



Neutral Citation Number: [2022] EWHC 1408 (Comm)

Case No: CL-2020-000441

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2022

Before :

PETER MACDONALD EGGERS QC
(sitting as a Deputy Judge of the High Court)

Between :

GEOQUIP MARINE OPERATIONS AG

Claimant

- and -

(1) TOWER RESOURCES CAMEROON SA
(2) TOWER RESOURCES PLC

Defendant

Julia Dias QC and Jason Robinson (instructed by **Clyde & Co LLP**) for the **Claimant**
SJ Phillips QC and Rebecca Jacobs (instructed by **Richard Slade & Company**) for the **Defendants**

Hearing dates: 19th May 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the judge remotely for circulation to parties' representatives by email. The date of hand- down is deemed to be 9th June 2022

.....

Introduction

1. On 16th March 2022, I handed down judgment in respect of two claims brought by the Claimant (“Geoquip”) against the Defendants:
 - (1) The claim for the balance of the lumpsum due under the contract between Geoquip and the First Defendant. I allowed this claim.
 - (2) The claim for Standby Costs, which was a claim under the contract and alternatively a claim by reference to an estoppel by convention or contract. I dismissed this claim.
2. I also allowed the claim against the Second Defendant as guarantor in respect of the claim for the lumpsum.
3. The matter came back before me on 19th May 2022 in respect of the costs of the action and the costs of the adjournment application. At the beginning of the trial in December 2021, the Defendants applied for an adjournment of the trial. I dismissed that application.
4. Ms Julia Dias QC on behalf of Geoquip submitted that as Geoquip succeeded in recovering sums due under the contract, and under the guarantee, Geoquip is entitled to costs of the action being the successful party within the meaning of CPR rule 44.2(2). Nonetheless, as Geoquip did not succeed in respect of the claim for Standby Costs, Ms Dias QC accepted that there should be a discount of 40% to reflect the fact that the success was not complete. Geoquip therefore seeks an order for 60% of the costs, as well as the costs of the adjournment application.
5. Ms Dias QC further referred to certain defences and counterclaims raised by the Defendants which were abandoned soon before trial, in particular a defence based on the Standby Costs being a penalty and a counterclaim for rectification. Both of these matters related to the claim for the Standby Costs.
6. Mr SJ Phillips QC on behalf of the Defendants submitted that the Defendants are entitled to an order for costs because they are the successful party, in that:
 - (1) They succeeded in resisting the Standby Claim and although they did not succeed on the claim for the balance of the lumpsum, that claim occupied a small part of the action and the trial in that it was essentially an issue of construction of the contract, whereas the claim for the Standby Costs was more factually intensive to which the evidence of the factual witnesses was principally directed.
 - (2) In addition, the Defendants refer to the failure on the part of Geoquip to engage in mediation as ordered by Calver, J on 16th April 2021 (para. 9), and the failure of Geoquip to provide disclosure of certain documents, which should be taken into account as relevant considerations.

7. However, recognising that the Defendants did not succeed on all matters, Mr Phillips QC submitted that there should be a discount of 20% from a full order as to costs, resulting in a costs order of 80% in the Defendants' favour.
8. Neither party sought an issues-based order and therefore the dispute between them centred on who was the successful party within the meaning of CPR rule 44.2(2)(a).
9. Under CPR rule 44.2(2), "*(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*".
10. CPR rule 44.2(4) provides that "*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*".
11. Amongst the "*different orders*" which the Court may make in accordance with CPR rule 44.2(2)(b) is an issues-based order. CPR rule 44.2(6)-(7) provides:

"(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;

...

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

...

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

...

(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."
12. It is certainly true that the successful party means the person who succeeds overall in the litigation, and not just on any particular issue (*Kastor Navigation Co Ltd v AXA Global Risks (UK) Ltd* [2004] EWCA Civ 277; [2004] 2 Lloyd's Rep 119, para. 143).
13. Identifying the successful party is by no means always an easy enquiry, although in most cases the successful party will be clearly identifiable. In *Rotam Agrochemical Company Ltd v Gat Microencapsulation GmbH* [2018] EWHC 3006 (Comm); [2018] 6 Costs LR 1365, Butcher, J said at para. 17-18:

“17. As set out in Medway v Marcus at para [46] by Tomlinson LJ, the starting point is to identify the successful party, and that this “surprisingly elusive process” has never been better described than by Sir Thomas Bingham MR in Roache. That involves a determination of which party “as a matter of substance and reality” has won. As the line of cases relied on by Rotam indicates, in very many cases it will be clear that the party which is to be paid money has won. Nevertheless there is no inflexible rule to that effect, as is shown by Medway and Magical Marking, in each of which the court needed to decide - unlike in Fox v Foundation Piling- which was the successful party.

18. Consistently with this, I consider that if a party, though ordered to pay a sum of money, has in reality and in substance won, it should be regarded as the successful party ...”

14. That said, there is justification in ensuring that the general rule is adhered to unless good and proper reasons can be given for departing from it. Otherwise, if the Court were to depart from the general rule too often and too readily, it would cease to be a general rule. Thus, in *Blackpool Borough Council v Volkerfitzpatrick Ltd* [2020] EWHC 2128 (TCC); [2020] Costs L.R. 1295, HHJ Stephen Davies said (at para. 13-14):

“13. The second question is whether the court should indeed be cautious about departing from the starting point (that the successful party should recover its costs) “too far and too often”, as suggested by Jackson LJ in Fox v Foundation Piling Ltd [2011] EWCA Civ 790, who described such departures as a “growing and unwelcome tendency ... [which] ... may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates”.

14. In my view, when deciding whether or not to depart from the starting point by reference to matters such as relative lack of success, the reasonableness of pursuing particular allegations or issues, the manner of pursuit and allegations of exaggeration, a trial judge should be careful to avoid applying the considerable benefit of hindsight which comes from having reached a firm decision at the end of the litigation. It is very often the case, in a dispute of any complexity, that the issues and the evidence both become more focused and more clear both at trial and particularly by the time of delivery of judgment in a way which they were not from the outset. Whilst each party who has won on a particular issue will often have been convinced from the outset that victory on that point was inevitable, that does not necessarily mean that this result would have been apparent, whether to the other party or to the judge when case managing the case or reading in to the case

pre-trial. Another judge may well have reached a different conclusion on a factual issue or on a disagreement between experts or on the proper construction of a complex contract. It is well known that a relatively small number of conclusions on key issues which may be finely balanced can make all the difference between success and failure, both overall and on significant individual elements of the claim.”

15. In the present case, as I mentioned above, Geoquip succeeded in its claim against both Defendants in respect of the balance of the lumpsum due under the contract and the Defendants succeeded in resisting Geoquip’s claim for the Standby Costs. Although these claims arose between the same parties and in respect of the same project, each of these claims (and the related claim under the guarantee) was quite distinct, as is apparent from my earlier judgment, in that (a) the facts underlying the cause of action relied upon were different, and (b) the issues of law and construction arising in respect of each claim were different.
16. In these circumstances, I am unable to determine whether one or the other of the parties was the sole successful party. However, the above analysis leaves out of account the relative costs of the parties in respect of each of the claims. For example, if the vast majority of the costs were associated with one or the other of the claims, there might be scope for concluding that one or other of the parties was the successful party. To this end, I asked the parties to identify what proportion of their calculation of costs were to be attributed to the claim for the balance of the lumpsum and to the claim for Standby Costs.
17. The parties responded to this invitation by the submission of a witness statement (by Geoquip) and written submissions (by the Defendants). I do not consider that there is any difference to be accorded to the manner or form in which the information I requested was provided. The parties’ positions were as follows:
 - (1) Of Geoquip’s total costs of £486,802.07, £367,094.63 were to be attributed to the claim for the balance of the lumpsum, meaning that £119,707.44 were attributable to the claim for Standby Costs. Geoquip explained the allocation of these costs in the first witness statement of Elizabeth Rule dated 25th May 2022.
 - (2) Of the Defendants’ total costs of £314,040.75, £47,106.11 were to be attributed to the claim for the balance of the lumpsum, meaning that £266,934.64 were attributable to the claim for Standby Costs. I understand that this equates to 15% of the Defendants’ costs relating to the claim for the balance of the lumpsum and 85% of the costs relating to the claim for Standby Costs.
18. Having considered these costs figures, I regret that they do not assist me in concluding whether one or the other of the parties was the sole successful party in the litigation, given their disparity in allocating the parties’ respective costs to each of the claims.
19. In these circumstances, the solution I favour is to award to Geoquip the costs of the claim for the balance of the lumpsum and to award to the Defendants the costs of the claim for

Standby Costs on the basis that Geoquip was the successful party in respect of the former claim and the Defendants were the successful party in respect of the latter claim.

20. I am not entirely certain whether this is an application of the general rule in CPR rule 44.2(2) or whether it is an application of the rule in CPR rule 44.2(6)(f) - that a party pay the costs “*relating only to a distinct part of the proceedings*”. If the latter, I must first consider whether an alternative order is appropriate, in particular whether costs should be awarded to one party with a proportionate discount or from a particular date. Both parties have applied for an order that they be paid their costs, albeit subject to a discount. I do not think that would be a fair order to either party, because it would inevitably mean that the party who succeeded on one of the claims but who is ordered to pay the other party the costs would be unfairly prejudiced.
21. I am conscious that neither party sought an order that they each be awarded the costs of the claim on which they respectively succeeded. I can see why they did not ask for such an order, not least because it might well mean, depending on the assessment, that neither recovers much by way of costs in net terms. Indeed, it is this consideration which has led the Court to make no order for costs in analogous circumstances (*Square Mile Partnership Ltd v Fitzmaurice McCall Ltd* [2006] EWHC 236 (Ch), para. 33-35, 46; *School Facility Management Ltd v Governing Body of Christ the King’s College* [2020] EWHC 1477 (Comm); [2020] 1 WLR 4825, para. 97). In *Square Mile Partnership Ltd v Fitzmaurice McCall Ltd* [2006] EWHC 236 (Ch), Mann, J made no order as to costs and said at para. 34-35 (referring to what is now CPR rule 44.2(4)(b) and rule 44.2(7))

“34. ... it all depends on how one identifies a successful party. In a case such as the one before me, both parties can be said to have been successful: the claimant in getting a significant, if not substantial, judgment; and the defendant in resisting a very large part of the claim and succeeding on the counterclaim. To treat the parties as both being successful would, in my view, be entirely in accordance with the note in the White Book which I have identified above. It is also provided for in CPR 44.3(4)(b) when applied to the defendant. If identifying a party as the successful party requires one to find and identify who it is that recovers net sums at the end of the day, then the claimant is a successful party in those terms. If it requires identifying who is successful on each of the claim and counterclaim then both parties have been successful ...

*35. It still does not, however, provide a ready answer to the costs problem. It immediately leads to the possibility of an order awarding the claimant the costs of the claim and the defendants the costs of the counterclaim. There are two problems with doing that, however. First, as in *Universal Cycles* the parties do not want me to do that and so far as it is the equivalent of an issue-based assessment, the provisions of CPR 44.3(7) discourage me as well ...”*

22. The second problem identified by Mann, J was apposite only to the case before him. As to the first problem, I asked each of the parties whether I am able to make an order which was not along the lines either party sought and both parties accepted that I could make such an order.
23. In the present case, I am unable to determine whether the allocation of costs to each of the claims as alleged by the parties is supportable and, in those circumstances, not making an order for costs might be unfair especially if the assessment of either party's costs in respect of each of Geoquip's two claims is not as asserted by either party.
24. Accordingly, in my judgment, the costs orders to be made are as follows:
 - (1) The costs in respect of Geoquip's claim for the balance of the lumpsum (and the associated claim under the guarantee) are to be paid by the Defendants to Geoquip.
 - (2) The costs in respect of Geoquip's claim for Standby Costs (and the associated claim under the guarantee) are to be paid by Geoquip to the Defendants.
25. For this purpose, the costs associated with the claim under the guarantee in respect of the balance of the lumpsum claim are payable by the Defendants and the costs associated with the claim under the guarantee in respect of the Standby Costs claim are payable by Geoquip, because the former claim under the guarantee succeeded, but the latter claim under the guarantee did not succeed. I was asked by Geoquip to award it the costs of the issue of the enforceability of the guarantee (which I addressed at paragraphs 155-165 of my judgment dated 16th March 2022), but I do not consider that the time spent on this specific issue warranted the making of a separate costs order in respect of that issue.
26. I have also considered whether the other considerations raised by each of the parties should have an impact on these costs orders and have concluded that they should not affect these orders.
 - (1) The fact that the Defendants raised arguments in respect of the claim for Standby Costs which were not pursued (*i.e.* the penalty argument and the claim for rectification) is not a matter which should reduce the costs order which would otherwise be made, given that it is often the case that an argument will be advanced in respect of a claim which is not successful, even though the party advancing that argument will have succeeded in respect of that claim overall. The general rule necessarily allows for that possibility.
 - (2) I do not consider that the conduct relied on by the Defendants, relating to any gaps in Geoquip's disclosure and Geoquip's unwillingness to mediate, should impact the costs order to be made in Geoquip's favour. The ADR order made by Calver, J on 16th April 2021 was not limited to mediation and Ms Dias QC explained that the timing of the offer to mediate and its likely effectiveness are not matters which would have resulted in a settlement. Moreover, assuming that the failure to mediate by Geoquip may have been relevant to any order for costs which might otherwise have been made in favour of Geoquip in relation to its

claim for Standby Costs, I do not think it should detract from the costs order in relation to the claim for the balance of the lumpsum, given the merits of that claim.

27. I also order the costs of the adjournment application should be paid by the Defendants to Geoquip, given that Geoquip were successful in resisting that application.
28. There are two remaining issues for consideration by the Court. First, Ms Dias QC on behalf of Geoquip has asked for a summary assessment of costs. However, given the difficulty in identifying the true allocation of costs between the two claims, I do not consider that a summary assessment would be desirable, especially as the Defendants objected to such a course. Accordingly, I direct that the costs ordered to be paid by each of the parties be subject to a detailed assessment.
29. Second, Geoquip has applied for a payment on account, and I think the Defendants have sought such an order at least in post-hearing correspondence. CPR rule 44.2(8) 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*”. In this particular case, if I were to order a payment on account to be made by each of the parties, having regard to the costs estimates provided by each of the parties, it is likely that there would be a small net difference between the two payments, with the result that any payment on account would be insignificant and of little benefit. In these circumstances, I decline to make such an order.
30. Therefore, for the reasons explained above, I direct that:
 - (1) The costs in respect of Geoquip’s claim for the balance of the lumpsum (and the associated claim under the guarantee) are to be paid by the Defendants to Geoquip.
 - (2) The costs in respect of Geoquip’s claim for Standby Costs (and the associated claim under the guarantee) are to be paid by Geoquip to the Defendants.
 - (3) The costs of the adjournment application made at the commencement of the trial in December 2021 are to be paid by the Defendants to Geoquip.
 - (4) There shall be a detailed assessment in respect of these costs.
 - (5) There be no payment on account required to be made by either party to the other party pending the assessment of these costs.
31. I would be grateful if the parties could prepare a draft order to reflect these directions.