



Neutral Citation Number: [2022] EWHC 225 (Ch)

Case No: BL-2020-000735

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

7 Rolls Buildings
Fetter lane, London
EC 4A 1NL

Date: 07/02/2022

Before :

MR JUSTICE ADAM JOHNSON

Between :

- (1) SAY CHONG LIM
(2) CITY SUCCESS INVESTMENTS LIMITED
(3) HYSON HOUSE
(4) LAPLAND

**Claimants/
Applicants**

- and -

- (1) CHEE KONG ONG
(2) GREENACRE CAPITAL LIMITED
(3) GREENACRE CAPITAL PARTNERS
LIMITED
(4) GREENACRE PROPERTIES LIMITED

**Defendants/
Respondents**

James Bailey QC and James Goodwin (instructed by **Withers LLP**) for the **Claimants**
Romie Tager QC (instructed by **Ince Gordon Dadds LLP**) for the **Defendants**

Written submissions only: 5, 9 and 11 November 2021

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.

Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and released to Bailii.

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Mr Justice Adam Johnson:

1. On 1 November 2021, I gave Judgment on two applications for interim relief made by the Claimants in this matter (“*the November Judgment*”). Judgment was given orally (see [2021] EWHC 3414 (Ch)), and the parties invited me to deal with costs later on the papers, in light of written submissions to be made by them. Written submissions were duly received on 5, 9 and 11 November 2021, and this is my Judgment following those submissions.
2. The Claimants seek an order for their costs of the applications, and of a third application made in June 2021, which resulted in an agreed Order of Michael Green J. containing undertakings (November Judgment at [28]). On the other hand, the Defendants (more specifically the First Second and Fourth Defendants, as Respondents to the Claimants’ applications) seek their costs from the Claimants on the indemnity basis.
3. The background facts are set out the November Judgment. The present Judgment should be read in conjunction with the November Judgment, and I will adopt the abbreviations used therein.
4. At [53] and [54] of the November Judgment, I drew attention to the oddity arising from the conduct of the Claimants’ applications, namely that at most points there seemed to have been considerable common ground between the parties such that an agreed structure was within reach, but at the same time there had been vigorous and heated dispute about the status of the *Standen Land transaction* (November Judgment at [14]), which in reality was something of a distraction.
5. In the November Judgment, I accepted that by that stage, the *Standen Land* transaction as originally contemplated in the Claimants’ evidence was not likely to materialise. At the same time, however, I accepted that efforts *were* being undertaken to realise value from GTL, and so concluded that a simplified form of *quia timet* relief was justified. I also accepted that particular provision should be made for the likelihood of such realisations of value taking the form of asset sales, and that led me to adopt the Claimants’ proposed draft paragraph 8C, drawn from their October 2021 application.
6. The Defendants rely on this end-point as justifying the conclusion that *they* were the successful parties, and so argue that they should have the benefit of the general rule that the successful party recovers its costs: see CPR, rule 44.2(2)(a).
7. The nub of it is the argument made by Mr Tager QC in his written submissions at paragraph 8. There, he says that the position eventually arrived at would have been acceptable at the outset if put forward by the Claimants, but instead they had been fixated on: “ ... *Mr Piper’s fantasy transaction [i.e. the Standen Land transaction]*.” He argues that if the Claimants had not been so fixated, then rather than the parties spending:

“ ... *well over £200,000 in costs, based on applications relying on an alleged imminent completion of the Standen deal, there should have been a simple application to which a draft Order was attached that ... proposed reasonable and proportionate quia timet relief.*”

8. The Claimants meanwhile say that *they* were the successful parties because they obtained the *quia timet* relief they were seeking, which the Defendants had resisted. They are also critical of certain aspects of the Defendants' conduct, including in particular what they say was the Defendants' failure to engage with their efforts to encourage negotiations.
9. To begin with, it is useful to consider the background to the Claimants' first application of 1 June 2021. Much follows from this, and it ties in with the question of the Standen Land transaction.
10. The Defendants' basic criticism is that in issuing and serving their application, the Claimants acted on the basis of unreliable information from Mr Piper and so jumped the gun needlessly. That resulted in very material costs being incurred in preparing the application, in particular in the preparation of Mr Lyndon-Skeggs' supporting Witness Statement. The Defendants say that was entirely wasteful and misguided, because in fact there was no imminently pending share sale to Standen Land, and the Claimants could and should have checked that for themselves but failed to do so. The Defendants say they have been proved right about this, because as early as 7 June 2021, Mr Rutman of Travers Smith affirmed that the proposed transaction had not really yet started (November Judgment at [26]), and as matters have turned out, it never in fact went anywhere.
11. I am not persuaded that this is a fair criticism. The suggestion that the Claimants jumped the gun with their 1 June 2021 application, without checking the background sufficiently, overlooks the fact that there *was* correspondence before then with the Defendants' previous solicitors, Chan Neill.
12. Chan Neill were replaced by Ince at some point towards the end of May 2021, but before then the Claimants' solicitors, Withers LLP, wrote to Chan Neill on 14 May and again on 18 May, setting out what they understood to be the structure and current state of progress of the Standen Land transaction and raising certain points requiring clarification. They proposed a variation of the existing Order of Zacaroli J accordingly, and asked for agreement.
13. The reply from Chan Neill when it came on 20 May 2021 was short and uninformative. On the question of the Standen Land transaction, it said only:

“You have made a number of assumptions regarding the Thanet Project which are incorrect and as a consequence of which any application to the Court is misconceived.

As matters stand, there is no binding Contract for the sale of the development project to Standen Land and Developments Limited or any other party.”
14. Withers wrote again on 27 May, this time to Ince, saying that this brief response was unsatisfactory (“*no attempt has been made to explain what such alleged misconceptions may be*”). I agree that it was. It did little to provide comfort to the Claimants. Their concern, in circumstances where they had already obtained injunctive relief from Zacaroli J premised on their allegations of fraud, was that a transaction was in contemplation which might bring about a realisation of value in a form not covered by

that Order (the so-called *lacuna* – see the November Judgment at [15]-[16]). That was an entirely justified concern. The broad assertion that the Claimants had made incorrect assumptions was plainly not sufficient to address it.

15. In any event, the matter did not end there. Withers gave the Defendants another chance, and requested a response by 12 noon on 1 June, failing which an application would be issued. No response was received by that time.
16. Instead, later in the afternoon of 1 June, Ince made a conciliatory approach by letter, offering an undertaking (November Judgment at [17]). By then, however, the Claimants' application was already in the course of being issued, and in any event the work done in relation to it had been completed and the relevant costs incurred.
17. When Ince were sent copies of the application papers, Mr Cohen responded by email saying he considered the Claimants' conduct abusive (November Judgment at [24]). Among other points, he said there was no need for urgent action because "*the existing Order is ... sufficient to restrain the activities you say your client is concerned may happen.*"
18. It will be apparent from what I have said already that I do not agree with the criticisms in Mr Cohen's email. As to the status of the Standen Land transaction, although I fully accept that by 7 June, in light of the information provided by Mr Rutman of Travers Smith, it was clear that there was not the degree of urgency the Claimants had thought, it does not follow that it was unreasonable for the Claimants to have prepared and issued their 1 June application. Even if they did so on the basis of a mistaken understanding, the fact is that the Defendants were given plenty of opportunity to engage and explain for themselves what the state of play was but failed to do so.
19. Moreover, and perhaps more fundamentally, it is also clear that there *was* a lacuna: see the November Judgment at [15]-[16]. By the time of the hearing before me (and probably before) that was common ground. Having identified the lacuna, and having intelligence that *something* was happening which might drive a coach and horses through their existing protections, it seems to me the Claimants were entitled to seek to protect themselves by preparing their application. The Defendants were given a chance to stop it and did not act. It was not unreasonable for the Claimants to press ahead.
20. Understanding this early part of the chronology provides useful context for what then followed, and perhaps helps to explain it. One might have thought, notwithstanding the issuance of the 1 June application, that there would still have been scope for agreement between the parties, in light of Ince's initial, conciliatory letter of 1 June (above at [16]; November Judgment at [17]), but unfortunately the opportunity it presented did not germinate.
21. As regards costs, the Defendants rely on their 1 June letter and say it suggests a willingness on their part to be reasonable and reach an accommodation, albeit not one that was based on the structure of the Standen Land transaction. I agree it does, but that does not persuade me that in context the letter justifies an award of costs in favour the Defendants. One needs to look at what happened next. Part of this I have already described: Mr Cohen took a much less conciliatory attitude in his later email of 1 June, having been notified of the 1 June application. Thereafter, the Defendants came to adopt a more entrenched position. Thus, although Withers, in their letter of 3 June,

welcomed the proposals in the conciliatory letter of 1 June, and invited a lawyers only call the following day (November Judgment at [25]), that suggestion was not taken up and the discussions floundered.

22. Instead, Mr Cohen sent a lengthy email on 7 June dealing with the status of the Standen Land transaction (November Judgment at [26]), and inviting the Claimants to withdraw their application and pay the Defendants' costs. Thereafter, the question of the status of the transaction, and the reliability of the information provided by Mr Piper, seems to me to have developed an entirely disproportionate significance in the ongoing exchanges between the parties. I say that for this reason. Although it is true that by 7 June Mr Rutman of Travers Smith had given his assessment of where matters stood, he did not go as far as saying that *no* transaction was contemplated. The fact is that there *had* been discussions with Standen Land. In any event, as the Defendants themselves accepted, including in the initial Ince letter of 1 June, the overall intention was obviously to seek to realise value from the *Thanet project* in one way or another – as the Defendants saw it, most likely by land sales rather than by a share sale. But however it was done, what the concern over the Standen Land transaction had revealed was the existence of *the lacuna*, and it was reasonable of the Claimants to want the lacuna filled.
23. Doing so involved nothing more than extending in an entirely natural way the relief already ordered by Zacaroli J. I agree with the Defendants to this extent, that it should have been a straightforward matter to resolve. After careful consideration, however, I cannot agree with the Defendants' basic submission that the fault in not doing so lies with the Claimants. In the circumstances as they developed, it seems to me the Claimants were not the ones at fault. Instead, the Defendants were the ones who unfortunately allowed themselves to become distracted from trying to resolve what should have been an easily soluble problem because of their focus on the Standen Land transaction.
24. To put it another way, and notwithstanding the issuance of the 1 June application, it seems to me there was still obvious potential in early June 2021 for a resolution along the lines Mr Tager QC flagged at paragraph 8 of his Skeleton (see above at [7]). That potential dissolved when the invitation to discussions in Withers' letter of 3 June 2021 was not taken up. The reason it was not taken up was because the Defendants preferred to draw up battle lines on the subject of the Standen Land transaction, ignoring the fact that they had had plenty of opportunity *before* the 1 June application to provide the same information they provided only after, and failing also to acknowledge the underlying point that, whatever the precise status of the Standen Land transaction, there was nonetheless an important lacuna in the existing Order which was a legitimate source of concern for the Claimants and which they were entitled to do something about (in Mr Cohen's email of 7 June, he wrongly stated that the Claimants were "*in any event protected by the existing Zacaroli J. Order*").
25. I need not I think say more about the detail of the parties' correspondence in the periods immediately before and after the Order of Michael Green J of 25 June 2021. The Defendants dug in their heels; they initially refused to provide any undertakings to hold the ring on an interim basis pending a later hearing of the 1 June application; a further application was therefore issued and then compromised on the basis of the agreed terms reflected in the November Judgment at [28]-[29].

26. Returning to the main points in the Defendants' submissions, as well as relying on the 1 June letter, they also seek to rely on the later email sent by Mr Cohen on 24 September. The text is set out in the November Judgment at [33]. I accept, as the Defendants submit, that it was again conciliatory in tone. I also accept, as I pointed out in the November Judgment, that on the face of it the terms offered by the Defendants in that email were rather more generous to the Claimants than the terms the Claimants were themselves demanding – in the sense that the Defendants' offer was to ring fence 50% of any "*net proceeds of sale*", whereas the Claimants wished to ring-fence only the *CSI entitlement* (November Judgment at [53]). This makes it all the more puzzling to think that the parties were not able to bridge their differences. Why not?
27. The Claimants blame the Defendants. One of their points is that the offer set out in the 24 September email was not workable, for example because it proposed an undertaking from Travers Smith, who were not on the record in the litigation and did not represent any party to it (their client was GTL). The Claimants had in fact made a similar objection about the workability of the original proposal in Ince's 1 June letter, but that was said to give rise to the opposite problem – i.e. that although Ince were on the record in the action they did not act for GTL and so could not give any undertaking about the treatment of funds flowing into its hands.
28. I am not persuaded that these are *entirely* fair points of criticism, in the sense that the Defendants' proposals indicated an apparent degree of flexibility and willingness to come to terms, and the problems the Claimants identified were really mechanical and logistical. With a degree of goodwill on both sides, they are just the sort of issues one would have expected to see resolved through discussion.
29. What the Claimants' points do illustrate, however, is that the Defendants' proposals were not of a type which could be the subject of an immediate and unqualified acceptance. Reaching a finally agreed and fully workable position depended on an ongoing dialogue. I think the more pertinent issue is to examine why such a dialogue failed to develop, again from what looked like a promising starting point, especially given the Defendants' apparent offer to ring-fence more than the Claimants wanted to capture.
30. The answer is again revealed in the correspondence. Withers wrote to Ince on 1 October. Among the points raised in that letter they said (1) that a solution to the issue of the undertaking might be a joint escrow account in the names of both Withers and Ince, (2) that they wanted to ring-fence only the *CSI entitlement* and no more, and (3) that they accepted any realisation of value from GTL might be via an asset sale or sales, and so proposed amendments to the existing draft Order to take account of that possibility (in effect what became draft para. 8C, as later adopted by me without amendment in the November Judgment at [62]). The letter concluded by asking whether it was agreed the proposed amendments could be dealt with in the context of the existing 1 June application, or whether the Defendants considered a new application notice to be necessary.
31. Each of these points, from the point of view of the Defendants, represented progress, or so one would have thought. Point (1) was a possible resolution of the workability problem. Point (2) was on any view a suggestion which improved their position. Point (3) was recognition of a point the Defendants had themselves been advancing.

32. The response from Ince, however, effectively terminated any further discussions. This took the form of a letter dated 11 October 2021. It is a long letter, sometimes expressed in emotive language. I summarised the main points arising from it in the November Judgment at [39]-[40]. The first point (November Judgment at [39]) was effectively an objection to the para. 8C language. The second main point made (November Judgment at [40]) was again about the status of the Standen Land transaction.
33. The letter concluded as follows:
- “You have absolutely no reason to be using a non-existent transaction as the pretext for an urgent application to disadvantage our client with unnecessary Draconian orders, and we will be resisting your application for that reason alone. You have absolutely no justification for troubling the court with this Application, and we will be seeking indemnity costs.”*
34. It should already be apparent that I do not agree with this overall conclusion or with either of the specific points of criticism I have identified.
35. The Defendants *did* have a valid point that the Standen Land transaction was not at all as far advanced as the Claimants originally alleged, but that was not an answer to everything and the Defendants’ focus on it obscured the importance of other issues, among them the facts that (1) the Claimants had acted reasonably in issuing the 1 June application, for all the reasons already given; (2) not even Travers Smith were saying there was *no* possible transaction – indeed in their email of 29 September they pointed the Claimants to Mr Piper who was said to be “*closer to the commercials*”; (3) there was undeniably still the *lacuna* to be dealt with; (4) if there was ongoing uncertainty about what steps were in fact being taken to realise value from GTL, that was a good reason for plugging the gap sooner rather than later, not deferring a resolution; (5) the para. 8C revisions were not “*unnecessary Draconian orders*”, and indeed in my Order I reflected para. 8C without amendment; and finally (6) on proper analysis the points separating the parties on the substance were not only narrow, but were getting narrower, and so looking at it objectively there was every reason to continue to engage in a dialogue.
36. In such circumstances, again after careful deliberation, I have come to the view that it is the Defendants who were responsible for the lack of progress at this stage. I therefore cannot accept the submission that the 24 September email should be a matter of great weight in assessing how best to deal with costs. What was needed was some open-minded engagement, and that did not happen, despite (as it seems to me) the constructive suggestions in Withers’ letter of 1 October.
37. Having recited that history, I come back to where I started, which is to ask myself who was the successful party.
38. Coming into the October hearing, the Defendants’ position (as reflected in Mr Tager QC’s Skeleton) was that the Claimants’ applications should be dismissed, because they were premised on the Standen Land transaction and there was no such transaction in prospect.

39. The Claimants' applications were not dismissed, however. The position arrived at in the November Judgment was that the Claimants were entitled to relief, in light of the evidence available as to efforts being made to realise value in one way or another from GTL (November Judgment at [55]), albeit that the relief given was in modified form to that sought in the Claimants' draft Order (see [5] above).
40. Standing back and asking who as a matter of substance and reality was the successful party, it seems to me it was the Claimants: they obtained forms of relief on their applications which *in substance* filled the lacuna they had identified and protected their position, which is really what they wanted all along.
41. Given the history I have recited, I do not think it is open to the Defendants to say that the proposals made in the 1 June letter and 24 September emails alter that analysis. They might have done had they been followed through, but that did not happen. On each occasion, although the Defendants seemed to open a door to a possible solution, it was quickly closed again soon after.
42. Mr Tager QC adopted a more conciliatory approach at the hearing before me, and submitted that the position eventually arrived at was one which was acceptable to his clients and could have been arrived at sooner, had the parties' efforts at reaching an agreed position not failed. That is no doubt correct, but relying on it as a point of criticism overlooks the importance of the Defendants' own conduct in contributing to that failure.
43. The result is that in my judgment, the Claimants should be awarded their costs of (1) the 1 June application, (2) the interim application which resulted in the Order of Michael Green J, and (3) the 13 October application.
44. The Claimants have served three costs schedules, but they do not seek summary assessment, only an order for their costs on the standard basis and a payment on account. The sums sought are as follows: (1) £63,356.50 in respect of the interim hearing in June 2021; (2) £104,909.92 in respect of the October 2021 hearing, dealing with the 1 June and 13 October applications; and (3) £10,940 in respect of attendance at the handing down of the Judgment and costs submissions. These figures give an overall total of £179,206.42. The Claimants seek a payment on account of 50% of the combined total of these amounts, corresponding to £89,603.21.
45. In his written submissions, Mr Tager QC was critical in a general sense of the amount of costs incurred (as noted above, he made special mention of the time and costs spent in the preparation of Mr Lyndon-Skeggs' initial witness statement). He also said that costs schedules (1) and (2) above were served late and in breach of the Order made by Fancourt J of 28 September 2021, having been served at 18:11 on 26 October 2021, which was more than one working day late (Fancourt J's Order required costs schedules to be served by 10 am on 25 October 2021). Mr Tager QC said that in those circumstances, the Claimants should be required to apply for relief from sanctions, and that if granted then the Defendants should have the opportunity to make detailed submissions on the "*hours, rates, double-manning and the briefing of 2 counsel and their level of fees*".
46. Strictly speaking, it is correct that the Claimants' costs schedules were not served by the deadline in Fancourt J's Order, but nothing turns on this. First, Fancourt J's 25

October deadline was specified in the context of the application being listed in a three day hearing window opening on 26 October 2021. In the event, the hearing took place on 28 October, having been pushed to the end of the hearing window by agreement of the parties, and so no prejudice was caused by service of the costs schedules on 26 October. Second, I accept the Claimants' explanation that they were in fact ready to serve their costs schedules in the original form by 10am on 25 October, but service was then deferred by reason of the late service of evidence by the Defendants. Third, properly analysed the idea of relief from sanctions is irrelevant, because neither Fancourt J's Order nor the CPR specify any automatic sanction for late service of a costs schedule: the proper course is for the Court to take the failure into account and respond in a proportionate manner – see Macdonald v. Taree Holdings [2001] 1 Costs LR 147, per Neuberger J. Here, even if one assumes a technical breach of Fancourt J's Order, the proportionate response is to permit reliance on the costs schedules, in particular in circumstances where no order for summary assessment is sought, only an order for costs to be subject to detailed assessment, accompanied by a payment on account.

47. In the circumstances, I will make the order sought for detailed assessment. That being so, CPR Rule 44(8) is relevant, This provides that:

“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.”

48. Here I see no good reason not to do so. Mr Tager QC's suggestion that his clients should have the opportunity to make further, detailed submissions is not a good reason. That is because (1) they had an opportunity to make such points as they wished to in the written submissions filed after the October hearing, and (2) they will have a further opportunity to comment on matters of detail during the course of any detailed assessment.
49. It is settled that a “*reasonable sum on account of costs*” will have to be an estimate dependent on the circumstances, the chief of which is, by definition, the fact that there has been no detailed assessment and there is thus necessarily a degree of uncertainty, the extent of which may differ from case to case: Excalibur Ventures LLC v. Texas keystone Inc [2015] EWHC 566 (Comm). As the Judge explained in that case, a reasonable sum will often be one that is an estimate of the likely level of recovery subject to an appropriate margin to allow for an error in estimation.
50. In the present case, Mr Tager QC has described the Claimants' costs as “*eye-watering*”. I agree they appear to be very high for applications of the type I had to determine. I therefore agree there is a higher than usual degree of uncertainty as to what eventually will be recoverable. The Claimants have sought a payment on account of 50% of the overall costs claimed, but it seems to me that is too generous a figure in the sense that it does not provide an appropriate margin for error in estimation. In the circumstances I will order a payment on account in the sum of £70,000, which is slightly less than 40% of the overall costs claimed.