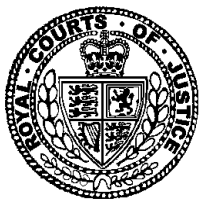

Neutral Citation Number: [2020] EWHC 3417 (TCC)

Case No: HT-2019-000191

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Rolls Building
Fetter Lane, London EC4A 1NL

Date: 17 December 2020

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- -

Between :

R.G. CARTER PROJECTS LIMITED

Claimant

- and -

CUA PROPERTY LIMITED

Defendant

- -

Steven Walker QC and **Peter Land** (instructed by **Kennedys Law LLP**) for the **Claimant**
Anneliese Day QC and **George Woods** (instructed by **Costigan King**) for the **Defendant**

Hearing date: 14 December 2020

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

- -

THE HONOURABLE MR JUSTICE PEPPERALL:

1. This judgment concerns the proper approach to costs where a party in effect discontinues a number of claims by a radical amendment to its Particulars of Claim. By a claim issued on 7 June 2019, RG Carter Projects Limited sued CUA Property Limited for damages of £14,225,768 for alleged misrepresentations. In the alternative it claimed extensions of time pursuant to a building contract and declaratory relief as to the proper sum due on its final account. RG Carter now seeks permission to amend its case to abandon the misrepresentation claim, abandon one head of claim on which an extension of time was previously sought, and reduce its claim on the final account. The overall effect of the amendments is to reduce the value of the claim by almost 87% from over £14 million to £1,852,338.57.

2. There is, unsurprisingly, no dispute as to RG Carter's entitlement to amend, but the parties are unable to agree the appropriate costs order:

   2.1 Steven Walker QC and Peter Land, who appear for RG Carter, accept that their client should pay the costs of and occasioned by the amendments. They contend that that is the usual order and that there is no good reason to depart from such practice.

   2.2 Anneliese Day QC and George Woods, who appear for CUA, complain that such conventional order would not compensate their client for the considerable wasted work undertaken in investigating and defending the now abandoned heads of claim. They assert that the amendments in this case amount in substance to the partial discontinuance of RG Carter's claim. Accordingly, they seek an order that RG Carter should pay 80% of CUA's costs to date, alternatively that it should pay the costs of the abandoned issues. Further, they argue that the abandoned case was always hopeless such that the court should order such costs to be paid on the indemnity basis. They also seek an order for summary assessment or, failing that, an order for detailed assessment with a substantial payment on account of such costs liability.

BACKGROUND

3. By a building contract dated 19 May 2015, CUA employed RG Carter as the main contractor in respect of works to demolish and rebuild the Cambridge University Arms Hotel. The total contract price was £34 million. Works were carried out between 2015 and 2018. RG Carter's original Particulars of Claim pleaded five heads of claim:

   3.1 A claim in misrepresentation by which RG Carter sought damages of £14,225,768.

   3.2 A claim for an extension of time of 53 days in respect of works to create an electrical sub-station.

   3.3 A further claim for an extension of time of an additional 35 days in respect of changes to the roof height.

   3.4 A yet further claim for an extension of time of an additional 15 days in respect of the need to remove asbestos from the site.

   3.5 A declaration valuing the final account at £40,347,677.

4. CUA pleaded a detailed Defence on 29 November 2019 and RG Carter responded by its Reply on 20 December 2019. RG Carter interrogated CUA's defence to the misrepresentation claim by a detailed Request for Further Information which CUA duly answered on 24 January 2020.

5. Kennedys Law LLP were instructed by RG Carter after the close of pleadings. On 10 July 2020, Kennedys gave notice that, having reviewed matters, they proposed to amend their client's case. A draft was promised "in good time" before the Case Management Conference that was then listed for 9 September 2020. That hearing and subsequent dates in October and early December 2020 were vacated and the matter came before me for the first Case Management Conference on 14 December 2020. On 24 November 2020, Kennedys served their client's draft Amended Claim Form and draft Amended Particulars of Claim. Among other amendments, the draft:

   5.1 abandoned the claims in misrepresentation and for an extension of time in respect of alleged changes to the roof height;

   5.2 reduced the sum sought on the final account from £40,347,677 to £36,866,260; and

   5.3 challenged the sums deducted by CUA in respect of liquidated damages.

   As already explained, the net effect of the amendments was significantly to reduce the value of the claim to £1,852,338.57.

DISCUSSION

THE PROPER ORDER AS TO COSTS

6. Practice Direction 17 to the Civil Procedure Rules 1998 states the general rule upon amendment:

> "A party applying for an amendment will usually be responsible for the costs of and arising from the amendment."

7. The editors of the 2020 edition of Civil Procedure (the White Book) observe, at para. 17.3.10, that such orders are "often" made. Paragraph 4.2 of Practice Direction 44 explains the meaning of some of the standard costs orders made in civil proceedings. It explains an order for "costs of and caused by" in the following terms:

> "Where, for example, the court makes this order on an application to amend a statement of case, the party in whose favour the costs order is made is entitled to the costs of preparing for and attending the application and the costs of any consequential amendment to his own statement of case."

8. It is common ground that the position in this case is akin to a partial discontinuance of a claim. In my judgment the analogy is well made at least in respect of the abandonment of the misrepresentation claim:

   8.1 While the abandonment of one or more remedies is not to be treated as discontinuance where the claimant continues his claim for other remedies (r.38.1(2)), a claimant may discontinue "all of part of a claim" (r.38.2(1)).

8.2 The "claim" for the purposes of Part 38 probably means the entirety of the claimant's action against a particular defendant: per Leggatt J as he then was in Kazakhstan Kagazy plc v. Zhunus [2016] EWHC 2363 (Comm), [2017] 1 W.L.R. 467.

8.3 In this case, the deletion of the discrete cause of action in misrepresentation was in substance a discontinuance of a part of RG Carter's claim and not just the abandonment of a claim for a particular remedy, albeit one effected by an amendment pursuant to Part 17 rather than service of a notice of discontinuance under Part 38.

9. It is therefore instructive to consider the consequences that would have flowed in the event that RG Carter had served a notice of discontinuance in accordance with Part 38. Rule 38.6 provides:

> "(1) Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant.
>
> (2) If proceedings are only partly discontinued –
>
> (a) the claimant is liable under paragraph (1) for costs relating only to the part of the proceedings which he is discontinuing; and
>
> (b) unless the court orders otherwise, the costs which the claimant is liable to pay must not be assessed until the conclusion of the rest of the proceedings."

10. In many instances, an order for the costs of and caused by (or, as we used to say, occasioned by) an amendment or (as PD17 puts it) the costs of and arising from the amendment, will meet the justice of the case. There will, however, be cases where the amendment abandons a particular cause of action that the defendant has spent a significant sum defending. Even in such cases, sometimes the amended statement of case will still pursue other causes of action arising out of the same facts, or the amendment will essentially just put a new label on previously pleaded facts such that the earlier costs have not been entirely wasted: see, for example, Begum v. Birmingham City Council [2015] EWCA Civ 386, [2015] H.L.R. 33.

11. Yet in other cases, the cause of action is simply abandoned and substantial costs will have been wasted. An award of costs on the conventional basis would, in such cases, cover the defendant's costs of amending his Defence to delete the now redundant answer to the abandoned plea, but would not recompense such defendant for the costs of investigating the original case or of pleading the first Defence. On such facts, the usual order would not be just and the appropriate order will often be to award the defendant not just the costs of and caused by the amendment, but also the costs in respect of the abandoned cause of action.

12. Accordingly, in my judgment the just order in this case is that RG Carter should pay both:
12.1 the costs of and caused by the amendment; and
12.2 the costs of the abandoned claims in misrepresentation and for an extension of time for the alleged change in the height of the roof.

THE BASIS OF ASSESSMENT

13. Ms Day argues that costs should be payable on the indemnity basis. The proper approach to applications for indemnity costs is not in dispute. In Elvanite Full Circle Ltd v. AMEC Earth & Environmental (UK) Ltd [2012] EWHC 1643 (TCC), [2013] 4 All E.R. 765, Coulson J summarised the applicable principles at [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 (No. 2) [2002] 1 W.L.R. 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 & Industrial Holdings Ltd v. Salisbury Hammer Aspden & 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 Allchurch Evans Ltd [2006] B.L.R. 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 & Wireless plc [2010] EWHC 888 (Ch)."

14. To that analysis, Akenhead J added five further observations in Courtwell Properties Ltd v. Greencore PF (UK) Ltd [2014] EWHC 184 (TCC), at [23]:

> "(i) The discretion to award indemnity costs is a wide one and must be exercised taking into account all the circumstances and considering the matters complained of in the context of the overall litigation (see Three Rivers DC v. The Governor of the Bank of England [2006] EWHC 816 (Comm) and Digicel.
>
> (ii) Dishonesty or moral blame does not have to be established to justify indemnity costs (see Reid Minty v. Taylor [2002] 1 W.L.R. 2800).
>
> (iii) The conduct of experts can justify an order for indemnity costs in respect of costs generated by them (see Williams v. Jervis [2009] EWHC 1837 (QB).
>
> (iv) A failure to comply with Pre-Action Protocol requirements could result in indemnity costs being awarded.
>
> (v) A refusal to mediate or engage in mediation or some other alternative dispute resolution procedure could justify an award of indemnity costs."

15. Costs ordered either on amendment under Part 17 or partial discontinuance under Part 38 are ordinarily payable on the standard basis. Indeed, r.44.9(1)(c) provides that where a right to costs arises under r.38.6, such order is deemed to be made on the standard basis. Of course, the court can make a contrary order. In particular, there is a growing practice of awarding indemnity costs where a claimant discontinues a claim pleaded in fraud:

15.1 In Clutterbuck v. HSBC plc [2015] EWHC 3233 (Ch), [2016] 1 Costs L.R. 13, the claimant discontinued a claim pleaded in fraud on the eve of an application to strike-out. As David Richards J (as he then was) observed, the claim was withdrawn without either explanation or apology. Observing that if a fraud claim failed at trial the court would generally be justified in ordering costs on the indemnity basis, the judge concluded that the court should make the same order where a fraud claim is instead discontinued.

15.2 Clutterbuck was subsequently followed by Rose J, as she then was, in PJSC Aeroflot – Russian Airlines v. Leeds [2018] EWHC 1735 (Ch), [2018] 4 Costs L.R. 775.

15.3 I respectfully agree that indemnity costs will often be appropriate where a claim in fraud is discontinued. Since it is professional misconduct to plead a claim in fraud without a proper evidential foundation, it is axiomatic that some explanation is owed upon the withdrawal of such an allegation. No doubt there will be cases where the allegation was properly made on the material then available to the claimant and the only responsible course to take following disclosure of some important contradictory evidence will be to withdraw the allegation, but unless such position is properly explained the claimant can usually expect to be ordered to pay indemnity costs.

16. RG Carter was careful, however, to stop short of pleading fraud in its misrepresentation claim. Mr Walker and Mr Land purported to reserve RG Carter's right to revisit the issue after the exchange of witness statements and disclosure. While Ms Day characterised that reservation of right as an implied threat, the simple position is that this case was never pleaded in fraud. It was not therefore a case where defeat at trial would necessarily have led to an order for indemnity costs.

17. Where a claimant persists in a speculative, weak, opportunistic or thin claim to trial, he can expect to be met by an order for indemnity costs when it fails: per Tomlinson J, as he then was, in Three Rivers at [25]. The court should, however, be wary of departing too readily from the usual rule that costs on discontinuance should be payable on the standard basis. In my judgment, it would be wrong in principle and a perverse disincentive to claimants' undertaking a proper review of their claims to order costs on the indemnity basis simply because, rather than pursuing a bad case to trial, a claimant takes a proper decision to discontinue. Of course, there may be cases where the very issue of a speculative, weak, opportunistic or thin claim is abusive because the claimant never intended to pursue the matter to trial. Such cases aside, the court should, save where fraud is alleged, ordinarily start from the position that costs should be on the standard basis.

18. I accept Ms Day's submission that the fact that RG Carter realised for itself that its misrepresentation claim was doomed to failure at such an early stage in this litigation might well indicate that the claim was always so thin or speculative that it should never have been made. Indeed, given that the misrepresentation claim has been abandoned before either the exchange of witness evidence or disclosure, this is not a case in which the claim was discontinued by reason of something unexpected emerging during the course of the litigation that has forced a re-evaluation of the claim. Further, Ms Day properly submits that the weakness in RG Carter's case had been pointed out by CUA even before proceedings were issued. Nevertheless, the claim was not pleaded in fraud and I am unable on the material before me to conclude that it was nothing more than an abusive attempt to extort money in

settlement for a known bad claim. Indeed, if the matter had been so obviously clear, CUA would no doubt have applied for summary judgment or applied to strike-out the claim.

19. For all of these reasons, I conclude that the proper order is that RG Carter should pay costs on the standard basis.

ASSESSING THE COSTS PAYABLE

20. CUA's costs up until the point of the amendment application were £370,000. Somewhat optimistically it sought an order that RG Carter pay £296,000, being some 80% of CUA's costs. Alternatively, by a letter dated 11 December 2020, it proposed that RG Carter should be ordered to pay £211,029.50. Such figure included an allowance of £30,000 for the costs of pleading an Amended Defence. Accordingly, it sought £181,029.50 in respect of past costs comprising:

    20.1 counsel's fees of £42,000, being 80% of the total fees of £52,500;

    20.2 the delay expert's fees of £9,425, being 20% of the total fees incurred of £47,130 with such expert; and

    20.3 profit costs of £129,603.50, being 65% of the fees incurred of £199,390.

21. I accept Mr Walker's submission that there is insufficient material to allow the court to contemplate summarily assessing this liability. Plainly the matter will have to be determined by a costs judge by detailed assessment. I acknowledge that it will be difficult for the costs judge to untangle the costs incurred in respect of the discontinued claims from those spent on the issues that are continuing to trial. I therefore gave careful consideration to whether the court might make a percentage order in this case rather than an issue-based order. The court is of course sensibly enjoined by r.44.2(7) to prefer a percentage order over an issue-based costs order. As Pumfrey LJ observed in Monsanto Technology LLC v. Cargill International SA [2007] EWHC 3113 (Pat), [2008] F.S.R. 16, such approach will necessarily lack any degree of mathematical precision. It does, however, have the significant benefit of avoiding the cost and complexity of seeking to untangle costs on an issue-by-issue basis in detailed assessment proceedings. That said, it is somewhat easier for a judge to assess the proper percentage when he or she has presided over the trial. From my brief involvement in this case at the Case Management Conference, I simply have no proper feel for what the percentage should be. Any attempt to fix the percentage would not just lack mathematical accuracy but be guesswork. Accordingly, I make the issue-based costs order indicated above.

22. Rule 47.1 provides the general rule that there should only be one detailed assessment at the conclusion of the proceedings. This is further supported by the default position on partial discontinuance at r.38.6(2)(b). I reject Ms Day's submission that I should order an immediate detailed assessment in this case. As Mr Walker rightly argues, it would be unnecessarily expensive and wasteful of scarce court resources to order an immediate assessment and thereby risk there needing to be two sets of detailed assessment proceedings. Further, if one waits until the end of the case there is at least the possibility, should CUA succeed in its defence to the remaining case, that there will never be a need to untangle the costs of the abandoned claims from the rest of the pre-amendment costs.

PAYMENT ON ACCOUNT OF COSTS

23. Rule 44.2(8) provides:

> "Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

24. The injustice to CUA of being kept out of the benefit of my costs order is of course best addressed by making an order for a payment on account of costs pursuant to r.44.2(8). I reject Mr Walker's submission that such power is designed for use simply in respect of the costs of a discrete application or after trial. Indeed, there is no such limitation in the terms of r.44.2(8), and there is no good reason why the court should depart from the usual rule in respect of costs ordered upon partial discontinuance.

25. Mr Walker also argued that RG Carter might yet succeed at trial and recover costs well in excess of those recoverable under my order such that it is the net recipient of costs. There is no merit in that objection. RG Carter has not at this stage proved any case against CUA. Rather, it has abandoned 87% of its original case but not before putting CUA to substantial cost. The only reason that CUA cannot have all of the costs payable under my order now is because the amount of the liability cannot be summarily assessed. It is accordingly a closer approximation to justice to order a sum on account of such costs liability rather than keep CUA out of all its entitlement.

26. In assessing the payment on account, it is necessary to remember that CUA has recovered costs on the standard basis. That said, proportionality will of course be assessed against the yardstick of the original £14-million value of this action. Taking a prudent approach to the sums already spent and the likely recovery on the standard basis, I assess the fair sum to be paid on account at £100,000.

OUTCOME

27. Accordingly, I award CUA the costs of and caused by the amendments to the Particulars of Claim, and further order RG Carter to pay the costs of the abandoned claims. Such costs will be assessed if not agreed on the standard basis by detailed assessment at the conclusion of the proceedings. In the interim, RG Carter will pay £100,000 on account of such costs liability.