Case No: HT-2016-000104

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2019] EWHC 2722 (TCC)

The Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 15/10/2019

Before:

MRS JUSTICE O'FARRELL

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Between:

(1) TRIUMPH CONTROLS - UK LIMITED
(2) TRIUMPH GROUP ACQUISITION CORPORATION **Claimants**

- and –

(1) PRIMUS INTERNATIONAL HOLDING COMPANY
(2) PRIMUS INTERNATIONAL INC.
(3) PRIMUS INTERNATIONAL CAYMAN CO.

Defendants

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Rajesh Pillai & Nathaniel Bird (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimants**
James Morgan QC & Kirsty White (instructed by **Harrison Clark Rickerbys Limited**) for the **Defendants**

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WRITTEN JUDGMENT
ON CONSEQUENTIALS

Mrs Justice O'Farrell:

1. On 11 March 2019 the Court handed down judgment for the claimants ("Triumph") against the defendants ("Primus"). In a further judgment handed down on 13 August 2019, the Court determined the outstanding issues on quantum, pursuant to which it was ordered that Primus should pay Triumph the sum of US$4,201,570.00 in damages and US$1,186,742.08 in interest, a total of US$5,388,312.08 plus ongoing interest.

2. On 13 August 2019 the Court ordered that issues as to costs and any application for permission to appeal would be determined on paper following the exchange of short written submissions by the parties.

3. Triumph's position is that it is the successful party and, as such, is entitled to the usual order that costs should follow the event. Primus has been ordered to pay substantial damages to Triumph. This has been hard fought litigation that extended over a number of years and over a number of hearings. Numerous points were taken on both sides and argued out in full. While Triumph did not win on every pleaded argument, the overall outcome is plainly in Triumph's favour and there is no reason to depart form the usual costs order.

4. Primus' position is that Triumph should be awarded a modest percentage of its total costs. Triumph relied on three discrete heads of claims, with each alleged to give rise to a different quantum of damages, but succeeded on only one of them. In respect of the claim on which Triumph succeeded, it lost on a number of sub-issues and failed to establish its primary case that it would have walked away from the transaction. Triumph has been awarded only a small fraction of the damages claimed of US$63.5 million. Triumph's failures led directly to very significant additional and severable costs being incurred by the parties.

5. I am grateful to the parties for their clear and succinct written submissions.

6. This judgment should be read together with the facts and findings set out in the earlier judgments, details of which are not repeated here.

Relevant legal principles

7. The Court has discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid: CPR 44.2(1).

8. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, although the Court may make a different order: CPR 44.2(2).

9. CPR 44.2(4) provides that in deciding what (if any) order 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.

10. CPR 44.2(5) provides that the conduct of the parties includes:

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

11. The Court may make an issues-based costs order but, before doing so, will consider whether it is practicable to make an order limiting the costs payable to a proportion of the overall costs: CPR 44.2(6) & (7).

12. In *Straker v Tudor Rose* [2007] EWCA 368 (CA) the approach to be adopted was set out by Waller LJ:

> "[11] The court must first decide whether it is case where it should make an order as to costs, and have at the forefront of its mind that the general rule is that the unsuccessful party will pay the costs of the successful party. In deciding what order to make it must take into account all the circumstances including (a) the parties' conduct, (b) whether a party has succeeded on part even if not the whole, and (c) any payment into court."
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> [12] Having regard to the general rule, the first task must be to decide who is the successful party. The court should then apply the general rule unless there are circumstances which lead to a different result. The circumstances which may lead to a different result include (a) a failure to follow a pre-action protocol; (b) whether a party has unreasonably pursued or contested an allegation or an issue; (c) the manner in which someone has pursued an allegation or an issue; and (d) whether a successful party has exaggerated his claim in whole or in part.
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> [13] Where, particularly in a commercial context, the claim is for money, in deciding who is the successful party, I agree with Longmore LJ when he said in *Barnes v Time Talk (UK) Ltd.* [2003] EWCA Civ 402 para 28 that "the most important thing is to identify the party who is to pay money to the other". In considering whether factors militate against the general rule applying, clear findings are necessary of factors which led to a

disapplication of the general rule, e.g. if it is to be said that a successful party "unreasonably" pursued an allegation so as to deprive that party of what would normally be his order for costs, there must be a clear finding of which allegation was unreasonably pursued."

13. The following principles were set out by Jackson J in *Multiplex Constructions (UK) Limited v Cleveland Bridge UK Limited (No.7)* [2008] EWHC 2280 (TCC) at [72]:

> "(i) In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.
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> (ii) In considering how to exercise its discretion the court should take as its starting point the general rule that the successful party is entitled to an order for costs.
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> (iii) The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.
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> (iv) Where the circumstances of the case require an issue-based costs order, that is what the judge should make. However, the judge should hesitate before doing so, because of the practical difficulties which this causes and because of the steer given by rule 44.3(7).
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> (v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order.
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> (vi) In considering the circumstances of the case the judge will have regard not only to any part 36 offers made but also to each party's approach to negotiations (insofar as admissible) and general conduct of the litigation.
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> (vii) If (a) one party makes an order offer under part 36 or an admissible offer within rule 44.3(4)(c) which is nearly but not quite sufficient, and (b) the other party rejects that offer outright without any attempt to negotiate, then it might be appropriate to penalise the second party in costs.
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> (viii) In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the

costs specific to the issues which he has won but also the common costs."

14. In *F&C Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 2807 (Ch.) Sales J provided further guidance:

> "[16] It is frequently a feature of litigation (particularly of complex, hard fought commercial litigation such as in this case) that arguments or factual disputes may be relevant to a number of underlying issues which have to be addressed in the proceedings. It is also frequently the case that a party may rely on a number of grounds to support his claim that he was entitled to take some particular action, and succeed in showing his entitlement so to act (i.e. on one or more of the grounds advanced as justification for the action) while at the same time losing the argument that certain other grounds relied on by him provided a proper basis to justify the action taken …
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> [19] In exercising its discretion as to costs, a court will be cautious before concluding that an award of costs in favour of the party who has won overall should be limited in either of these cases. This is a function of the general approach that courts should avoid an unduly finely detailed division of issues and sub-issues when deciding what costs orders to make.
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> [20] The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party: CPR Part 44.3(2)(a). Often it will be appropriate that the winner should get an order that the loser should pay his costs even where there have been issues on which the overall winner has lost: see e.g. *Actavis v Merck* [2007] EWHC 1625 (Pat), at [25]; *Fleming v Chief Constable of Sussex Police Force* [2004] EWCA Civ 643; [2005] 1 Costs LR 1, at [43]; *HLB Kidsons v Lloyds Underwriters* [2007] EWHC 2699 (Comm); [2008] 3 Costs LR 427, at [11]. In commercial litigation, the starting point in working out who the winner is for the purposes of making costs orders will usually be to look at what money has been ordered to be paid: see *Fiona Trust & Holding Corporation v Privalov* [2011] EWHC 664 (Comm) at [36] per Andrew Smith J ("At least in commercial litigation, the party 'who ends up receiving payment' is generally characterised as 'the overall winner of the entire action', citing *Multiplex Constructions (UK) v Cleveland Bridge* [2008] EWHC 2280 (TCC); [2009] 1 Costs LR 55 at [72] per Jackson J).
>
> [21] Parties should be afforded a reasonable degree of latitude in formulating claims, including pleading alternative bases for the same basic claim. That is a normal and reasonable way to conduct litigation (where the parties are operating under conditions of uncertainty about how the court might ultimately react to the arguments and evidence to be heard in support of the

claim) and may be a good way of ensuring that the court has before it the full circumstances of the case so that it is in a position to get to the true heart of the dispute and arrive at what it regards as the just outcome. Therefore, where that is done and the party proceeding in that way has won on his claim and has acted reasonably, it will often be appropriate for a simple costs order to be made in his favour."

15. In *Sycamore Bidco Ltd v Breslin* [2013] EWHC 583 (Ch.), having referred to the principles set out by Jackson J in *Multiplex,* Mann J identified the following additional matters at [12]:

> "(i) The fact that a party has not won on every issue is not, of itself, a reason for depriving that party of part of its costs. There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially complex litigation such as the present case, any winning party is likely to fail on one or more issues in the case. As Simon Brown LJ said in *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125 at paragraph 35: "the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues". (Gloster J in *Kidsons v Lloyds Underwriters* [2007] EWHC 2699 (Comm)).
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> (ii) The reasonableness of taking a failed point can be taken into account (*Antonelli v Allen* The Times 8th December 2000 per Neuberger J).
>
> (iii) The extra costs associated with the failed points should be considered (*Antonelli)*.
>
> (iv) One still has to stand back and look at the matter globally, and consider the extent, if any, to which it is just to deprive the successful party of costs. (*Antonelli*).
>
> (v) The conduct of the parties, both before and during the proceedings, is capable of being relevant (CPR 44.3(5)).”

Costs order

16. Triumph obtained an award of substantial damages in its favour against Primus. It is common ground that Triumph should be regarded as the successful party and is entitled to recover at least part of its costs against Primus.

17. Triumph’s case is that there is no good reason to depart from the general rule that, as the successful party, it should have its costs.

i) There are no admissible offers of settlement that affect any order for costs.

ii) Triumph acted reasonably in bringing its claims. None of the allegations made by Triumph was unreasonable and Triumph conducted this litigation in a proper and reasonable manner.

iii) Triumph did not exaggerate its claim. Although it lost the Clause 6.6 Claim, the claim was properly and reasonably advanced and without exaggeration.

18. Further, Triumph submits that an issues-based or proportional costs award would not be appropriate or practicable.

i) Such an award would not properly reflect Triumph's overall level of success in this long-running and hard-fought litigation. Triumph has ultimately been vindicated by these proceedings.

ii) The three breach of warranty claims advanced by Triumph shared a common underlying factual background and raised overlapping issues. Therefore, it would have been necessary to undertake much of the same investigation into the state of the companies and the sales process even if the claims on which Triumph lost had not been pursued.

iii) The valuation issues were common to each of the claims.

iv) Primus was not wholly successful on either the Nadcap Warranty Claim or the Operational Warranty Claim.

v) Triumph succeeded on much of its quantum claim.

19. Primus' case is that the Court should make a proportional costs order to reflect Triumph's failure on significant issues in the case:

i) The three warranty claims were separate and cumulative in terms of damages. In particular, the Nadcap Warranty Claim was dealt with as a discrete issue by both parties; additional witnesses were called to give specific evidence on the issue and the experts addressed the claim as a separate issue. As a result, the Nadcap Warranty Claim gave rise to identifiable, substantial and severable costs. There was limited overlap with the background or other disputed facts.

ii) The same issues apply, to a lesser extent, in respect of the Operational Warranty Claim.

iii) It was not reasonable for Triumph to raise or pursue those claims.

iv) Although Triumph won on the FLP Claim, it failed on discrete and costly sub-issues in respect of the same.

v) Triumph's failure on the Clause 6.6 Claim gave rise to a judgment sum that was a small fraction of the total amount claimed.

20. I conclude that the circumstances of this case do not require the Court to make an issues-based order but that a proportional costs order would be appropriate to reflect Primus' success on the Nadcap Warranty Claim for the following reasons.

21. Firstly, the central issue in the case was whether Primus was in breach of the warranties in the SPA, entitling Triumph to damages. Triumph won on that central issue.

22. Secondly, both parties deployed a number of arguments in respect of each warranty claim and quantum. Every point was fought. Some points were stronger than others but none of the points argued was unreasonable or unarguable. Each party won and lost sub-issues in respect of each part of the case. But Triumph emerged as the victor with an award of substantial damages.

23. Thirdly, the length and costs of the trial would not have been significantly different had the claim been limited to the FLP Claim. I accept Triumph's submission that there was much common background and the scope of the investigation at trial largely would not have changed. The experts would still have been required to produce their reports and give evidence on the same valuation issues. Most of the key witnesses covered more than one issue or claim. Most of the Operational Warranty Claim evidence was relevant to the FLP Claim.

24. However, there were discrete areas of evidence arising out of the Nadcap Warranty Claim that took up time in court and would have caused Primus to incur costs in successfully defending the claim that would not have been otherwise incurred. That can be reflected in a proportional costs order.

25. Having regard to the substantial overlap in the factual and expert evidence that would have been required in any event, I conclude that Primus should pay 85% of Triumph's costs.

26. The parties agree that the costs should be subject to a detailed assessment on the standard basis.

Payment on account of costs

27. Triumph seeks a payment on account of its costs. By letter dated 13 September 2019 RPC, solicitors for Triumph, confirmed that Triumph's costs are not less than £6,938,000. Triumph seeks 50% of this sum on account of its costs.

28. Primus accepts that Triumph is entitled to a reasonable amount as a payment on account but submits that it should be limited to 30-40% of the relevant costs figure because there is a high degree of uncertainty as to what may be recovered on detailed assessment.

29. CPR 44.2(7) 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.

30. Where the amount of costs is to be assessed on the standard basis:

    i) the Court will only allow costs which have been reasonably incurred and are reasonable in amount, resolving any doubt in favour of the paying party: CPR 44.3(1)&(2); and

    ii) the Court will only allow costs which are proportionate to the matters in issue: CPR 44.3(2).

31. In assessing the reasonableness of the incidence and amount of the costs incurred, the Court will have regard to all the circumstances, including the conduct of the parties, the value of the claim, the importance of the matter to the parties, the complexity of the issue, and the skill, time and effort spent on the application: CPR 44.4.

32. I note that no detailed bill of costs has been prepared and RPC's letter contains a very high-level breakdown of the costs incurred.

33. There has been no costs budgeting in this case. Triumph filed a costs budget in February 2016 which estimated costs of £2,222,785 but that is not of assistance because it was not an agreed budget or the subject of a costs management order and it was not updated to reflect considerable developments in the case as it progressed over some three years.

34. Primus is entitled to its costs of and occasioned by amendments made to the claims (pursuant to orders dated 4 March 2016 and 30 June 2017), which it estimates to be around £508,000.

35. The recoverable costs, limited to 85% of its costs following a detailed assessment, will result in a substantial sum due to Triumph. The overall figures identified do not appear to be disproportionate to the claims. Having seen the volumes of factual and expert evidence in this case, including the large documents database, and having heard the trial, it does not come as any surprise that the estimated costs for one party exceed £6 million.

36. Taking the above matters into account, I consider that a reasonable sum on account of costs is £3 million.

Application for permission to appeal

37. Primus seeks permission to appeal in respect of the draft grounds dated 13 September 2019 as follows:

    i) error of fact and/or law as to the basis on which purchase price was agreed;

    ii) error of fact and/or law as to the impact of delayed profitability on the purchase price;

    iii) error of fact and/or law as to the lower purchase price that would have resulted from delayed profitability;

iv) error of fact and/or law as to the reduced purchase price that would have reflected the reduced DCF figure based on the Amended LRP and whether Primus would have agreed to the same;

v) error of fact and/or law in finding that Triumph would have reduced the purchase price to reflect the reduced DCF figure based on the Amended LRP and that Primus would have agreed to the same;

vi) error of fact and/or law as to the purchase price that would have been agreed;

vii) error of fact and/or law as to the proper construction of "goodwill" for the purpose of paragraph 3.1(f) of Schedule 8 to the SPA.

38. I refuse permission to appeal because the grounds do not identify any errors of law or findings of fact that were not open to the Court on the evidence.

i) Grounds 1 to 6 are an attempt to challenge findings of fact made by the Court having assessed the credibility and reliability of the witnesses who gave evidence against the contemporaneous documents deployed during the trial and the expert evidence.

ii) Ground 7 seeks to challenge a point of construction of the SPA but does not identify any error in the Court's analysis.

39. For those reasons, the appeal has no real prospect of success and permission is refused.

Order

40. For the reasons above, the following order is made:

i) Primus shall pay 85% of Triumph's costs, such costs to be subject to a detailed assessment on the standard basis.

ii) Primus shall pay Triumph the sum of £3,000,000 on account of such costs, such sum to be paid by 4pm on 29 October 2019.

iii) Primus' application for permission to appeal is refused.