

Neutral citation number: [2020] EWHC 3025 (Ch)

IN THE HIGH COURT OF JUSTICE

Claim No. B30BM297

THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)

BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
The Priory Courts, 33 Bull Street
Birmingham B4 6DS

Date: 11 November 2020

Before:

MR STEVEN GASZTOWICZ QC

sitting as a Deputy High Court Judge

BETWEEN:

BALBER KAUR TAKHAR

Claimant

-and-

(1) GRACEFIELD DEVELOPMENTS LIMITED

(2) KEWAL SINGH KRISHAN

(3) PARKASH KAUR KRISHAN

Defendants

(CONSEQUENTIAL ORDERS)

Mr John Wardell QC and Mr Lee Jia Wei (instructed by Tanners Solicitors LLP) for the Claimant

Mr Joseph Sullivan (instructed by Gowling WLG (UK) LLP) for the Defendants

APPROVED JUDGMENT ON THE FURTHER APPLICATIONS

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

MR STEVEN GASZTOWICZ QC:

1. On 23rd October 2020, I set aside the order of HH Judge Purle QC made on 28th July 2010 in action number 8BM30468. I also ordered that 90% of the Claimant's costs of this action be paid by the Defendants to the Claimant.
2. I laid down a timetable for further written submissions to be provided by both sides (in addition to those that had been made at the hand-down hearing itself) in relation to the remaining matters before the court. These have now been received.
3. The remaining matters are :
 - (i) whether the Claimant's costs of the claim are to be assessed on the indemnity basis;
 - (ii) what payment on account should be ordered in relation to the Claimant's costs;
 - (iii) whether there should be an order for the repayment by the Defendants of the costs paid to them by the Claimant in action number 8BM30468, with interest
 - (iv) whether there should be an order for the payment by the Defendants of the trial costs incurred by the Claimant in action number 8BM30468, with interest.

I will deal with each of them in turn.

- (i) Whether the Claimant's costs of the claim are to be assessed on the indemnity basis
4. The Claimant's application is on the basis that the Defendants' conduct has been such as to take the situation "out of the norm" so as to justify an order for indemnity costs.
5. The Defendants resist this on the basis that they did not bring a fraud claim here, as in *Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595, but were the Defendants to it; that there is no principle that a Defendant to a fraud claim should automatically pay indemnity costs; and that the Claimant also alleged that another type of document before the court at the original trial (ISV account enquiry forms) had been forged by the Defendants, which was not proved. It is submitted that both parties have been responsible for conduct which has been the subject of criticism.

6. In *Excelsior Commercial Holdings Ltd v Salisbury Hamer Aspden & Johnson* [2002] EWCA Civ 879, as noted at para 44.3.8 of the White Book 2020, the Court of Appeal held that the making of a costs order on the indemnity basis would be appropriate where the conduct of the parties or the particular circumstances of the case are such as to take the situation “out of the norm” in a way that justifies an order for indemnity costs (at para 31 per Lord Woolf and at para 39 per Waller LJ).
7. Further clarification was provided by the Court of Appeal in *Esure*, which is also summarised at para 44.3.8 of the White Book. The Court stated (1) that the decision in the *Excelsior Commercial* case was made in the context of previous decisions where the argument mounted was that under the CPR indemnity costs should only be ordered where there was some sort of lack of probity or conduct deserving of moral condemnation on the part of the paying party, (2) that the word “norm” was not intended to reflect whether what occurred was something that happened often, so that in one sense it might be seen as “normal”, but was intended to reflect “something outside the ordinary and reasonable conduct of proceedings”, (3) that to bring a dishonest claim and to support a claim by dishonesty cannot be said to be the ordinary and reasonable conduct of proceedings” (at paras 17 and 25 per Waller LJ). See also *Whaleys (Bradford) Ltd v Bennett* [2017] EWCA Civ 2143, at para 22, where Newey LJ disagreed with the judge below holding that the paying parties’ conduct was not exceptional “because many debtors try to avoid paying that which is due”.
8. There is nothing confining these principles to the conduct of Claimants, as opposed to Defendants, nor is there any reason why they should be so confined. If the conduct of a party, on whichever side of a case, is found to take the situation “out of the norm” in the sense referred to, an order for indemnity costs can be considered appropriate.
9. In this case, the Second and Third Defendants (who at all material times were also the only directors of the First Defendant) not only forged a key document in support of their case with a view to deceiving the court in the original action (which worked), but also went on oath in the present action to lie about what they had done and to seek to deflect blame for the forgery onto third party professionals, who were not before the court.
10. In my judgment, this is conduct by the Defendants which takes the case well out of the norm, and justifies an order for costs on the indemnity basis.

11. It is true that the Claimant alleged that ISV forms had also been forged, which she failed at trial to prove. However, that was initially supported by expert handwriting evidence which concluded there was “strong evidence of forgery”. That opinion was subsequently revised downwards to being “limited positive evidence”, as set out in my trial judgment, but that revised evidence still remained. The strong evidence of the Defendants having forged the Profit Sharing Agreement document also still remained and was part also of the picture when looking at these other documents. I do consider, though, that there could have been more thorough investigation and consideration of the position relating to the ISV forms in relation to which ultimately the Claimant lost. However, it was not determinative of the case, and I have allowed for this in making the previous deduction of 10% from the costs of the action the Claimant would otherwise have recovered. It seems to me this adequately reflects the justice of the situation in relation to this aspect of the matter. The Claimant acted on less than sure ground, and ultimately lost on the issue relating to the IVA forms, but her conduct was not fraudulent or such as to cause me not to award her the rest of the costs on the indemnity basis.

12. Accordingly, I order that the costs be paid on the indemnity basis.

(ii) What payment on account should be ordered in relation to the Claimant’s costs

13. It is now accepted by both the Claimant and the Defendants that there should be an order for a payment on account of costs (pursuant to CPR 44.2(8)) in the sum of £204,623. The Defendants say through counsel that they are going to have to seek to liquidate assets in order to make the payment. They seek 28 days in which to make payment, with liberty to apply. The Claimant agrees to an order for payment within 28 days but does not consider there should be liberty to apply.

14. Having considered the submissions made on both sides, I am going to order that there be liberty to apply. This does not mean that any subsequent application (which would need to be supported by evidence) would succeed, but simply that it is appropriate to give liberty to apply lest there be any proper basis which emerges for such an application.

(iii) Whether there should be an order for the repayment by the Defendants of the costs paid to them by the Claimant in action number 8BM30468, with interest

15. The order of 28th July 2010 has been set aside. This includes the order that the Claimant pay the Defendants' costs. The costs paid by her, pursuant to an order which has been set aside, must in my judgment be returned to her.
16. The Defendants dispute there is jurisdiction to order this (and also contend it is unnecessary and inappropriate to do so). In my judgment, to order the repayment of those costs is simply an order being made consequential on, and arising out of, the setting aside of the original order. The costs order has been set aside and what follows from that is that the parties fall to be restored to the position they were in had this order not been made. That includes the Defendants repaying the monies they were paid by reason of the order that has now been set aside.
17. This seems to me to be right as a matter of principle. It is also supported by comments in the speech of Lord Jessel MR in *Flower v Lloyd (No 1)* (1877) 6 ChD 297 at pp300-301.
18. I am able to make orders that are consequential to the setting aside of the order, of which this in my judgment one.
19. It is limited to deciding where monies paid over in pursuance of an order which has been set aside and no longer exists shall go, pending the underlying action being determined (save to the extent that an order for payment of the costs of the original trial costs is made now under item (iv) in the list of matters to be decided).
20. To leave such monies where they are, in the Defendants' hands, would effectively leave them with the Defendants as security for costs against the possibility the Claimant will again have to pay them (or the non-trial part of them, as the case may be) at the end of the continuing action, which there is no identified basis for, and which would be without the usual safeguards. It would also amount to more than just security even as the Defendants would be free to deal with the monies in the meantime.
21. There will therefore be an order for the return by the Defendants to the Claimants of any monies paid by the Claimant to the Defendants in respect of action number 8BM30468.

22. There appears to be a dispute as to the amount to be treated as paid. The Claimant's written submissions (both original and supplementary) are that £560,653.60 was effectively paid, but the Defendants are disputing £196,678 of this sum. That this is the extent of the dispute in relation to the amount of costs involved is not contested in the Defendants' submissions. Nothing is said by either side about the question of the rate or amount of any interest on the sums to be returned.

23. It appears to me that the appropriate course, given the decision I have in principle made, is to order that £363,975.60 be repaid to the Claimant within 28 days, with liberty to both sides to apply. This includes liberty to the Claimant to apply for the dispute as to the balance to be determined if the position in relation to any further sum cannot be agreed, and to seek interest on the sums to be repaid.

(iii) whether there should be an order for the payment by the Defendants of the Claimant's trial costs in action number 8BM30468 with interest.

24. In a situation where, for example, a trial is adjourned because it is not ready on the date of the trial due to the actions or inactions of one of the parties (or, indeed, mid-way through for such a reason), the party responsible can be expected to pay the costs thrown away as a result. The eventual outcome of the case when it is subsequently tried is irrelevant to the responsibility for, and causation, of that loss.

25. Even if the other side subsequently loses and is ordered to pay costs, there is no reason why it will have been unfair for the responsible party to have had to pay the costs thrown away as a result of its failures. Nor is it unfair for the other side to escape payment of those costs because he or she has to pay the costs of the litigation generally, which should involve one trial, not also the costs of an aborted trial which were not caused by the litigation having properly to be determined but by reason of the other side's fault regardless of the ultimate outcome of the litigation.

26. In the present case, it seems to me that the same points apply. The costs thrown away by the first trial having been ineffective in determining the dispute, due to the fraud of the Defendants in presenting forged evidence, have, as a result, been thrown away by reason of their conduct. Even if the Claimant loses at trial, it will not mean she is responsible for the

costs incurred in there having been an earlier trial of no effect due to the Defendants' conduct. They are responsible for that, and it is with them that those costs should lie.

27. In terms of jurisdiction, this an order which results from the setting aside of the judgment. As a result of it, the costs of the first trial have been wasted. I am satisfied that the court has jurisdiction to make the order under s51 of the Senior Courts Act 1981 as the costs of any proceedings are in the discretion of the court. It otherwise has power to do so under its inherent jurisdiction.
28. The decision in the case of *Contractreal v Davies* [2001] EWCA Civ 928, referred to by counsel for the Defendants, does not seem to me to prevent this. I am not making the order on the basis that the costs of the earlier proceedings are costs of or incidental to these proceedings, but on the basis that as a result of the order made in these proceeding setting aside the judgment entered in case number 8BM30468 the costs of the trial in those proceedings have been wasted.
29. Both parties have invited me, as part of their submissions in this case, as a result of the setting aside of the judgment entered, to make an order providing for a CMC in case number 8BM30468 to be listed and I will as part of the order I make in that case also order that the Defendants do pay the costs of the trial in that action wasted by reason of the setting aside of the judgment in this action. That will be limited to the trial costs alone, excluding the costs of pleadings, disclosure or anything else.
30. I should add for completeness that a conspiracy claim has previously been issued by the Claimant seeking these costs, amongst other things, and remains extant. Plainly, as the Claimant's counsel says, if the costs of the original trial are awarded as relief as a result of the setting aside now of the judgment, they will not, of course, be recoverable a second time round in any separate action. That does not affect either the ability to make, nor the reasons I have given for making, an order for those costs following the judgment that has been given, however.
31. No separate representations have been made by the Defendants in relation to the question of whether these costs should be assessed on the standard or the indemnity basis, but I have taken into account their submissions in relation to indemnity costs generally. I have set out

relevant principles above. What led to the costs of the first action being wasted was the forgery of a key document by the Defendants. Though there are additional blameworthy features in relation to the present case (as identified above), this in itself takes the situation out of the norm in the relevant sense, and in my judgment it is appropriate for there to be an order for the costs wasted as a result of the Defendants' dishonesty to be paid by them on the indemnity basis.

32. The order sought, of Claimant's costs to be assessed on the indemnity basis if not agreed will therefore be made.

33. I am invited also to make an award of interest, but I am not clear what power is relied on in relation to an award of interest on those costs, in addition to which, again, neither side has made submissions in relation to the rate or amount of any such interest. I shall adjourn generally the application for interest to be paid, with liberty to the Claimant to apply if she wishes for the question of whether interest should be awarded, and if so at what rate and in what amount, to be determined. The Defendants will, of course, be fully able to respond to any such application.