the claim is bona fide and not a sham; whether the Claimant has a reasonably good prospect of success; whether the application for security was being used oppressively so as to stifle a genuine claim; whether the Claimants want of means has been brought about by any conduct by the Defendant; whether the application for security is made at a late stage of the proceedings.'*

Here is a passage, in my judgment, which is significant and particularly relevant so far as this case is concerned:

> *'It must obviously also take into account the prejudice to a Defendant who, if successful, will be faced with the prospect of recovering nothing unless security for costs has previously been ordered.'*

The balancing exercise is an exercise that must relate to the prejudice not only prospectively to a Claimant against whom security is sought but so far as the Defendant who seeks security to protect his or her position also. It is of particular materiality in this case because the Defendants face a CFA. There is a ATE insurance policy proposed – an After the Event policy, about which more I will say later – but at the end of the day I must consider the whole of this matter against the proportionate terms of costs and prospective gain in this litigation.

05 I am not persuaded that the onus of showing that more money cannot be raised has been discharged by the Claimants. In fact, there is a list which is considerable of interested parties and they are the real litigants who stand in the shoes of Chlorelle now and stand to gain. There is, I am satisfied, at present evidence of an unwillingness to put their hands in their pocket but there is no evidence before me of an inability to raise money essentially to protect their own interest. They are the gainers if they do. So this is not a case, it strikes me, where this litigation is being stifled or would be stifled if security or a security for costs order in addition to the ATE were ordered by this court. If the litigation did not proceed, it would proceed in consequence of the unwillingness of the parties who seek to be protected, i.e. the creditors, to put their hands in their pockets and

given the number of them that would be a comparatively modest exercise for each of them to protect their own position. There is no question in my view of stifling here.

06 There is a risk of disadvantage of a gross nature in costs so far as the Defendants are concerned. They have already voluntarily funded and provided the expert evidence in their case in relation to the counterclaim; they have expended a great deal of actual money already in pursuit of defending the claim and pursuing the counterclaim. They make it very clear to me if I were to order security for costs and the Claimants did not pursue the action they would in fact drop the counterclaim. They would drop the counterclaim, one draws the common sense inference that they would not throw good money after bad.

07 So far as the strength of the action is concerned as to the respective merits, this court is not invited to weigh up the merits. It is not in a position to. Suffice it to say on the face of it this is not a sham or spurious claim; neither is it a sham or spurious Defence and Counterclaim. I have come to the conclusion here that the only security that is offered is the insurance policy and it is that at which I must look. It is a document that is appallingly drafted; it is a document that emanates from insurers who have been less than candid with the court. I am surprised to see the redactions that were in the documents and the endorsements made in July 2010, and that those endorsements were not provided to this court and the parties until 11:58 today. I ask myself this; how on earth can any party faced with that sort of document be in a position to say 'Well, what are we in for? What is the cover that is being proposed for us? What risks do we in fact face?' There are certain specific criticisms made of the document that I think are of importance that weigh with me. It is right that I should make some mention of them. When it comes to pre-inception expenses and costs, the position is very much less than clear. An argument was addressed to me by Miss Lemon – it was a helpful argument – but the document on its construction was not clear about pre-inception costs as opposed to expenses. There is an argument that she mounted and I give her all due credit for her ingenuity for putting it before me. But this is not a question of ingenuity; this is a question of clarity, so that the defendant knows where they stand, what they are in for, what sort of offers they can afford to make and what offers they should make. They should be placed in a position to assess clearly the cover that they may get should this litigation proceed in relation to expenses, costs and the like. I was very much less than impressed with what constitutes success – partial success, lack of success. Costs and expenses and money to be recovered were mixed up in various parts of the insurance contract, and when one comes to consider what constitutes success it is with difficulty that one arrives at a firm conclusion. It strikes me that the submissions made on behalf of the Defendants by Miss Rosemary Jackson where she closely analysed the document in a way that I am not going to recapitulate at the moment but which I adopt because it shows how in a very careful construction or attempted construction, clarity is not possible. Miss Lemon is, as always, realistic and candid. Such security as possibly may be afforded by this After the Event insurance is something frankly that is not as good as money in the bank or as good as any guarantee. I am not in the position sensibly to weigh up what the real advantage of this strange contract is today. If I am not, what about the Defendants and their legal advisers when they are assessing their position and their risk, and their duty under the Civil Procedure Rules to consider settlement? How possibly do they realistically consider settlement in such a situation?

08 I have come to the reluctant conclusion here that there must be some security for costs and I am going to order security for costs. It will not be in the sum of £200,000 as is sought. I am going to pitch it at a lower stage so that that valiant body of creditors who seek to be protected are in a sensible position, should they wish to, to put their hands in their pocket and contribute towards the fund that will support their action, the action adopted by the liquidator on their behalf. I put that sum at £100,000. This is an action that has either to die a natural death or to have a swift trial. It has been going on for far too long. It will be stayed for 12 weeks and if the money is not paid within 12 weeks the action do stand dismissed. That will give the creditors time to consult, to look at their accounts that are yielding precious little at the moment and see whether they want to utilise it towards an investment to their future. I so order.
