Neutral Citation Number: [2022] EWHC 277 (TCC)

Case No: HT-2019-000112

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

Business & Property Courts,
7 Rolls Building,
Fetter Lane,
London EC4A 1NL

Date of hearing: Wednesday, 2nd February 2022

Before:

MR ADAM CONSTABLE QC
(Sitting as a Judge of the High Court)

Between:

MISS ELAINE NAYLOR AND OTHERS

Claimants

- and -

(1) ROAMQUEST LIMITED
(2) GALLIARD CONSTRUCTION LIMITED

Defendants

- -
- -

MISS SIAN MIRCHANDANI QC and **MR DAVID SAWTELL** for the **Claimants**
MISS DOMINIQUE RAWLEY QC and **MR GOLDSTONE** for the **Defendants**

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Approved Judgment

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MR ADAM CONSTABLE QC:

1. The first issue between the parties is whether or not I should consider the question of costs at all today. The claimants' position is that until the supplementary report from Mr Bullock and the revised pleadings are served, it is impossible to establish the extent to which each party succeeded in respect of the application to amend and that to strike out. It says that the victory (if indeed that is what it should be called) of the defendants is such that it may be minimal or hollow, and that there also may be another round of arguments as to the effects, as was identified in earlier discussions today.

2. The defendant contends that there is no reason why the costs cannot be determined now. There have been significant changes to the pleadings as a result of two applications and an intervening application relating to intrusive investigations, and the court should be able to take stock of the position in determining the costs position as at the moment.

3. I agree with the defendants' position. It seems to me that it is obviously correct that the final shape of the pleading as a result of the applications is not yet known, but that shape does not of itself alter the my view of the success or failure, or some position in between, of the two polar opposite arguments that have been advanced in the two main contested applications before O'Farrell J ([2021] EWHC 567 (TCC)) and before myself ([2021] EWHC 3507 (TCC)) in relation to strike out and amendment.

4. The Bullock exception may in due course be pleaded as a broad one which preserves the majority of the sums initially claimed by the Claimant. It may be the other way round. It may be accepted that a good deal of the quantum falls away. That is yet to be seen. Indeed, what success the (as finally amended) claim ultimately enjoys, whether broadly expressed or otherwise, will only in fact be known at trial, and it does not seem to me that it would be right in a case such as this that the costs of the interlocutory skirmishes so far would need to await trial, and by analogy to that it does not seem to me that they need indeed even to await seeing precisely what Mr Bullock says and the extent of the exception to which much of the pleading must now be limited.

5. So, I consider it appropriate for me at this stage to hear the parties' substantive submissions as to the success or failure of the parties' arguments to date to lead to where we are, and form a view and determine the allocation of the costs liability for the applications in front of O'Farrell J which had been reserved, and those for the arguments that took place in front of me.

6. Dealing with the second point raised in relation to this issue today, the fact that there may be an argument in due course that the document to be served may itself be either inoffensive or offensive, which leads to further arguments, that again does not cut across my ability to deal fairly with matters as they are today. Those arguments, such as they may be, may give rise to their own cost implications in due course, but they do not prevent me from giving a proper view as to the costs position as it should stand at present.

7. Therefore, I would like to turn to the cost applications themselves.

(Further discussion followed)

8. I will deal first with the two related applications to strike out (on the part of the defendants) and amend (on the part of the claimants). With regard to the costs reserved from the defendants' original strike out application dated 30th July that was heard by O'Farrell J, the claimants seek an order today that the defendants pay 75% of its costs to be subject to a detailed assessment, and the defendants seek an order that the claimants pay 70% of its costs to be summarily assessed. I will also deal, because there is some overlap of background and overall approach and outcome (which both parties argue I should consider) with the costs of the amendment application that have been heard in front of me, which was a continuum of the previous application to strike out. The claimants, in relation to that second hearing, seek all their costs and the defendants seek effectively the same, rolled up in what might be called the usual order for the costs of and occasioned by the application to amend to be paid by the claimants, which would include, it says, the costs of contesting the application. Neither side today seeks summary assessment of the latter costs, although the defendants say that it would wish to reserve its right to do so upon finalisation of what those costs may be, which would only be apparent after the remainder of the pleading exercise has been completed.

9. The initial application to strike out related to three aspects of the claim as originally pleaded. The first was a root and branch attack on the level of particularity of the central breaches claim which it is said was speculative; one related to the diminution in value claim; and the other was a no standing locus claim. Following a contested hearing and a reasoned judgment from O'Farrell J the latter two points were rejected. The former was successful insofar as the judge agreed that the pleading as served had contained speculative allegations and determined that the claim was not allowed to proceed on the basis of what she described as the defective pleading as it stood.

10. I agree with the characterisation from the defendants that what might be regarded as a lifeline was then thrown to the claimants by the court in enabling the claimants to amend their claim rather than having the defective pleadings struck out.

11. The claimants rely in relation to both elements of the overall series of skirmishes upon the case of *Chemise Lacoste v Sketchers USA* [2006] EWHC 3642 for the proposition that the costs of an application to amend should be borne by the amended against party where they should have consented to the amendment, and it also suggests that whittling the claim from the outset through to the exception from Mr Bullock's report might more readily have been done by RFIs referring to the decision in *Crest Nicholson v Grafik Architects* [2021] EWHC 2948. I accept, of course, that it is correct as a matter of principle that if the objections made by any party in relation to an amendment are unreasonable and should not have been made, that will be reflected in an order that the opposing party pays the costs of that (unjustified) opposition. It is also correct, as a matter of approach, that part of the question of reasonableness will include consideration of whether requests for information could or should have been made, or indeed what the reaction was (if any) to offers (if any) of further information or clarification or particularisation by the party whose pleading it is said is defective.

12. It is right at the outset to say, and the defendants concede this, that it did not enjoy full success in the first hearing, but the extent of the changes required to be made to the claimants case following the application was plainly significant, as can be seen from the schedule I included in my judgment on the second hearing at paragraph 23. A number of allegations were dropped, others were amended, others were improved, leading to the second pleading that was considered in my application.

13. Whilst both sides enjoyed success, therefore, on balance I regard the defendants as being the winner of the application in front of O'Farrell J. It does not seem to me to be right to consider that success is determined merely by reference to the proportion of issues succeeded on (2 out of 3, from the Claimant's perspective) principally because, as appears from the judgment, the lion's share of the submissions and time was spent on the fundamental attack on the particularity and speculative nature of the defects pleaded, which went to the heart of the case. O'Farrell J considered that the defendants were, as is clear from the outcome of that application, plainly justified in making that attack on the particulars of claim and the manner in which it had been pleaded, and also in maintaining that attack through to the contested hearing. The fact that the claimants were thrown a life line does not detract from the justification in the defendants' stance. There is no suggestion before me as far as I can see that in the face of those valid objections to the adequacy of the pleading there was any acceptance by the claimants that further particularisation or amendment was required or proffered by the claimants, which might have put a different complexion on whether pursuing the strike out to a contested hearing was justified.

14. Therefore, in relation to the first part of the overall picture on strike out and amendment, I consider that the defendants should be paid 50% of their costs, rather than the 70% that is sought by them, a percentage which I think under- reflects the success that ought to be attributed to the fact that two of the points were defeated by the claimants.

15. In relation to the adjourned application before me, each party sees themselves as having an entitlement to their costs in full, subject to assessment. On the claimants' side, it is certainly clear and correct that part of its re-pleading survived the relaunched attack, and that attack was indeed narrowed prior to, during and to some extent after the hearing before me. The claimants contend that the only real inroad was the limitation in relation to the DPA claim to the Bullock exception, and the refusal for permission in relation to the claims for further reports.

16. In contrast to the way the claimants put it, the defendants say that the usual order should be granted in circumstances where it was reasonable for the defendants to object to the amendments. It says that when one looks at the matter standing back from where we are now, it is only now, following two hearings, that there is likely to be a pleading that is fit to be an agenda for trial, and it says that looked at in the round it has taken two applications and a long period of time to get to the point at which there is a proper pleading. It says therefore that the defendants should be entitled to its costs for getting the claimants' case into shape.

17. Having had the benefit of considering the parties' submissions during the hearing itself and in determining the application, I am clearly of the view that both parties took a somewhat extreme and un-nuanced position to the key amendments. There is, I accept, some force in Mr Sawtell's observations today that the initial response from the defendants in relation to the redlining and also in relation to the approach of Mr Boucher as an expert were bad points and should not have been advanced.

18. It is also right to note that the Category A claims in relation to the contractual element had survived the strike out, notwithstanding, it seems to me without, of course, deciding the point, the potential difficulties that that claim may face should it transpire that the defects relied upon do not in fact affect the fire safety of the building, as I indeed indicated in my earlier judgment.

19. On the other hand, the key thrust of the allegation advanced by the defendants in the strike out/amendment application in front of me relating to the majority of the items in dispute rested upon a fundamental mismatch between the supporting expert evidence provided by the claimants to justify 'a reasonable prospect of success' and its pleaded case. From my perspective, having dealt with the application and the array of points being made, it seems to me that this was the thread that ran through the points. It was the point that took most time in terms of submissions and in terms of grappling with dealing with the parties' respective arguments. It resulted in a careful review of the expert evidence and an attempt to overlay the pleadings against that expert evidence and to see whether it could be said that the case as pleaded was supported by that evidence.

20. It follows that, in my view, a focused review of the supporting evidence should have made it clear to the claimants that the amendments they were proposing went considerably wider than the articulation of the limited exception from Mr Bullock's report. That remains the case as a matter of liability even if it transpires in quantum terms that the cost consequences of the exception are broadened out to such a point that the financial claim remains completely or largely alive. As matters stand as a result of the defendants' stance, the allegations of breach and the technical case upon which the claimants now rely is significantly narrower than before. So, it does seem to me that the claimant's second attempt to have pleaded the case coherently was, again, defective and fundamentally unsupportable by a mismatch between the evidence upon which the claimants were relying and the breadth of the pleading. That was the fundamental attack, and it seems to me that that fundamental attack was correct.

21. Looking at it in the round, it seems to me that neither side can properly be regarded as the complete winner or loser, and neither side, it seems to me, should be entitled to their costs in full. It does seem to me that both parties increased the costs borne both by themselves and by the other party in the way in which they approached the application. The defendant itself, had it not been so extreme in its response, may well have been able to narrow the debate to a point where the correct identification of a mismatch and the basis upon which the pleading should be particularised could have been identified either by it or by the claimants.

22. That observation, as I say, has to be balanced against the conclusion that the defendants' submission that we are now a long time down the track and there is now a proper pleading being provided for the first time, and it will look extremely different from that first presented, is ultimately sound.

23. Therefore, taking account of all of the circumstances and bearing in mind those criticisms that are justified in respect of some of the defendants' collateral points, but placing due weight upon the substantive justification for the main thrust of its criticisms of the claimants' further attempt at pleading, it seems to me that it ought to recover its costs of and occasioned by the application for the amendments, subject to a 50% deduction in relation to the costs of opposing and contesting the application and in making its own strike out application (which is the mirror image of the amendment application) to reflect the level of success on the part of the claimants in fighting off a number of the points which ought not, on proper reflection, have been advanced.

24. In terms of the question of summary assessment in relation to the first, I remind myself that it is not sought in relation to the second at this point. It does seem to me that it

would be best if I do not summarily assess them today for this reason. It is clear that both sides have urged upon the court a submission where one should look at where we are now and look at the effort that it has taken to get here, that being, it seems to me, an entirely valid way to look at it. I think the costs of getting here should be looked at in the round through the eyes of totality and proportionality. I think to draw a dividing line between two portions of a continuum of costs for the purposes of summary assessment versus either detailed assessment or some later summary assessment, would be unfortunate. So I do not want to summarily assess the initial application now. I will leave it to the defendants to form a view as to whether it wishes to apply for summary assessment or detailed assessment. The sum in the aggregate is £200,000. That sum is not out of the realms of those costs that are dealt with summarily by courts on the basis of hard fought applications, and it does not seem to me that summary assessment will necessarily be inapplicable or inappropriate, but it it may be that if both parties are sensible one would like to think that the parties can resolve, given the deductions that need to be made in any event, the costs payable without having to trouble either a TCC judge or a costs assessment master.

25. I then move to the intrusive inspection application. I will leave to one side for one second the costs of the hearing. The claimants' position is that it should pay 50% of the costs, not 100%, to be subject to detailed assessment. Again the defendants seek 100% of its costs, summarily assessed in the sum of £56,000. The claimants accept, as it must, that the defendants were largely successful in defending its application. It essentially relied upon the back and forth between the parties in the run up to the application itself to articulate or justify the need for the application. It is obviously difficult for me on an application of this nature, particularly when I did not hear the application at the time, to judge the minutiae of that back and forth and the parties potentially changing positions.

26. The second main part of the claimants' argument is that the investigations have borne fruit. However, that is not an argument that can in any way detract from what essentially is the most fundamental point made by the defendants, which is that the claimants did not achieve anything over and above the intrusive inspections that were offered by the defendants in their letter of 19th February 2021, or indeed in advance of that by a significant period of time where an offer was made for the claimants' experts to avail themselves of the building during the course of works and when the building was open. The failure to have carried that out was itself the subject of some criticism by the judge in her judgment.

27. Given that the claimants are not in any better position than they would have been had it accepted if not two then one of the offers made by the claimants long in advance of the application, the defendants ought to receive their costs in full of those costs. It is a relatively small amount. There is no reason why they should not be summarily assessed today. I do not think there is any suggestion that they are not sufficiently separate from the other costs to be subject to the ordinary summary assessment that those costs will be subject to.

(Further discussion followed)

28. Dealing with the £56,000 costs of the application leading up to the hearing, the two statements of costs are behind tabs 24 and 26. There are two categories of complaint. The first relates to telephone attendance. In relation to that it is suggested that the 1.6

hours and 4 hours should be reduced to 1 and 2. I am asked to note the equivalent figures, not reduce the equivalent figures but just take them into account when I am looking at it overall. Given that this has been going on for a significant amount of time, and applications like this more than most require liaison with and between the defendants because of the practical nature of the implications of the application, those submissions are not well founded. I accept that they are reasonable on their face. That amount of time over a period of 6 months is justifiable.

29. In relation to the number of hours on documents, which is 9.8 and 13 in relation to one of the split costs and 4.8 and 6.3 of the Grade A work that is subject to criticism on page 243 in relation to the second one, I do accept, having looked at both the witness statements and indeed the judgment in relation to this, it is very clear that there was a good deal of work being carried on. However, it is also clear that Miss Rawley was significantly involved, given her costs which themselves are not subject to any criticism. It is appropriate that those ought to be reduced by a small amount. So I am going to reduce the hours for item 2 on page 233 to £7,500 from £8,680. The equivalent 4.8 and 6.3, which totals about £4,300, I will reduce that to £4,000 for those two items altogether, and I hope the maths from that can be fed through the numbers.

30. In relation to the application for the hearing itself, the only criticism levied relates to the attendance of two rather than one Grade C (or possibly D depending on the timing) in relation to one of the two and both an A and a B in relation to the other. I do form the view that whilst it is obviously open to a party to wish to have both a B and a C Grade at a hearing, that is not necessarily reasonable for the purposes of costs being paid by the other side. So £675 should come off of that. I think it is appropriate that there would be a partner, but not necessarily a B fee-earner in relation to the other one, so I am going to allow in the £1,755 but take out the £1,305.

31. I think in the round that is just shy of £2,000 coming out, but again the precise maths and number to come off of £10,637 can be worked out by those in front of me.

(Further discussion followed)

32. In terms of the matter of principle, the costs of the application date 19th January and consequential should be costs in the case. That was case management even if people had different views in respect of it. It needed dealing with. In terms of the costs of attendance in order to argue about costs, those should be the defendants' costs and they should be awarded 75% of their costs, which will be subject to summary assessment. So the question is 75% of what?

(Further discussion followed)

33. So the overall costs between the two defendants are just over £26,000. I have already decided that they recover 75% of those costs. That reduction had nothing to do with the costs themselves but it reflected a point of principle that reflected the success in the costs hearing, which this ultimately has been about. I also identified that the costs of dealing with the application and the timetabling matters that fell out of that were really matters that should be costs in the case. That has not been reflected, and that is no criticism at all, because it would not have been prepared in such a way as to reflect that distinction. It is not really possible to see on the basis of this what it would have been, but I would imagine that a fair amount of the solicitors' time would have been dealing

with the timetabling and a fair amount of counsel's time would have been dealing with getting up the substantive costs application. It does seem to me in fact that a reduction to £22,000 as suggested by the claimants is reasonable. This is to reflect the fact that the costs awarded should only deal with the costs. So it should be £22,000 that is then reduced to 75%. Although I do say this. Whether this overcomplicates it and whether it will ever be relevant is an entirely different thing, but the 25% of £22,000 is irrecoverable, the £4,000 balance (between £22,000 and £26,000) is costs in case. It is not irrecoverable as a matter of principle.

This judgment has been approved by the Judge.