



Neutral Citation Number: [2024] EWHC 842 (Ch)

Case No: BL-2021-000461

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
CHANCERY DIVISION (ChD)

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 March 2024

Before :

Mr Justice Rajah

Between :

(1) South Tees Development Corporation	<u>Claimant</u>
(2) South Tees Developments Limited	
- and -	
PD Teesport Limited	<u>Defendant</u>
- and -	
Teesworks Limited	<u>Third Party</u>

Zoë Barton KC and Daniel Petrides (instructed by **Forbes Hare**) for the **Claimant**
Andrew Walker KC and James Mitchell (instructed by **DWF Law LLP**) for the **Defendant**
Katharine Holland KC and Admas Habteslasie (instructed by **Taylor Wessing LLP**) for the
Third Party Counsel

Hearing dates: **27th March 2024**

RULING

Ruling by MR JUSTICE RAJAH

1. On 5 February of this year I handed down judgment after a six-week trial which took place towards the end of last year. I directed that there would be a further hearing to deal with the form of the order, costs, applications for permission to appeal and any other matters which are consequential upon the judgment, and this is that hearing.
2. I have dealt with the issues which have arisen in relation to the form of the order but I now have to deal with the issue of costs. The relevant provisions are in CPR 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.

(6) The orders which the court may make under this rule include an order that a party must pay

—

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment.

(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.

(8) 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.”

3. The first question is who is the successful party. The defendant is clearly the successful party. In these proceedings the claimant and the third party have maintained that the defendant has no rights of way across its land and the claimant, supported by the third party, has sought declarations to that effect. The defendant has established that it has rights of way over three significant routes including importantly, the emergency secondary access to Teesport over South Bank.
4. On the face of the issues at trial the defendant has clearly won. Having looked at the pre-action correspondence, the pleadings and the without prejudice save as to costs correspondence as to what each party was seeking to achieve in the litigation, it seems to me that the result in real life to use the phrase used in *BCCI v Ali (No.3) (1999) 149 NLJ 1734* is that the defendant has won by establishing a right to emergency access and egress the rights to which the claimants and third parties thought carried a ransom value.

5. It has also established other rights of access to South Gare and rights of access to Redcar Quay which the claimant, supported by the third party, has sought a declaration that the defendant did not have. The defendant has established rights of access to South Gare which the claimant and third party denied.
6. Ms Barton in submissions which, if I may say, oozed realism, accepted that. Ms Holland said that the abandoned claims, which I will come to, meant that the claimants and third party had won before the trial started. That is in my judgment simply wrong having regard to what those abandoned claims actually added to the substantive issues between the parties.
7. I will have to refer to the abandoned claims again later but they do not affect my assessment that the defendant is clearly the overall winner. The general rule is that the defendant is therefore entitled to be paid its costs by the claimant and third party as the unsuccessful parties.
8. The next question is whether a departure from the general rules is justified. Some of the guidance derived from the authorities as to whether to make an issue based order was helpfully summarised by Stephen Jourdan KC sitting at a Deputy High Court Judge in the case of *Pigot v Environment Agency* [2020] EWHC 144 at paragraph 6:

“(1) The mere fact that the successful party was not successful on every issue does not, of itself, justify an issue-based cost order. In any litigation, there are likely to be issues which involve reviewing the same, or overlapping, sets of facts, and where it is therefore difficult to disentangle the costs of one issue from another. The mere fact that the successful party has lost on one or more issues does not by itself normally make it appropriate to deprive them of their costs.

(2) Such an order may be appropriate if there is a discrete or distinct issue, the raising of which caused additional costs to be incurred.

Such an order may also be appropriate if the overall costs were materially increased by the unreasonable raising of one or more issues on which the successful party failed.

(3) Where there is a discrete issue which caused additional costs to be incurred, if the issue was raised reasonably, the successful party is likely to be deprived of its costs of the issue. If the issue was raised unreasonably, the successful party is likely also to be ordered to pay the costs of the issue incurred by the unsuccessful party. An issue may be treated as having been raised unreasonably if it is hopeless and ought never to have been pursued.

(4) Where an issue based costs order is appropriate, the court should attempt to reflect it by ordering payment of a proportion of the receiving party's costs if that is practicable.

(5) An issue based costs order should reflect the extent to which the costs were increased by the raising of the issue; costs which would have been incurred even if the issue had not been raised should be paid by the unsuccessful party.

(6) Before making an issue-based costs order, it is important to stand back and ask whether, applying the principles set out in CPR rule 44.2, it is in all the circumstances of the case the right result. The aim must always be to make an order that reflects the overall justice of the case.”

9. I should make a couple of points about this passage. These are not rules which are being set out here by the learned Deputy High Court Judge but a summary, or compilation, of guidance derived from the authorities. I would add to that summary that whether or not an issue-based approach is

justified is not a purely mechanistic exercise which turns upon whether a discrete issue can be identified which has given rise to additional costs. Also relevant is whether that issue is simply another basis or another argument for putting the principal claim or is one which would not have been litigated if the unsuccessful party had conceded the issue on which the successful party had won. For that see *Kastor Navigation v AGF MAT* which is in the authorities bundle at tab 60 at paragraph 151.

10. It is also relevant as to how reasonable it was for the successful party to take the failed point, bearing in mind, amongst other things, the extra costs associated with it. The failure to win on every issue that is argued at trial is a less fundamental failure than the failure to make an offer to meet the winner's true entitlement; see *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125.
11. The significant issue in this case is that at the outset of the trial the defendant abandoned a raft of claims to rights of way over many other routes. I referred to this in paragraph 7 of my judgment. Mr Walker says it was reasonable for the defendant to have pleaded its case broadly and then to have refined it but the history shows that the defendant's case has been pleaded in general in vague terms which it has amended repeatedly and that the defendant simply has not pinned down the claims it was advancing at trial until the start of trial. That is simply too late. Unsurprisingly the claimant and the third party have incurred costs in preparing to deal with these issues at trial.
12. Ms Barton observes, rightly, that had those claims been discontinued rather than amended out of existence, costs would have automatically been payable by the defendant to the claimant and third party (subject to duplication) in respect of those claims.
13. Mr Walker says, however, that those claims were largely secondary or alternative claims, and I accept that.
14. Ms Holland says that the commercial significance of those claims having been made was to impede development of the land. In her oral submissions she refined that to impeding the sale of the land but so far as the development of the land is concerned, the abandoned claims do not seem to have

impeded the building on the land significantly any more than the remaining claims which have been vindicated would have done and there is no evidence that any development in the sense of building on the land has been held back. Indeed, from the site visit it seemed that building and construction at South Bank at least, is continuing without reference to the rights of way.

15. Mr Walker and Ms Barton regard the costs attributable to these claims as modest. Ms Holland declines to put a figure on it but suggests, I think, that they are significant and should be the subject of a separate, effectively issue-based, order for their payment.
16. I am satisfied that these abandoned claims should have been investigated and abandoned a long time ago and it is pointed out that the dispute was bubbling for over a year before the claimant forced the issue by commencing proceedings. Some additional costs will have been incurred as a consequence of these claims not having been abandoned sooner, mainly in relation to expert evidence and preparation for trial.
17. Ms Barton proposes that that figure should be 10% on her fairly rough and ready basis. Mr Walker says somewhere between 5% and 10% in principle. In principle it seems to me it should be 10% on a broad feel for how much those issues represent in terms of time and costs in relation to this litigation.
18. The next point is that if these costs are to be represented by making a discount in relation to the costs which are recoverable by the defendant how much should that discount be. There is a question of a discount of 10% so that the defendant does not recover the costs which it spent in relation to the abandoned claim but then what about the cost which had been incurred by the claimant and the third party in relation to the abandoned claims? Ms Barton in her skeleton argument asked for one figure of 10% in respect of both the claimant and the third party's costs. In oral submissions in a reply which went beyond what the rules permit, Ms Holland suggested that there should be two lots of 10% taken away from the defendant's costs, so a deduction in total of 30%. That was on the basis that there should be 10% to reflect the costs which had been incurred by the third party and 10%

which were the costs to reflect the costs incurred by the claimant and 10% to represent the Defendant's costs it should not be permitted to recover.

19. I am not willing to make that deduction of 10% for each of the claimant and the third party. The approach which the claimant and the third party have sought to take throughout these proceedings, in anticipation I suspect of this issue arising, is that they are both parties in the same interest and that they would seek to avoid duplication of costs. Now, it is a matter for them if they wish to appear here with full legal teams acting for them separately but I do not think that that is a matter on which it can be expected that the defendant would or should have to pay two complete sets of costs on an issue on which they have identical interests and are joined, because of dealings with the land between the claimant and the third party, to ensure that the relevant parties are bound.
20. Therefore, in principle, and I am still only dealing with this in principle, it seems to me that any deduction from the costs which are to be paid by the claimant and the third party to the defendant in respect of the defendant's costs as the successful party should be a deduction of 20% and not 30%.
21. On the other issues on which the defendant failed at trial I did not consider that any departure from the general rule is justified. The most significant of these is that the defendant brought a claim based on a proprietary estoppel on which it failed. It was of course a different cause of action to the claims which were made for the rights of way on the basis of either deeds or on the basis of the law of prescription but it was still a separate route to the same result, namely a right to emergency access across South Bank. It was in the end only necessary because the claimant and the third party did not accept, and denied, the rights which the defendant ultimately established at trial.
22. Also, while there were additional costs in relation to the proprietary estoppel claim it is worth pointing out that the position is not as clear or as unclouded as the claimants and the third party might like to suggest. There were experts' costs in relation to the issue of trespass, but those are difficult to separate out. The defendant in any event won that issue. The defendant was successful in establishing an incursion to its land by the roundabout which the claimant and the third party

denied and it seems to me that was, in effect, almost a standalone point, notwithstanding its connection with the way in which the defendant sought to put its claim on proprietary estoppel.

23. All the parties invited me to make a specific finding on the issue of trespass, whether or not it was necessary for my findings in relation to proprietary estoppel, and I did so, and the defendant was successful on that issue.
24. In principle it seems to me to be right that the defendant as the successful party should recover its cost from the claimant and the third party of the proceedings but there will need to be an adjustment to reflect its abandonment of the abandoned claims. In principle that is an adjustment of 20%. But there is one other matter which I still need to consider and that is conduct.
25. Both parties rely on each other's conduct in relation to these proceedings. The only matter which I am going to take into account or place any significant weight on is the offer which was made on 19 September 2023 by the defendant. That was made two weeks before trial and it was an offer which was rejected out of hand on 21 September 2023.
26. The defendant's offer was principally to compromise all of the claims on the following terms.
Firstly, that the defendant would submit to a declaration that it had no rights of access over South Bank save for one limited express right under the 1964 deed to a small part of Access Route 1.
Secondly, that the claimants and third party would grant a right of way to South Gare along Access Route 6. Thirdly, that the claimants and third party would grant a right of way to Redcar Quay over as much of Access Route 5 as was in their ownership; and finally, that each party would bear their own costs.
27. In real terms the defendant has substantially beaten that offer. Firstly, it has established rights of way over South Bank including Access Route 1 and emergency rights of access, and this is considerably better than it was offering to accept in its 19 September letter. Secondly, it has matched what it offered in respect of Access Route 6 to South Gare; and thirdly, it has almost

matched what it offered to accept in respect of access to Redcar Jetty, the right of way actually established being slightly restricted.

28. Had that offer been accepted, significant parts of the costs of the trial would have been avoided. I say significant parts because of course there were costs which were incurred prior to that offer being made, but, just to give an idea, the defendant says the costs of all parties since that offer was rejected may be somewhere between £1.5 million and £2 million.
29. A Calderbank letter like that one can be taken into account. That is clear from the case of *Coward v Phaestos* [2014] EWCA Civ 1256 and CPR 44.2(4)(c). There is no rigid test as to whether or not the offer in the letter has been beaten at trial; see paragraph 98.
30. Ms Barton took me to the 2023 White Book at 44.2.19 to point out that since that decision CPR Part 36 has been changed and the commentary to the White Book advocates caution in treating old authorities on CPR44.2(4)(c). The commentary does not identify *Coward v Phaestos* as one of the authorities in respect of which caution is required. As I read that case, it is simply saying that CPR 44.2(4)(c), which says that an offer to settle to which Part 36 does not apply can be taken into account, gives the court a very wide discretion which is not the same as the rules which apply under CPR Part 36. It does not seem to me that what is said by the Court of Appeal in relation to CPR 44.2(4)(c) is affected by the changes which have been made to CPR Part 36. Indeed, Ms Barton did not suggest that a Calderbank letter like this cannot be taken into account and she accepted that the defendant has done substantially better than that letter.
31. Ms Holland had a number of points in relation to the letter. She said that no account was taken in the letter of the abandoned claims - but I observe that the effect of the proposal would have been that the abandoned claims would have been abandoned. She says that no account was taken of the costs of the abandoned claims. The proposal was to drop hands, namely that each side would bear their own costs which in the light of what actually happened was clearly very generous. The

abandoned claims are not going to account, as I have already made clear, for a 100% discount in the costs recoverable by the defendant.

32. Ms Holland's main point however was that the offer was subject to contract. One of her points is that it would have taken time to work out the terms of the contract. But time is not the reason why this offer was not accepted. It was rejected by 21 September and the response makes clear that the claimant and third party were still open to continuing discussions. They were open to meaningful discussions notwithstanding the limited time before the commencement of trial, albeit on a framework which had been previously outlined which is apparently a reference to a proposal which had been made in January 2023.
33. Ms Holland's final point in relation to this is that it is not an offer which was capable of being accepted because it was subject to contract. It is perfectly common in complicated cases for offers to be made in principle with the fine detail to be ironed out in the drafting of an order or agreement. The reality is no attempt was made to engage with this offer and had a genuine attempt been made I would be very surprised if it had not been possible to reach an agreement which would have avoided the trial.
34. What then is the significance of that offer having been made, quite close, it must be said, to the trial? It was just two weeks before the trial. It seems to me Mr Walker is right that the costs which have been incurred since that order, or at least since its rejection on 21 September should be the defendant's in any event without any deduction.
35. In principle the order which I am going to make is that the defendant should have 80% of its costs paid by the claimant and the third party until 21 September and 100% of its costs thereafter.
36. So far as payments on account are concerned, there has not been significant argument. I would be minded to order 90% of the cost budgeted sums which I understand are considerably less than the actual sums incurred. The reason why it is right to give a large proportion of costs budgeted sums is

that the current thinking is that there is a high probability that cost budgeted sums will be recovered at or very close to the sums in which the master has approved a costs budget.