



Neutral Citation Number: [2023] EWHC 1283 (Comm)

Case No: CL-2021-000469

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF**  
**ENGLAND AND WALES**  
**COMMERCIAL COURT (KBD)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 26 May 2023

**Before :**

**THE HON MR JUSTICE BUTCHER**

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**Between :**

**(1) MANISH GOYAL**  
**(2) JYOTI GOYAL**

**Claimants**

**- and -**

**(1) BGF INVESTMENT MANAGEMENT**  
**LIMITED**  
**(2) BGF INVESTMENTS LP**  
**(3) BGF GROUP PLC**  
**(4) ALEXANDER NEVILLE SNODGRASS**  
**(5) ARUN BALASUBRAMANIAM**

**Defendants**

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**Harish Salve KC, Peter Head and Chintan Chandrachud (instructed by Gresham Legal)**  
**for the Claimants**

**David Mumford KC and Ryan James Turner (instructed by Macfarlanes LLP) for the First**  
**to Fourth Defendants**

**Lesley Anderson KC and Paul Strelitz (instructed by CMS Cameron Mckenna Nabarro**  
**Olswang LLP) for the Fifth Defendant**

Hearing dates: 15-17, 20-23, 27-31 March, 3-5 April 2023  
Further Submissions: 11, 12 April 2023  
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## RULING ON CONSEQUENTIAL MATTERS

### The Hon. Mr Justice Butcher:

1. I have today handed down my judgment in the trial of this matter. The Claimants' claims fail for a number of reasons.
2. The parties have been unable to agree three aspects of the orders which should be made consequential on my judgment. Those are:
  - (1) Whether the Claimants should pay the Defendants' costs on an indemnity basis (at least from 18 April 2022), as the Defendants contend, or on a standard basis, as the Claimants contend.
  - (2) The amount of any payment on account.
  - (3) The time within which such a payment on account should be made.
3. The court will ordinarily order costs to be paid on an indemnity basis if the conduct involved in pursuing the claim has been out of the norm.
4. A helpful summary of some of the considerations which may be said to take a case out of the norm was provided by Miles J in Libyan Investment Authority and Others v King and Others [2023] EWHC 434 (Ch). At [4]-[9] he said:
  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 or 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 (sic) 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.
5. I should record that I specifically agree with Miles J's statement in para. 9 of that judgment, that while the failure of allegations of fraud at trial is a factor which may tell, and will often tell strongly, in favour of an award of indemnity costs, there is no rule that indemnity costs will automatically follow, and equally it does not operate as a starting point. In my view, its weight must depend on the precise nature of the allegations, the reasons why they were advanced, and the reasons why they failed.
6. In the present case, the Defendants contend that costs should be awarded on an indemnity basis for, broadly, the following reasons:
  - (1) That Mr Goyal put pressure on at least the First to Fourth Defendants to settle by advancing his case through social media.
  - (2) That Mr Goyal sought to generate further pressure on the First to Fourth Defendants by drawing in the parent company, BGF Group plc, as a defendant.
  - (3) The Claimants pursued a case which they must have known would fail: in particular they must have known that it would fail on grounds of lack of inducement and causation.
  - (4) There were two aspects of the Claimants' case which were particularly speculative: (i) Mrs Goyal's claim to beneficial ownership of shares held by Mr Bhattacharya and Mr Agarwal; and (ii) the claim to conspiracy and common design liability.

- (5) What was alleged was a claim in fraud, with serious allegations against professional men, which failed.
  - (6) The Claimants had failed to plead their case in a clear and conventional way.
  - (7) The Claimants' case on quantum was unjustifiably complex. The counterfactuals were ill thought out, and in large part hopeless.
  - (8) A considerable proportion of the costs could have been avoided. The Defendants made drop hands offers on 18 January 2023, which were not accepted.
7. For their part, the Claimants say that the present is not a case in which indemnity costs are justified. They point out that the Court has not found that either of the Claimants were dishonest in their evidence, but has found rather that they have unconsciously reconstructed events. They say further that the Claimants made concessions prior to and in the course of the trial. And they say that there can be no question of their conduct of the case up to trial being unreasonable or overly aggressive.
  8. In my judgment, this was a case which can be said to have been speculative, weak and thin. But I am not persuaded that these attributes were so conspicuous as to mean that indemnity costs should be paid throughout. I do not consider that there was a sufficiently high level of unreasonableness. The Claimants are right to say that I did not find their evidence to have been consciously dishonest. The origin of the case was doubtless Mr Goyal's sense of grievance, which led him to convincing himself that things had been said, and had a significance, which had not been so.
  9. I am, however, persuaded that from the time of the drop hands offers the Claimants' continued pursuit of the action does merit an award of indemnity costs. By that time it must have been clear as to the real difficulties with the Claimants' case, including in particular as to (i) Mrs Goyal's claim, (ii) the claim for conspiracy, and (iii) as to causation and loss. I intend, therefore to order that the Claimants pay the Defendants' costs on a standard basis up to 25 January 2023, and on an indemnity basis thereafter. Those costs are to be assessed if not agreed.
  10. The second issue is the amount of a payment on account of costs. The First to Fourth Defendants seek a payment of £2 million on account of their costs, and the Fifth Defendant of £1.268 million on account of his. The Claimants have invited the Court to order payments on account of £1.5 million and £1 million respectively. They contend that the First to Fourth Defendants' incurred costs (which have been updated to a figure of £3.7 million) are exceptionally high for a 'relatively straightforward' case, by the standards of the Commercial Court, as are the Fifth Defendant's claimed costs of £2.1 million, especially given that the First to Fourth Defendants did, as the Claimants put it, 'most of the heavy lifting at trial'.
  11. In my view the figures proposed by the Claimants are somewhat, but not much, too low to reflect an amount I can be confident will be recoverable on a detailed

assessment. I intend to order that payments on account should be made of £1.75 million and £1.1 million.

12. The third issue is as to the time within which such payments on account should be made. The Claimants say that they require 42 days in which to arrange their financial affairs to enable them to make payment, and that this will not cause prejudice. Given what is submitted on their behalf including that the Claimants are individuals and that they lack liquid funds, I am prepared to give them 42 days from today, 26 May 2023, to make the payments on account.