Neutral Citation Number: **[2023] EWHC 1585 (Ch)**

Case No: **BL-2020-001435**

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

7 Rolls Building
Fetter Lane, London,
EC4A 1NL

Date: **9 June 2023**

Before:

The Honourable Mr Justice Richard Smith

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Between:

Henderson & Jones Limited	**Claimant**
- and -	
David Jason Ross and others	**Defendants**

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Hugh Sims KC, Stefan Ramel and Dan Butler (instructed by **Harrison Clark Rickerbys Limited**) for the **Claimant**
Ali Tabari (instructed by **Thursfields**) for the **First and Second Defendants**
Rebecca Page (instructed by **Mills & Reeve LLP**) for the **Third Defendant**
Adam Kramer KC and Hannah Glover (instructed by **Addleshaw Goddard LLP**) for the **Fifth Defendants**
Tom Shepherd (instructed by **Browne Jacobson LLP**) for the **Sixth Defendants**

Hearing dates: **9th June 2023**

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APPROVED RULING

The Honourable Mr Justice Richard Smith **Friday, 9 June 2023**
(**15:41** pm)

Ruling by **THE HONOURABLE MR JUSTICE RICHARD SMITH**

1. On Wednesday afternoon I heard further from the parties concerning consequential matters arising from my judgment on the merits handed down remotely on 26 May 2023.

2. By that judgment, I dismissed all the claims brought by the claimant, Henderson and Jones, against the five remaining defendants, those claims comprising multiple claims for breach of directors' duties, knowing assistance, negligence and unlawful conspiracy. It fell to me then to consider the consequences of my judgment in terms of costs and interest. I gave my order then with, given the hour, reasons to follow. These are those reasons.

3. At the outset there was no dispute between the parties as to the following matters: 1) that the defendants should have their costs of these proceedings; 2) that the claimant should make a payment on account of those costs; 3) the defendants should have pre-judgment interests on their costs; and 4) that the defendants should have post-judgment interest at the statutory rate.

4. The parties did differ on the following matters: 1) whether the defendants should have their costs on the indemnity basis, as they contended, or the standard basis as the claimant contended; 2) whether the amount of the payment on account by the claimant to the defendants should be 80 per cent of incurred costs as most of the defendants contended, or 50 per cent as the claimant contended; 3) the rate of pre-judgment interest, whether 4 per cent as the defendants all contended, or some lesser figure or range of figures as the claimant contended; 4) when post-judgment interest should start to run, whether from the date of my order for the payment of costs as the defendants contended or the conclusion of any detailed assessment as the claimant contended, and finally, 5) the timing of whatever payment on account I might order.

5. Turning to the basis of assessment first, whether indemnity or standard, the starting point is that costs should be awarded on the standard basis, but indemnity costs may be appropriate where there is something in the conduct of the parties or the circumstances of the case or both that takes the situation out of the norm. I was referred by the parties to various authorities concerning the relevant considerations for the court as to whether a matter does or does not fall outside the norm so as to warrant or not an award of costs on the indemnity basis.

6. As to those, the first and second defendants relied on *Clutterbuck* v *HSBC plc* [2015] EWHC 3233 (Ch) (at [16] to [17]) for the proposition that, in the ordinary course, costs should be awarded on the indemnity basis at the end of an unsuccessful fraud trial. The issue in that case arose following a discontinuance but the first and second defendants say it makes no difference to the principle.

7. Given that the claim here was that D1 and D2 were dishonest and conspired with others to cause harm to creditors and, it was said, the claim failed in its entirety and was not a close-run thing, the defendant's position ought to be reflected in an indemnity costs order.

8. D1 and D2 relied on three further matters: 1) the failure by the claimant to adduce any evidence from Clement Keys -- THMG's accountants and auditors; 2) the publicity generated by the claimant, it was said, in pejorative terms; and 3) perhaps relatedly, the suggested realpolitik of this case, namely that D1 and D2 are of limited means and were only dragged along in the case in the hope of success against D5 and/or D6 whose pockets are considerably deeper.

9. D3, Mr Gerard Barnes, filed a skeleton argument for Wednesday's hearing but it was confirmed then that Ms Page's client and the claimant had agreed matters of interest and costs and I therefore say nothing further about D3's position on those matters.

10. D5, the bank, says that this claim should never have been pursued against it. The claimant could have brought a stop to things much earlier by accepting a drop hands offer in June 2020, but decided to persist in unfounded dishonesty claims against the bank as well as engaging in unacceptably poor conduct of these proceedings.

11. D5 relied on the matters enumerated in *Three Rivers District Council* v *Bank of England* [2006] Costs Law Review 714 (at [25(4)-(8)]).

12. Although it was accepted that there is no automatic rule that the failure of a case of dishonesty or fraud will justify an order for indemnity costs, D5 pointed to authority indicating that they are routinely awarded in such cases, reflecting the fact that the defendant had no choice but to come to court to defend the allegations as well as the distressing experience of their target, Mr Sweeney. D5 also said that the claims are speculative, weak, opportunistic and thin in terms of the lack of any cogent motive for Mr Sweeney to have acted dishonestly, the lack of any proper basis for the conspiracy claim, the substantial overstatement of the claim value and the lack of any witness of its own. D5 also pointed to other aspects where it said the claimant fell below the standard expected in the conduct of these proceedings, as well as courting publicity for the claim.

13. Finally in terms of the defendants, D6 too sought indemnity costs including by reference to the dishonesty allegations, and *Clutterbuck* and *Three Rivers*, the speculative, weak, or thin nature of the claims, the suggested selective or blinkered approach to the documents, the claimant's suggested briefing of the press and the claimant's letter to members of D6's firm, informing them of the large amount of the claim, the non-application of their limitation clause and their engagement letter in the event of wilful default and the risk of contribution to partnership assets in the event of insolvent liquidation.

14. The claimant, by contrast, said an award of indemnity costs was not justified, emphasing that there is no mechanistic approach or rule that unsuccessful allegations of dishonesty attract indemnity costs and neither *Three Rivers* nor *Clutterbuck* says otherwise. There must be a high level of inappropriateness or unreasonableness and the failure of a case of fraud or dishonesty is but one potentially relevant factor, see Mr Justice Miles in *Libyan Investment Authority and others* v *King and Others* [2023] EWHC 434 (Ch) (at [6]).

15. Nor, more broadly, the claimant said, should an award of indemnity costs be made simply because the paying party has been found to be wrong, or its evidence rejected in favour of that of the receiving party (see *Williams* v *Jarvis* [2009] EWHC 1837 (QB) (at [13]).

16. The claimant rejected the allegations that it took a blinkered approach to the documentary evidence, the alleged motive for the defendant's dishonesty was weak, that the claimant briefed the media, or that it was unjustified in writing to members of D6 before trial. Even if its related conduct could, however, be said to be unreasonable, it was not at a sufficiently high level, nor would it carry with it indemnity costs in favour of all defendants in any event.

17. It was said that liquidators had formed the view there was a case for breach of directors' duty and a transaction to defraud creditors, but they could not afford to bring their own claim. The claimant undertook the same due diligence in conjunction with its legal advisers and the claimant too formed the same view. The claimant brought the claim but given its position as assignee with no first-hand knowledge, that claim necessarily relied on inference from the documents. Its position was materially different, it was said, from a claimant with first-hand knowledge of events and of the truth or otherwise of the allegation. The claimant genuinely believed in the merits.

18. Moreover, only six of the 23 issues in play alleged some form of dishonesty, the concepts of fraud on creditors and transactions defrauding creditors not requiring such a finding, nor was motive a requirement for a finding of dishonesty.

19. As for the suggestion that the claim was weak or speculative, the detailed factual analysis of the judgment was not indicative of weakness but of a closely contested trial with none of the claims, for example, being inferential and partially struck out or discontinued as was the case in respectively *Libyan Investment Authority* and *Clutterbuck*. Another judge, it was said, might well have formed a different view on the facts, with the claimant's case falling well within the reasonable range of possible outcomes on the facts. The claimant said its claims were even supported by the defendant's expert who found there was an undervalue and the email exchanges of 25 and 26 October referring to the frustration of the actions of the potential future administrator.

20. Public comment on open court proceedings was not a good ground for indemnity costs and there was no campaign here by the claimant. The PIP scandal was and remains of general public interest. The claimant was justified in writing to D6's members, D6 having refused to confirm its insurance position and having itself stated that it was a matter for the claimant whether it wrote to its members to give them a notice said to be required under section 214A of the Insolvency Act 1986.

21. Finally, the claimant relies on various aspects of the defendants' actions in these proceedings which were said to be unreasonable. Having set out at some length the defendants' and claimant's position, I now turn to the discussion.

22. Having carefully revisited the matter since hand down and in light of the parties' submissions and the principles gleaned from the authorities, as applied to the particular facts of this case, I was satisfied an award of indemnity costs was appropriate here. Having considered their positions, both individually and collectively, I made such an award in favour of all the defendants. I came to that view for a number of related reasons which, considered together, do take this case out of the norm and reflect, in my view, unreasonable conduct to such a high level to warrant an order for indemnity costs. I make clear that I did not do so by way of moral condemnation of the claimant, which is not a requirement for such an order to be made. I also made clear in light of the concerns expressed by the claimant at the hearing that the mere fact the claimant was a litigation funder made no difference to my decision. Litigation funding is commonplace these days and does provide an important function affording access to justice where otherwise that may not be possible.

23. Rather, my reasons included, non-exhaustively, first, although I accept that indemnity costs do not necessarily follow if, with hindsight, a misguided claim has been pursued, even one resulting in a resounding loss, the claims in this case were, in my view, speculative, weak or thin such as to attract an indemnity costs order. In paragraph 575 of my judgment, I described the claimant's overall approach which led me to reject its characterisation of the restructure. That approach pervaded the claims as against each defendant, in particular the claimant's characterisation of matters depending in large part on its own interpretation, often quite strained, of a handful of incomplete documents or other complete documents not placed in proper context.

24. In taking this approach it ignored altogether other important parts of the much larger record which ran firmly counter to the claimant's characterisation. I need not repeat these matters set out in my judgment but, when these were all put together as the suggested basis for a conspiracy said to involve all five defendants engaged in dishonest conduct, the weakness or thinness of the claim was palpable. That approach was the principal reason why such a detailed factual analysis was required in this case, not because it was so closely contested.

25. Second, but closely related to the first, although I accept that unsuccessful claims of dishonesty do not automatically carry the burden of indemnity costs, that burden is warranted when the approach I have described is coupled with such serious allegations as were made in this case, including against professionals, all of whom had no choice but to come to court to defend themselves.

26. So, for example, Mr Sweeney was suggested to have turned a blind eye to a prejudicial restructure, but this failed to pay proper regard to the 14 months or so of financial scrutiny and demands to which Mr Sweeney had subjected THMG over that period, including the equally intense scrutiny and demands to which he subjected THMG in the context of the potential insolvency of the much smaller Irish subsidiary within the group. Nor did his suggested motive for acting dishonestly make any sense. Barclays had no need to approve the restructure, and it will only have shot itself in the foot if it had consented, in effect, to the demise and insolvency of the very company which would remain its borrower after the restructure had taken place.

27. Although this example is one of the most obvious, the same approach does permeate the whole case as against all defendants. Moreover, the record contains multiple references to the genuine commercial reasons for the restructure, including as imparted by Mr David Ross to D5 and D6, which the claimant either sidestepped or, in one case, attempted to explain away as a reason to put forward to others to conceal the true purpose.

28. As D3 noted in its written submissions, referring to Mr Justice Mann's observations in *Mansol* v *Cripps Harries LLP* [2016] EWHC 2483 (Ch) (at [474]), this is a case where the claimant donned its fraud detection goggles and turned the frequency to "high" to attribute a dishonest feature to every interesting feature in the landscape.

29. As I would put it far less elegantly, the claimant saw many portents in the shadows but less ominous aspects which were more clearly visible in broad daylight.

30. Third, although I recognise that the claimant was perfectly entitled not to join Clement Keys as a defendant to these proceedings, as I have also found, its approach to the role of that firm was always unrealistic. Clement Keys was involved in every aspect of the restructure and of its accounting sought to be impugned by the claimant. It signed off on the accounts and it confirmed that THMG remained a going concern thereafter. The claimant's failure to grapple with the essential point of Clement Keys' involvement created a fundamental difficulty when trying the case as it was as against the five defendants.

31. Fourth, as to the conduct of the parties, it wasn't necessary for me to delve into and make findings on the minutia of the procedural twists and turns. It is sufficient for me to highlight one point. Although I accept that PIP implants, and the impact on the women who had them implanted, are matters of considerable public interest and concern, and whatever the precise level of engagement with the media on the claimant's part and its timing, I am satisfied that the

claimant positively courted publicity to increase pressure on the defendants in this case, particularly D5. For example, in their article written for the Evening Standard on 4 October 2022, a month before trial, two directors of the claimant acting in that capacity widely shared their view of Barclays as a target for this claim, and if the so-called floodgates were opened, others like it. Again, the claimant was entitled to take this course, but having gone out of its way to publicise so widely its view that the restructure was *illegally* designed to *defraud* THMG's creditors with the *dishonest* assistance of D5, the bank knowing or having reason to suspect that the restructure was *illegal*, the claimant can expect to be visited with an order for indemnity costs given the other matters I have described in this ruling and the findings in my judgment. Fifth, I was also unable to accept the claimant's valuation of the claim, principally due to the double counting of the value of the property and the business, even though both reflected the same earnings stream. That issue was not considered sufficiently at the outset by the claimant's expert who had been instructed to add the value of the property to his calculation. This resulted in that calculation being significantly overstated. I am satisfied that this unrealistic approach to value was also calculated to put pressure on the defendants and it would have been apparent to the claimant that the value of its claim was, as I have also found by quite some distance, an outlier compared to the contemporaneous valuations undertaken. I am also satisfied that the unrealistic figures bandied about on the claimant's side did have a chilling effect on settlement prospects in this case.

32. Sixth and finally, but in a sense tying all these points together and underlining why an indemnity costs order should be made in favour of all the defendants, whatever the liquidator may have made of a potential claim for breach of director's duties and of a potential transaction defrauding creditors under section 423 of the Insolvency Act 1986, I am satisfied that these proceedings were only brought in the form they finally were, including claims against them all for alleged dishonesty, because only D5 and D6 would have had the ability to meet any judgment in this case, and D1 to D3 were only brought along with them because the accessory liability of the former required the primary liability of the latter, although I should add that the claimant also hedged its bets unreasonably as to the side of the line on which D3 fell.

33. Accordingly, I was satisfied that, taken together, the circumstances of this case were such to amount to conduct which was sufficiently highly unreasonable to take it out of the norm so as to warrant indemnity costs. That is why I ordered indemnity costs in favour of each defendant.

34. I can take the other points more briefly.

35. As to payment on account, I have already indicated there was no dispute that this should be made. As to the amount of that payment on account, because the claim exceeded £10 million in value, cost budgeting did not apply in the case, but the parties had been ordered by Master Clark to exchange cost estimates which they did in August 2021. However, each of the defendants provided updated, albeit not necessarily final, cost figures for the purpose of the respective payments on account they sought. The claimant had also produced its own cost figures.

36. I may be corrected on the figures, but my understanding was that the claimant's total costs are £3.3 million excluding VAT; for D1 and D2 together, their total costs are £634,000 including VAT of which they seek an 80 per cent payment on account of £507,000. For D5 the costs incurred are £3.092 million, including irrecoverable VAT with an interim payment of £2.5 million sought, apparently representing 77.9 per cent of the costs plus pre-judgment interest at 4 per cent, and for D6 the costs incurred are £1.917 million, excluding VAT, with an 80 per cent interim payment of £1.53 million sought.

37. In approaching the question of the amount of the payment on account, the authorities indicate that I was not looking for the irreducible minimum but an estimate of the likely recovery, subject to an appropriate margin for error and the potential effect of other factors impinging on recoverability and/or risk of recovery, and overpayment. In doing so I recognise that the court did not have the benefit of any prior cost budgeting exercise, albeit I took into account the prior estimates exchanged between the parties, recognising their limitations. I also paid close regard to what the claimant said as to the level of costs incurred by the different defendants as indicated in the updated figures and how it was suggested these would likely be reduced on assessment. Having considered these matters, the parties' submissions, my finding as to the basis of assessment, my view, having conducted the trial as to the substance of the case and the likely costs incurred and recoverable by the defendants, as well as the prospects of any appeal, as to which I had already considered the claimant's grounds of appeal, I was satisfied that an appropriate payment on account in this case, after applying in the claimant's favour a margin of error avoiding the risk of overpayment, was for each of the defendants, 70 per cent of the amount stated in their respective updated summaries of costs incurred to date. I invited the parties on Wednesday to agree the appropriate figures as figures.

38. I also ordered such payments on account to be made within 21 days of Wednesday, despite the claimants seeking more time to accommodate their own insurers' and lenders' processes. In my view 21 days was ample time for the claimant and related commercial parties to get their ducks in a row.

39. Moreover, despite the claimant requesting such payment to be made into court for D1 and D2 to avoid the risk of not getting the money back following any successful appeal, I was firmly of the view that the balance of the parties' interests lay in favour of the defendants receiving their money now. I therefore declined that request.

40. In terms of pre-judgment interest, there was no dispute that the claimants should receive this on their costs. The question was what should the rate be. The authorities indicate that the purpose of an interest award is to compensate the successful party for the loss of his money, or the costs of borrowing to fund the litigation and that the rate may differ where the litigant is a private individual who tends to recover a higher rate than in more normal commercial lending to reflect the reality that their cost of borrowing is higher. Undertaking, as I had to do, a general appraisal of the position having regard to what was reasonable and the classes of litigant before me,

namely three individuals, a leading Midlands law firm and a first-class bank, I was satisfied the appropriate pre-judgment interest rate in this case for D1 and D2 was 4 per cent per annum, for D5 2.5 per cent and for D6, 3 per cent.

41. Finally, in terms of post-judgment interest, the claimant said that this should not commence until after the final assessment had occurred but, in my view, the claimant had already received enough information to enable it to make a realistic and informed assessment of its liability. Indeed, having been embroiled in these proceedings for so long, and having incurred significant costs of its own, and having seen the cost estimates as updated, and having already engaged meaningfully with the defendants throughout about their costs, including on the issue of security for costs and, more recently, it will already have had a very strong sense of its liability for their costs, so I ordered that the judgment rate should start to run 21 days from Wednesday to allow the claimants sufficient time to make the payments on account before the judgment rate clock then takes over.

42. In terms of further matters, in preparation for this hearing for permission to appeal, I noted an error in and omission from the judgment handed down on 26 May 2023. The error was an incorrect reference to a definition in one of the transaction documents from 30 November 2012 as referred to in the judgment. I will correct that error under CPR Part 40.12.

43. The second concerns the omission of a reference to the content of one of the contemporaneous documents. Again, I will correct that omission under CPR40.12, since otherwise the judgment does not reflect my intention. I gave notice of those intended corrections to the parties this morning since the latter did touch upon one of the grounds of appeal for which permission to appeal was sought by the claimant.

44. Turning to permission to appeal, I heard today adjourned from Wednesday the claimant's application for permission to appeal on eleven grounds as set out in the draft grounds. Having considered those carefully, including written submissions served for the consequentials hearing and subsequently by some of the defendants, I refuse permission to appeal as having no real prospect of success. There is also no other compelling reason why the appeal should be heard. Given the number of grounds, I shall provide brief written reasons separately and in all likelihood by way of attachment to the form N460 itself which I shall circulate as soon as I can so that the claimant is equipped, as necessary, for the Court of Appeal. I merely say here that the claimant's overall approach seemed to me to be to seek to re-open findings which were perfectly open to me, or indeed any reasonable tribunal, to make on the evidence and the facts before it.

45. Finally, it seems to me, unless anyone has anything to say on the subject otherwise, or unless it has already been agreed, that today's costs and those from Wednesday should be in the case.