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Case No: KB 2020 004517

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/10/2022

HER HONOUR JUDGE HOWELLS
(Sitting as a Deputy High Court Judge)

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Between:

ANDREW EVANS	**Claimant**
- and -	
R&V ALLGEMEINE VERISCHERUNG AG	**Defendant**

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- -

Sarah Crowther KC (instructed by Penningtons Manches Cooper LLP) for the Claimant
Pierre Janusz (instructed by DAC Beachcroft Claims) for the Defendant

Hearing dates: 25th – 29th July 2022 (inclusive)

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Approved Judgment on Costs

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HER HONOUR JUDGE CATHERINE HOWELLS

HHJ Howells:

1. This is the reserved judgment on the claimant's application in this case for costs to be awarded on an indemnity basis. In July of this year, I heard the trial on liability of this matter and found in favour of the claimant. After delivery of judgment the claimant made an application for costs of an indemnity basis. As there had been no indication of such an application beforehand and defendant's counsel was without instructions on the matter, the parties were ordered to file written submissions which they did. I am very grateful to both counsel for the careful and extremely helpful written submissions they have provided.

2. There is no dispute in this case that the claimant was successful in the action. There is no dispute that the defendant should pay the claimant's costs. It is also accepted that from 7 July (which was 21 days after the expiry of a relevant Part 36 offer) those costs should be on an indemnity basis. However, the claimant now invites the Court to order that the defendant do pay the costs of the action as a whole on the indemnity basis. It is that application which is dealt with in this judgment.

3. Pursuant to the Civil Procedure Rules 44.3 the court has the power to order assessment on an indemnity basis. There is a distinction drawn between Part 36 consequences of costs on an indemnity basis and the wider discretion that a judge has to award such costs. In this case the claimant seeks to rely on my wider discretion and contends that indemnity costs should be ordered because of the overall conduct of the defendant.

4. I have had an opportunity of considering a number of authorities that have been provided to me by claimant and defendant is in relation to this issue. I have also been assisted by refreshing my memory of the notes to the Civil Procedure Practice 2022 at paragraph 44.3.8.

5. In *Excelsior Commercial and Industrial Holdings Ltd* v. *Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ the Court of Appeal clarified early decisions of the court in relation to the general discretion to award indemnity costs. The court declined to give detailed guidance at the principles to be applied by judges intending to make such orders, recognising that every case must be fact specific, and taking the view that they should not strive to replace the language of the rules with other phrases. Nevertheless, it was stated that the making of a costs order on an indemnity basis was where conduct or circumstances was "out of the norm". At paragraph 38 Lord Justice Waller made it clear that the matter should be left so far as possible to the discretion of judges at first instance.

6. In *Esure Services Ltd v Quarcoo (2009) EWCA Civ 595* further clarification was provided; it is clear from that decision that indemnity costs are not to be ordered solely in cases where there is some lack of probity or conduct deserving of moral condemnation on the part of the paying party. Where in *Excelsior* there is reference to "out of the norm", the word "norm" was intended to reflect "something outside the ordinary and reasonable conduct of proceedings".

7. There have been a number of other decisions from the Court of Appeal and at first instance where the question of indemnity costs has been considered. Nevertheless, I

take the view that, whilst they provide helpful examples and useful guidance, they do not bind me in terms of the exercise of my discretion

8. I am assisted by approach taken in the case of *Three Rivers DC v Bank of England (2006) EWHC 816, a* case which has been described as notorious and on its facts extreme, where the claimant abandoned the claim at a very late stage in the proceedings. Tomlinson J gave a detailed summary of factors to be taken into consideration in relation to indemnity costs. It was recognised that the court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide. The critical requirement before an indemnity order can be made in the successful party's favour is that there must be some conduct or other circumstances which takes the case out of the norm. That test is not a requirement for conduct attracting moral condemnation which is an a fortiori ground but, rather, unreasonableness. The judge listed number of other factors which were relevant in that case for an unsuccessful party (in that case the claimant) to be ordered to pay indemnity costs. The court could and should have regard to the conduct of the unsuccessful party during the proceedings, both before and during the trial, as well as whether it was reasonable for the party to pursue particular allegations. Further where a case was speculative, weak, opportunist or thin, a party could expect to pay indemnity costs if it fails. Certain examples were given which would take a case out of the norm to justify an order for indemnity costs including where a party pursues a claim which was irreconcilable with contemporaneous documents.

9. It is clear from my reading of the authorities that indemnity costs are not to be awarded simply because a party has lost or has pursued the case to trial which was, on the face of it, weak. It is wrong to consider this discretion with the benefit of hindsight i.e., with knowledge of how a particular issue has ultimately resolved.

10. The approach I take in relation to this application and my wide discretion, is to consider, pursuant to this line of authorities, the conduct of the defendant during the proceedings both before litigation and after and before and during trial. I then determine whether that conduct or other circumstances take this case outside the norm i.e., something outside the ordinary and reasonable conduct of proceedings.

11. The claimant has set out a number of allegations of "conduct " by the defendants which independently and cumulatively it is said amount to justification for an indemnity costs order. I will deal with these in turn

Failure to engage with the Rehabilitation Code

12. The claimant accepts that the Rehabilitation Code is a voluntary code which many insurers and large defendant such as the NHS routinely engage with to hopefully narrow issues between parties and to avoid litigation where possible. One of the principal objects of the rehabilitation code is to enable funding to be put in place for rehabilitation on a without prejudice basis to any question of liability. On the facts of this case liability was very much in dispute. It is correct that rehabilitation was sought by the claimant on a number of occasions. However, the defendant insurer refused to engage. It is right that the claimant warned the defendant that they would raise this as a relevant factor in relation to costs. However, as counsel for the defendant points out in his written submissions the Rehabilitation Code is an entirely voluntary code. It is a code which is in place (as far as I am aware) between insurers and public authorities

such as the NHS and claimant representatives in England and Wales. I have seen nothing which would indicate that it should apply to overseas insurers such as in this case. A party to the code is the Association of British Insurers. This case involved the application of German law to an accident in Germany and with German insurers. That of course does not mean that a party could not voluntarily follow something along the lines of the code. It does, however, mean that there is probably less of an impetus on parties to work collaboratively pre litigation for rehabilitation purposes. That is far from ideal, but I do not consider that any failure by the defendant to voluntarily accept the provisions of the Rehabilitation code and to work with the claimant for example by funding treatment and the like can be criticised in such a way as to take it as conduct outside the norm. All insurers, foreign or based in England and Wales, might be well advised to try and work in a collaborative fashion as per the terms of the code. However, refusing to do so is not in itself in my judgement sufficient to say that indemnity costs follow. That is particularly the case where the insurer is an overseas one and therefore not, as far as I am aware bound in any way by the code.

Failure to engage with ADR

13. There was no attempt by the defendant to settle this case before the trial. Parties are always encouraged to try and mediate or seek alternative dispute resolution. Alternative dispute resolution does not require a case to be fully trial prepared with every risk evaluated before it can be entered into. Courts and practitioners are well used to early dispute evaluation and other methods of negotiations prior to their being a full picture in respect of all the evidence.

14. The claimant contends that the defendant did not respond to their offer of ADR. The claimant first proposed this in March 2021 and June 2021. The court order of November 2021 specifically contained a standard term which encourages the parties to consider alternative dispute resolution. The claimant says there was a renewed attempt in February 2022 to engage the defendant. The defendant stated that ADR was premature. The claimant suggested that a date to be put in the diary so that when all the evidence was available, parties were ready to meet. Unfortunately, that was not done. By the time that the defendant agreed to ADR there were no convenient dates. As such, the claimant says the defendant has not negotiated in any way. The claimant of course made a Part 36 offer in the month before trial. As far as I am aware no offers were made at all by the defendant.

15. In response defence counsel states that the defendant did not show an unwillingness to engage with ADR: it was simply a question of timing and availability of evidence so that risks could be assessed. I accept that, but only up to a point: as stated, parties should be well used to negotiating at different points of litigation. It should not always be necessary to wait for finalised joint reports from experts before litigation risk can be evaluated. Having said that, I am not satisfied that such is conduct which is "out of the norm" as defined by the authorities. It is unfortunate that the parties did not negotiate earlier. Negotiation is of course a two-way street. Either party could, if they so wished, have made an earlier Part 36 offer of settlement. Had the claimant made their offer 12 months earlier, when they first suggested a meeting and the defendant did not engage, they would be entitled to the indemnity costs that a successful Part 36 offer brings. Parties are always encouraged to negotiate. However, the defendant's decision not to do so until it was too late to be effective, whilst regrettable and not to

be condoned, is not conduct which justifies the imposition of an indemnity costs order.

Failure to cooperate in narrowing issues in dispute

16. The claimant asserts that the defendant failed to narrow issues in dispute in respect of agreeing issues of German law, either early in proceedings or shortly before trial. The defendant's decision to obtain their expert evidence was a reasonable one and they should not be criticised for that: this is an area where the court was assisted by the expert evidence on both sides. The experts remained in disagreement on minor issues, but those matters needed to be determined by the court: it was not unreasonable for either side to want to argue these issues: this is particularly the case where the opening written submissions on the law by leading Counsel for the Claimant were later clarified in oral submissions.

17. The accident reconstruction experts remained far apart in their evidence; each party was entitled to challenge and test the other side's evidence. I do not consider this to be unreasonable conduct.

18. The defendant applied very late on, in a rather unprepared fashion, for permission to rely upon additional expert evidence from their reconstruction expert. The application was refused. Whilst I accept that the application was weak, late, and ultimately unsuccessful, I do not consider that it was wholly without merit. Nor do I consider that making such an application was so ill-judged or out of the norm that costs should be on an indemnity basis. The defendant will pay any additional costs of such an application in any event.

19. The defendant did not agree calculations prepared by the claimant's expert Mr Mottram: this all occurred during the trial, due to additional evidence being submitted by the defendant. This again was unfortunate and, no doubt, tested the patience of the litigators. However, whilst I do not condone such an approach, I do not accept that it was conduct justifying an indemnity costs order. No one was ambushed by new information; the parties were able to deal with it in evidence. There was no delay to court proceedings.

20. All of these matter were far from an ideal of litigation presentation. However, this court, and many others, sees this sort of event on a regular basis. It is not behaviour which should be condoned, but it does not fall outside the range of reasonable conduct (albeit it may be said to be very much at the lower end).

Failure to prepare for trial / comply with rules and practice directions

21. The claimant describes "a litany of failures on the part of the defendant". I refer to the written submission for the detail, but they include:

    - not instructing Dr Weyde (expert witness) properly by providing him with all the evidence: this was corrected during trial.
    - Dr Weyde being late with his evidence for the joint statement.
    - Failing to comply with the requirement for video link evidence for oversees witnesses (as a result of which, there was delay to the trial as an unsuccessful

application was made and some of the defendant evidence was not capable of being given orally).

- Not arranging for an interpreter for Dr Weyde (he did not say he wanted one; in fact, his English, for a non-native speaker, was very good.)
- Making 3 different applications during the course of the trial which caused delay and wasted valuable trial time.
- Failing to provide defence Counsel with the video evidence attached to an expert's report: I do not think this is a material factor, although no doubt an inconvenience for Counsel.
- Failing to clarify the accuracy of the translation of the accident reconstruction report (it was unfortunate management of the witness which permitted him to painstakingly seek to correct some of the translation in the witness box, whilst no one had initially seized the point that the official translation had been agreed between the parties: all those present in the court will no doubt feel that such should have been managed better).
- Successfully making a late amendment to its case to allege excessive speed: this should have bene done previously but, ultimately, permission was given, and no prejudice was caused.

22. In response to these assertions the defendant contends that these matters had no materiality overall on how the case and trial was run. Lateness of the joint report, it is said cannot be laid at the defendant's door: it is said that this was Dr Weyde's fault as he was pressed repeatedly for his report. Globally, such fault still lay at the defendant's door: Dr Weyde was the defence witness. However, I have no evidence to suggest that the solicitor did not take reasonable steps to chase. They also chased the Foreign Office for a response as to permission for witnesses to give evidence from Germany: in my judgment they did this rather too late in the day and did not actively pursue this until it was too late. The defendant's legal team appeared to be rather taken by surprise by the provision of PD32. Nevertheless, the penalty imposed upon them was that they could not call oral evidence from those witnesses. I accept that court time was spent dealing with this issue, but I cannot conclude that it was exceptional or out of the norm for solicitors to wake up to the need to make an application to the court, late in the day. I accept that Dr Weyde did not need an interpreter. The making of applications during trial was unfortunate, and in my judgment represented a failure of preparation on the defendant's part. This is very frustrating for litigators on the opposing side. However, in the course of trials and litigation, things happen which should have been dealt with before, but parties and the court are well use to and well equipped to deal with. This might not be the smooth running of the litigation train, but it did not cause the train to go off the tracks. None of the issues identified were out of the norm.

23. In general terms the "litany" of failures were not such that they disrupted any significant degree the smooth running of this action and, whilst failures of preparation are never to be condoned, I do not find that any of the failures identified here, either individually or cumulatively, constituted conduct outside the usual and reasonable conduct of proceedings.

Pursuing a hopeless case

24. The claimant contends that the defendant's case was hopeless: its own reconstruction evidence contradicted factual witnesses. The witnesses were unable to be called to

give oral evidence because of failure to comply with the practice direction as above. The defendant, it is said, changed its case late on. Effectively, the defendant's expert was allowed to control the conduct of litigation.

25. The defendant may now, with the benefit of hindsight, conclude that reliance on its expert evidence to the extent that it did, and failure to ensure that witnesses were present to give evidence, was misguided; I know not. However, the question of whether this was conduct so out of the norm to justify indemnity costs should not be judged retrospectively from the position of knowledge that such evidence was ultimately rejected at trial. It cannot be said, on a reading of the evidence overall, that the defendant's case was so hopeless that it should not have been pursued. Trials test the strength of evidence: the defendant's evidence was not preferred but it was not, on its face, so hopeless that a party could say it was bound to fail. It was not unreasonable to fight this trial.

Failure to respond to Part 36 offer

26. When no ADR /JSM was arranged the claimant made a Part 36 offer which he beat. The defendant did not respond to the offer. There is no obligation within the rules to respond (although professional courtesy might suggest it was appropriate). The consequence of that is that the claimant has indemnity costs from the appropriate date. I do not see that I can award a double indemnity costs order for failing to respond, nor treat that failure to reflect back on the litigation generally and say that indemnity costs should be awarded from an earlier date. The jeopardy the defendant faced by not accepting the claimant's offer has already and correctly come into effect by the standard Part 36 consequences I have ordered.

Conclusion

27. I take a step back from the individual complaints to consider whether, separately or cumulatively, the conduct of the defendant in this matter justifies the penalty of indemnity costs. I conclude that it does not. I accept that the conduct of this litigation by the defendant has been imperfect. They could have done much more to prepare this matter for trial at an earlier stage, make appropriate applications earlier, and (probably) take a realistic assessment of the strengths of their case. However, parties are entitled to run cases which are not the strongest. They take their chance at trial. The defendant took that chance and lost.

28. None of what is said is a reflection on the trial management of counsel: I of course do not know what instructions are given and at what point. I do not intend any of the above to reflect upon Mr Janusz.

29. In conclusion therefore, I accept that this case was very far from a paradigm of preparation and good practice from the defendant. Nothing I have said should be taken as justification for poor litigation preparation nor failure to engage in negotiations. As has been said by many judges on many occasions, litigation is to be avoided where possible. Reasonable settlement of claims is to be encouraged. However, the conduct of the defendant in this case was not so far below the bar as to be ""something outside the ordinary and reasonable conduct of proceedings".

30. For those reasons I award the claimant the costs of the proceeding on a standard basis up to 7th July 2022 and thereafter (as a result of the Part 36 consequences) on an indemnity basis.