Neutral Citation Number: **[2023] EWHC 434 (Ch)**

Case No: **HC-2016-002106**

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

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

Date: **24 February 2023**

Before :

Mr. Justice Miles

- -

Between :

1) Libyan Investment Authority **(2) LIA Advisory Services (UK) Limited** **(3) Maplecross Holdings Investment Co Limited**	**Claimant**
- and -	
(1) Mr Roger Milner King **(2) International Group Limited** **(3) Beeson Property Investments Limited** **(4) Stoke Park Estates (formerly known as Beeson Investments)** **(5) Mr Charles Montgomery Merry and** **(6) Conrad Strategic Partners Limited**	**Defendant**

- -
- -

Andrew Onslow KC, Kate Holderness and Gretel Scott (instructed by **Hogan Lovells International LLP**) for the **Claimant**
Patrick Green KC, Henry Warwick KC and Rachel Tandy (instructed by **Croft Solicitors**) for the **Defendant**

Hearing dates: **24th February 2023**

- -

APPROVED JUDGMENT

Mr Justice Miles:

1. The claimants accept that they must pay the costs of the proceedings, but there is disagreement about the basis of assessment.

2. The parties are agreed that the general rule about costs including the amount of any costs is set out in CPR44.2: in deciding what order to make about costs, the court will have regard to all the circumstances, including the conduct of the parties. The conduct of the parties includes conduct before as well as during the proceedings, whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue, and the manner in which a party has pursued or defended its case or a particular allegation in the case.

3. The principles governing the award of indemnity costs have been considered in many cases and these are summarised in paragraph 44.3.10 of the 2022 edition of the White Book. There is a danger of seeking to substitute for the overall requirement, that the court must make such order as it thinks just in accordance with the overriding objective, some other gloss or formulation.

4. The cases include the very well-known decision in *Three Rivers DC v Bank of England* [2006] EWHC 816 (Comm) where Tomlinson J set out a number of factors (which are listed in paragraph 44.3.10 of the 2022 edition of the White Book). This case has been referred to in many later decisions. In the quoted passage, the judge said at [25]:

> "(8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a claimant has discontinued only at a very late stage in proceedings:
>
> (a) where the claimant advances and aggressively pursues serious and wide-ranging allegations of dishonesty or impropriety over an extended period of time;
>
> (b) where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;
>
> …
>
> (e) where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;
>
> (f) where the claimant pursues a claim which is irreconcilable with the contemporaneous documents …"

5. There have also been cases which have discussed the relationship between bringing an unsuccessful claim for fraud of dishonesty and the award of indemnity costs. These include *Clutterbuck v HSBC Plc* [2015] EWHC 3233 (Ch) and *Natixis SA v Marex Financial and Others* [2019] EWHC 3163 (Comm). In a more recent decision, *Bishopsgate Contracting Solutions Limited v O'Sullivan* [2021] EWHC 2628 (QB), Mr Justice Linden said at [16]:

"Various decided cases illustrate the sort of situation in which an order for an assessment on the indemnity basis may be made although, in my view, they do no more than this. Thus, as Mr Forshaw [counsel for the claiming party] points out, examples of where such orders have been made include:

(i) where a claim is dishonest and/or is dishonestly maintained, as I have pointed out;

(ii) where a claim is "speculative, weak, opportunistic or thin": see *Three Rivers District Council v The Governor of the Bank of England* [2006] EWHC 816 (Comm) at para 25(5);

(iii) where a claim is pursued for reasons or purposes unconnected with any real belief in their merit. As Coulson LJ put it in *Lejonvarn v Burgess* [2020] EWCA Civ 114 at para 66:

> "An irrational desire for punishment unlinked to the merits of the claims themselves is precisely the sort of conduct which the court is likely to conclude is out of the norm."

(iv) where allegations of fraud or dishonesty are made which have failed: see *Clutterbuck v HSBC plc* [2015] EWHC 3233 (Ch) at paras 16 and 7. In relation to this authority, Mr Forshaw came close to submitting that as a matter of course, if allegations of fraud or dishonesty have failed, costs must be ordered to be assessed on an indemnity basis. Insofar as that was his submission, I do not agree. There is, in my view, no such rule in the context of applications for indemnity costs although, as I have said, where such allegations are made and fail, that may be a reason for making such orders;

(v) where an overly aggressive and unreasonable approach to correspondence between solicitors has been adopted: see *Excalibur Ventures LLC v Texas Keystone Inc* [2013] EWHC 4278 (Comm) at para 48."

6. Earlier in the same judgment, Mr Justice Linden recorded that he accepted that the conduct which forms the basis of an order for assessment on the indemnity basis must involve a sufficiently high level of unreasonableness or inappropriateness to justify an order. He quoted Sir Anthony Colman in *National Westminster Bank v Rabobank* [2007] EWHC 1742 (Comm) at [28]:

> "Where one is dealing with the losing party's conduct, the minimum nature of that conduct required to engage the court's discretion would seem, except in very rare cases, to be a significant level of unreasonableness or otherwise inappropriate conduct in its widest sense in relation to that party's pre-litigation dealings with the winning party or in relation to the commencement or conduct of the litigation itself."

7. Mr Justice Linden also warned against the risk of hindsight, i.e. assessing the conduct with the knowledge of the outcome of the case and with knowledge of how a particular issue was resolved, see [15].

8. The defendants also relied on some comments of Lord Justice Coulson in the *Burgess* case at paragraph 55. Lord Justice Coulson referred to the possibility of an indemnity cost order being made in the light of the speculative or weak nature of claims in

litigation. He rejected the contention that indemnity costs were only appropriate where it could be shown with hindsight that the costs had been unnecessarily incurred and said that: "Indemnity costs are, for example, routinely ordered in favour of a vindicated defendant when allegations of fraud are dismissed at trial."

9. It seems to me in the light of these authorities that the failure of a case of fraud or dishonesty is a factor that the court may take into account in deciding on the basis of assessment but there is no automatic or rule that the making of such allegations which fail at trial will justify an order for indemnity costs or even operate as a starting point in the sense that the paying party is then required to explain why indemnity costs are not appropriate. It is also right to recall that the default position is that standard costs are to be paid unless the court orders otherwise.

10. I turn to the factors particularly relied on by the defendants to justify their application for indemnity costs.

11. The first is that very serious allegations of fraud and dishonesty have been made against the defendants and were persisted in through to the end of trial. The claims were all dismissed.

12. They say next that the case pursued by the claimants was a weak or speculative one.

13. In particular, they point out that there were basic flaws in the deceit case, which they say the claimants ought to have recognised from the time that they were allowed to reformulate their case by Judge Barker (as explained in my main judgment). So they say the case based on the representations as to the valuations was never a realistic one. They also say that the case that the defendants made implied representations as to their own state of belief was unrealistic. They say that the KS letter can only realistically be read as containing KS's own views and that since the claimants accepted that KS genuinely believed those views and that in any case the case against KS was struck out by Judge Barker, that part of the case was thin and speculative and should not have been pursued. The defendants also say that the claimants' case on reliance was not properly evidenced: they referred to the email which I have addressed in the main judgment, where Mr Rhazali said that he did not think the two letters were valuation reports. They also point out that the claimants failed to provide any convincing or cogent evidence that the two letters - the KS letter and the S&P 2009 letter - were even before the board. The defendants say that the claimants' own case about the way in which they understood the KS letter has morphed from a case concerning an understanding that it contained a land valuation to some other case of reliance.

14. In relation to the other causes of action, the defendants say that these were largely based on the suggestion that the defendants had been involved in the decision to disinstruct Savills and that that was undermined by the evidence of their own witness, Mr Furze, which they failed to understand properly. That evidence was provided in April 2022, seven months before the trial started.

15. The defendants say that there were other flaws in the claimants' case. It was only at trial that the claimants advanced a motive for Mr Layas acting as he did. Mr Onslow KC, on behalf of the claimants, argued that questions of motive were not part of the cause of action and it was not necessary for them to advance a motive but it seems to me that there is force in the defendants' point that, particularly in a fraud case, the court will need to examine the motivation of the various participants in the underlying events.

16. The defendants say that the claimants advanced allegations at trial which were not foreshadowed in their pleadings and that they ranged more widely at the trial than their pleadings gave advance notice of.

17. The defendants say that the claimants had powerful reasons to consider the merits with particular care given the elaborate consideration of the pleadings that took place at both the strike out hearing before Judge Barker and the hearing when permission to amend was sought. The defendants say that the claimants ought to have taken stock at that claim and realised that their case was at best a speculative one.

18. The defendants also rely on various offers that were made in the course of the litigation to settle the claim. They referred me to a without prejudice save as to costs letter, dated 27 January 2021, in which they offered to drop hands. That was written after the reformulation of the claim at the hearings before Judge Barker. The claimants rejected it. The defendants made another drop hands on 3 February 2022. By then the costs had gone up from the previous offer and the defendants were offering to give up any contingent right to claim their costs. Again that offer was rejected by the claimants, who said again that the offer to drop hands was derisory. The defendants made a third offer on 6 May 2022, which involved an escalating contribution to the defendants' costs, depending on the timing of acceptance of the offer. That was rejected by the claimants, who made a Part 36 offer of £4.5 million plus costs by letter of 22 June 2022.

19. The defendants say that their offers were reasonable ones say that it was unreasonable for the claimants in the circumstances to continue to take the considerable risks of pursuing the litigation.

20. The defendants also rely on other features of the case. They note that the claimants did not call or obtain the documents of Mr Al-Agori or Mr Layas and that this made it still more speculative than.

21. In the circumstances they ask for their costs on the indemnity basis.

22. The claimants, for their part, say that the touchstone of indemnity costs is unreasonableness in a high degree or conduct which is out of the norm (which may amount to the same thing). They say that simply because allegations of dishonesty are brought and fail, that is not itself a ground for indemnity costs, although it may be a factor that can be taken into account. I have already addressed the principles above.

23. In relation to offers which do not constitute part 36 offers, they say that it is a fallacy to say that because an offer may turn out to be reasonable with hindsight, the rejection of the offer at the time must be treated as unreasonable and they relied on the decision of the Court of Appeal in *F&C Alternative Investments Holdings Limited v Barthelemy* [2012] EWCA Civ 843.

24. The claimants say that the case that they pursued was neither speculative nor weak. The pleadings were heavily debated before Judge Barker, who concluded that there was a proper case to proceed to trial, with real prospects of success. An attempt to appeal that decision was dismissed.

25. They also refer to other relevant factors which supported that view. They note that Roger King, who signed the defence, did not appear at the trial or even put in a witness statement. Though, in the event, I decided not to draw adverse inferences, it was reasonable for them to suppose that there was a realistic possibility that a judge at trial would do so. They say that his failure to give evidence was a reason for thinking that the claim was a realistic one.

26. They also point out that there was no reverse smoking gun in this case, no document which undermined their case. They note that the court reached a mixed view about the evidence of Mr Merry, accepting some of it but in some respects deciding that he had been evasive and had made misleading statements, which he must have known at the time were misleading, particularly in 2013 and 2014, and that he gave indeed evasive evidence at the trial.

27. They say that the judgment is based on a detailed examination of the evidence and that the decisions which the court reached were nuanced. They say that another judge might have found the other way on at least some of those points.

28. They do not accept that there was any material departure from the pleaded case.

29. They say in relation to questions of motive that that was no part of the cause of action. That is something that I have already referred to.

30. As to the assertion that the claim was weak or speculative, they say that the case in relation to deceit was a runnable one, albeit it has failed, and that they did produce evidence on reliance, albeit the court has rejected it. As to the other causes of action based on dishonesty, they accept of course that the court has reached a final conclusion after a full examination of the evidence but say that that it was by no means pre-ordained or clear-cut which way the court would go.

31. They say that the costs should be assessed on the standard basis.

32. I find this case to be close to the dividing line between indemnity and standard costs. I have accepted the submission of the claimants that the bringing of a failed case in dishonesty does not of itself justify an award of indemnity costs. On the other hand, I have decided that the case was a speculative one in a number of respects.

33. It seems to me first that it should have been evident to the claimants from the time of the orders of Judge Barker that although they had been given permission to carry on with the case, the claims in deceit had real difficulties. Once the case against KS had been struck out and the claimants had to accept that KS genuinely believed the contents of the KS letter, it was always going to be very difficult to persuade the court that there was a runnable case in deceit. As explained in the judgment, the case that there was an implied representation as to the state of mind of the defendants was conceptually challenging. The claimants' own case was that they believed that KS was giving its own views and that the defendants had nothing to do with the production of the letter. So, even on the pleadings it was always a very difficult case.

34. As to the other claims which were brought and pursued by the claimants, these were, to my mind, somewhat speculative. They were not based on direct evidence. Indeed, at the trial the claimants accepted that their case was inferential. It also appeared to me that the claimants had not fully appreciated the impact of their own witnesses' evidence, as they opened the case on the basis that the defendants must have been involved in the decision to disinstruct Savills and that this was the only reasonable inference for the court to draw. In fact, Mr Furze's evidence was that the decision to disinstruct Savills had taken place in the first conversation that day with Mr Layas and (necessarily therefore) the defendants had had no involvement in the decision. That was a hallmark of the way that the case was brought and pursued: i.e. the claimants pursued speculative theories and hoped that the evidence would come out in their favour.

35. It also seemed to me that the claimants times strayed beyond their pleaded case. So, for example, I saw it as an important part of the claimants' case to say that the defendants were involved in the excuse about "timing constraints" because that was their springboard for alleging that there had been a conspiracy leading up to the email from Mr Layas to Mr Rhazali, which talked about such constraints. That was not pleaded (and nor was it ultimately established at trial).

36. I was also struck by the thinness of the evidence in relation to the claimants' main case on reliance, namely that the board had read and considered the two letters and had treated them as valuations. In the event, two of the witnesses they relied on refused even to give evidence and no real explanation was given for that course, and Mr Rais' evidence was essentially disastrous for the claimants. It is always, of course, open to a party to pursue a claim in the hope that it may stick but it seems to me overall that this was pretty speculative litigation in which very serious allegations of fraud (indeed criminal conduct) were made against the defendants and others.

37. I also think that there is force in the defendants' submission that the offers that they made to drop hands were substantial offers and that acting reasonably the claimants ought to have given very careful consideration to their position at the time those letters were written. Although it is right to say that Judge Barker permitted the claims to proceed, that amounts to no more than that the case was capable of getting over the fairly low hurdle of avoiding being struck out. It cannot be an answer to an application of this kind that the case was capable of passing that low hurdle.

38. Considering all of these factors in the round, on balance I have reached the conclusion that I should award the costs on the indemnity basis.