Neutral Citation Number: [2022] EWHC 3153 (TCC)

Case No: HT-2020-000162

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

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Date: 09/12/2022

Before :

Ms VERONIQUE BUEHRLEN K.C.
Sitting as a Deputy High Court Judge

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Between :

NAZIRALI SHARIF TEJANI

Claimant

- and -

(1) FITZROY PLACE RESIDENTIAL LIMITED
(2) 2-10 MORTIMER STREET GP LIMITED AS A GENERAL PARTNER OF 2-10 MORTIMER STREET LIMITED PARTNERSHIP

Defendants

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T.C. DUTTON KC and MARK LORREL (instructed by **Mortimer Court Chambers**) for the **Claimant**
GARY BLAKER KC and PAUL DE LA PIQUERIE (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Defendants**

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JUDGMENT ON COSTS AND INTEREST

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 9 December 2022 at 10.30am

Introduction

1. Judgment was handed down following the trial of this case on 2 November 2022. The Parties have filed written submissions on consequential matters with a view to the further issues arising being dealt with by the Court on paper. Those issues concern:

   (i) Whether the Claimant should pay the Defendants' costs on the standard or the indemnity basis;

   (ii) The amount of the payment on account of those costs;

   (iii) The date for the payment of the payment on account; and

   (iv) The rate of interest to be paid by the Claimant on the Defendants' costs pursuant to CPR 44.2(6)(g) and/or CPR 36.17(3)(b).

The basis of assessment

2. The Claimant rightly accepts that he "*has suffered a resounding defeat*" and must therefore pay the Defendants' costs. The usual order would be for costs to be assessed on the standard basis. However, the Defendants submit that the costs ought to be assessed on the indemnity basis in this instance. They rely on nine reasons why they say the conduct of the Claimant, and other circumstances of the case, are such as to take the case "*out of the norm*" such as to justify an award of indemnity costs. The Claimant takes issue with the Defendant's approach and submits that costs should be assessed on the standard basis.

3. Whether an order for indemnity costs ought to be made is a matter of discretion for the trial judge. All relevant circumstances of the case should be taken into account. Waller LJ addressed the breadth of that discretion in *Excelsior Commercial and Industrial Holdings Ltd* [2022] EWCA Civ 879 when he said at paragraph 32:

> "This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that,

> before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement."

4. The question I have to ask myself is whether there is something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs (per Waller LJ in *Excelsior* at para. 39).

5. As noted above, the Defendants rely on 9 reasons which they say (presumably cumulatively) take this case "*out of the norm*". *Firstly*, the Defendants submit that the contrast between the nature and audibility of the noises complained of by the Claimant and those heard in Court was stark and that the claim was from the outset "*speculative, weak and opportunistic*". The Claimant denies that allegation largely on the basis that the Defendants were willing to make significant settlement offers based on the Claimant's and their own expert acoustic evidence. I do not consider that the Claimant's argument has merit. Parties make offers to settle litigation for a variety of reasons including the desirability of settling disputes, the inherent risks involved in litigation, the disruption it causes and the irrecoverable costs. The fact that the Defendants were willing to make a payment in order to settle the Claimant's claim does not signify that the claim itself had merit. However, whilst I agree with the Defendants that the claim was weak, I do not consider that it was speculative or opportunistic. The outcome of cases involving private nuisance can be difficult to assess and predict.

6. *Secondly*, the Defendants submit that the Claimant's account of the nature and audibility of the noises complained of was at odds with his own expert evidence and that despite that he continued to argue in evidence that the property was uninhabitable. It is correct that despite the amendment to his pleadings Mr Tejani did continue to assert, when giving evidence, that the property was uninhabitable. However, as I noted at paragraph 9 of the Judgment, I formed the view that Mr Tejani had difficulties when giving evidence that were explained by his ill health and lack of direct involvement in the relevant events. I would not regard his continuing, albeit very much mistaken, belief that the property was uninhabitable as justifying an award of indemnity costs.

7. *Thirdly*, the Defendants rely on the difference between the Calderbank and Part 36 offers made by the Defendants to the Claimant, which offers they say the Claimant unreasonably failed to accept, and the outcome of the proceedings. They also point to the fact that the Claimant failed even to acknowledge receipt of either offer (this being the Defendants' sixth reason). The fact that the Claimant failed to accept the Defendants' offers is not on its own a sufficient basis on which to award indemnity costs: see *Excelsior* per Waller LJ at [31]. However, it is a relevant factor. The failure to acknowledge an offer of settlement is not merely discourteous as is submitted on behalf of the Claimant. Parties to litigation should make efforts to settle their disputes and offers of settlement ought properly to be engaged with, all the more so when they are made pursuant to CPR Part 36.

8. The Defendants' fourth and fifth reasons can be taken together. In essence they are concerned with the Claimant's failure properly to formulate his claim from the outset. The Defendants point to the fact that the Claimant's claim was substantially amended on two occasions with the result that a claim for £4,375,303 (including interest) became a claim for £999,872. They also rely on the fact that the causes of action relied upon by the Claimant changed over time and/or were abandoned. In this context the Defendants also submit that had the claim been a claim for some £1 million from the outset it would in all likelihood have been treated differently by the Defendants and less costs incurred.

9. I agree with the Defendants that the manner in which the claim was presented in the Letter Before Action and then pleaded, together with amendments that eventually resulted in much lower value of claim and the need to abandon unsustainable causes of action, and repeated reformulation of the claim(s) all evidence the fact that the claim was not formulated as it ought to have been from the outset. I also accept that as a result the Defendants will likely have incurred costs they would not otherwise have incurred. However, I agree with the Claimant's submission that these are matters that can be taken into account by the costs judge and that, whilst the Defendants' criticisms of the Claimant's conduct of the case are well-founded, they are not in my view sufficiently outside the norm as to justify the making of an order for indemnity costs.

10. I have dealt with the Defendants' sixth reason above. *Seventhly*, the Defendants point to the fact that they were forced to incur substantial additional costs because of a failure on the part of the Claimant's lawyers to carry out work that fell to them such as in relation to the Claimant's disclosure and preparation for the PTR. Although the limited correspondence I have seen does evidence such issues, the extent of the issues would require further investigation. Further, it is a matter that can and ought to be taken into account by the costs judge. It is not in my view such as to justify an order for indemnity costs.

11. *Eighthly*, the Defendants submit that the Claimant did not comply with the pre-action protocol on the basis that the Letter Before Action failed to identify the causes of action subsequently relied upon by the Claimant and instead relied on causes of action that were later abandoned by the Claimant. The Defendants' ninth reason is also concerned with the Letter Before Action which the Defendants submit was "inconsistent with the claim run by the Claimant to trial in two curious ways". This is because unlike the Particulars of Claim, firstly the Letter Before Action rightly recognised the fact that the Second Defendant's obligation under clause 5.6 of the Agreement for Lease was a qualified one and secondly it identified the Claimant's first written complaint as having been made by email dated 13 September 2017 (and not on 11 October 2016 as pleaded). Both these points go to the fact that the claim was not properly formulated as it ought to have been from the outset. These points really go to the same issue as the Defendants' fourth and fifth reasons which is that the claim was not properly thought through and presented from the outset. Again I accept that as a result the Defendants may have incurred costs they would not otherwise have done. However, I consider that this is a matter that can be taken into account by the costs judge and not a factor of sufficient weight to justify an award of costs on an indemnity basis.

12. Two further submissions were made on behalf of the Claimant that I ought to address. *Firstly*, it was said that the Defendants' conduct is also relevant when considering whether indemnity costs should be ordered. That is correct. However, it was then submitted that the Defendants had overrun their approved budget by a significant margin and that it was therefore to be inferred that the

Defendants had acted disproportionately in the conduct of this litigation. Certainly the Defendants' costs incurred (£906,178) are significantly greater than the approved budget (£637,907). However, I would not infer from that fact alone that the Defendants have acted disproportionately – there may be many relevant factors to be taken into account in explaining the actual level of costs incurred by the Defendants of which the Court is not presently aware.

13. *Secondly*, the Claimant submitted that the fact that the Claimant had not accepted the Defendant's Part 36 offer militated against an order for indemnity costs because the Defendants had already benefitted by not having to pay out the £280,000 offered. I think that submission is entirely misconceived. The Claimant's failure to accept a reasonable offer may not on its own justify an order for indemnity costs but it does not in my view militate against an order for indemnity costs being made on the basis that the party making the offer and who has subsequently "beaten" that offer is better off.

14. The Claimant ought to have accepted the Defendants' offers of settlement. Further, the Defendants are right to criticise the manner in which the Claimant's case was presented in the Letter Before Action and the Particulars of Claim which, because the claim had not been properly thought through, subsequently resulted in causes of action being abandoned and a claim for a much lower amount being pursued. Further, it may well be that the Defendants' solicitors were forced to undertake certain tasks that ought properly to have been undertaken by the Claimant's solicitors such as in relation to the preparation for the PTR. However, taking all these matters into account I do not consider that the Claimant's conduct was such as to the take the case out of the norm in a way that was sufficient to justify an order for indemnity costs.

The amount of the payment on account of those costs

15. In the absence of an order for the Claimant to pay the Defendants' costs on an indemnity basis the Claimant has offered to make a payment on account of costs in the sum of £535,000. I understand that this is intended to take into account a deduction of £5,000 in respect of a costs order made by Pepperall J in favour of the Claimant on 10 July 2020. No alternative amount has been posited by the

Defendants. The sum being within an acceptable range I will therefore make an order for a payment on account of costs in the sum of £535,000.

The date for the payment of the payment on account

16. The Claimant has confirmed that he is able to make the payment within the standard 14 days of the date of the order. The order should therefore be for payment by the Claimant to the Defendants of the sum of £535,000 on account of costs within 14 days.

Interest on costs

17. The Defendants are entitled to interest on their costs pursuant to CPR 44.2(6)(g) and/or CPR 36.17(3)(b).

18. The Defendants ask for 4% on the basis that this would be in keeping with "a normal commercial rate" and slightly in excess of the Bank of England base lending rate. The Claimant proposes a rate of 2% on the basis that it is only relatively recently that the Bank of England base rate has increased to 3%, the increases in rates having been incremental since a 0.1% rate in March 2020.

19. Taking into account the Bank of England's base rates since March 2020 together with the general approach that interest be calculated at 1% over base, I consider that the 2% offered by the Claimant is reasonable and appropriate.

20. Interest should apply to the costs pursuant to CPR 44.2(6)(g) from the date the costs were incurred until the date of judgment i.e. the date of the order. Thereafter interest will apply at the statutory rate on the judgment debt as a whole.

21. I would be grateful if the parties could please draft up the minute of Order accordingly.