Citation Number: [2020] EWHC 760 (TCC)

Case No: HT-2018-000322

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY & CONSTRUCTION COURT
QUEEN'S BENCH DIVISION

The Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A INL

Date: 11th February 2020

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Before:

MR JUSTICE WAKSMAN

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Between:

(1) TC DEVELOPMENT LTD	**Claimants**
(2) BUJ ARCHITECTS	
- and -	
(1) INVESTIN QUAY HOUSE LTD	**Defendants**
(2) JOHN DOWNER	

- -

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JAMES McCREATH (instructed by **IBB Solicitors**) for the **Claimants**

SARAH CLARKE (instructed by **Hamlins Solicitors**) for the **Defendants**

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APPROVED JUDGMENT

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MR JUSTICE WAKSMAN:

1. There was a claim for unpaid fees effectively by the two claimants in this matter against the defendant which is a Jersey company. The Jersey company did not engage in any real way with the litigation, and that led to there being a trial at which I heard from both claimants. The defendant did not appear. I gave a reasoned judgment making an award against the defendant.

2. The claimants have put in a costs budget which I approved I think in the sum of about £186,000, and it was contemplated that the claimants in order to make a recovery on costs would seek to make an application that the gentleman behind the defendant (Mr Downer) should be joined as a party for the purpose of an application to make a third party costs order against him. That is what happened, and he filed evidence to say why - according to the usual principles - this was not a case for making a third party costs order against him. The claimants in the light of what he said were not prepared to take his evidence at face value, particularly in relation to how the company had been funded and how monies came into the company and went out of the company, and they sought an order for cross-examination which meant the original hearing of the application - which would otherwise just have been on witness statements - went off. It was due to have been heard today.

3. However, on 4th February the following offer by email was made by those acting for the claimants. "Dear Kate" - that is the solicitor for Mr Downer - "this is a formal offer made without prejudice save as to costs by my clients to settle their application for a non-party costs order against your client. The terms of the offer are that your client pays my client their costs of the litigation, such costs to be the subject of a detailed assessment if not agreed and pursuant to 36.17.4 B from the date on which the relevant period expired in relation to my client's Part 36 offers, their costs are to be assessed on the indemnity basis. Regards." Comes back the reply the same day: "Andrew, thank you for your client's offer. Your client's offer is accepted. I will send through advance order for signature and return so I can file tonight."

4. The defendant's solicitors sent through a draft. The claimant's solicitors said that they would look at it in the morning but the parties needed to agree a payment on account, and said that there should be a payment on account of £165,000, and said that it may be appropriate to include in a draft the costs which the company has to pay. That is a separate matter in my view. The order that was sent by the defendant really simply recited what was in the offer, that is to say that Mr Downer would pay the costs of the litigation and on an indemnity basis.

5. Those acting for the claimant produced an amended order which did two things. It stated first of all that the costs of the litigation should include the costs of the application for the third party costs order expressed to be for the avoidance of doubt, and secondly that there should be an interim payment. The defendant in short did not accept that. It said that the offer which had been accepted made no provision for an interim payment by this court, and secondly that the cost of the litigation did not include the costs of the application for third party costs order.

6. I have now to determine both of those, and I do so as usual by taking an objective look at the exchange of emails. It is to be noted that the first part of the email says it is to settle their application for a non-party costs order against the defendant.

7. I deal first of all with the question of whether the cost of the third party costs order application should be framed within that. It might have been desired, but I take the view that objectively speaking the offer did not include those costs for this reason. First of all, it refers to the costs of the litigation. I can see that the litigation as a whole would include or could include the costs of an application for a third party costs order. However, I have to take account of clause 2.

8. Clause 2 referring to the application of the rule that the costs should be on an indemnity basis all arises because of the claimant's Part 36 offer as against the first defendant which in fact they bettered on my judgment. That does not work in relation to an application for a third party costs order.

9. Mr McCreath, for whose submissions I am indebted, says that does not matter because the reference to Part 36 was really a forensic tool to justify why it is that the costs are to be agreed to be paid on an indemnity basis. I do not think objectively one can read it like that; because if one did one, still would run up against the point that all that would do would justify an indemnity costs order in respect of the cost of the underlying litigation as against the defendant itself. It would have no application at all in relation to Mr Downer. Yet Mr McCreath argues that it must in fact cover both the litigation and the underlying application with which I disagree.

10. Secondly, I would refer to the way in which the matter was put in the application. Neither side has suggested this is inadmissible evidence, and it would be difficult to do so because in my judgment it forms part of the factual matrix. Paragraph 12 of the application says that the claimant's costs in the litigation are in the total of sum of £186,182 as stated in the claimant's updated costs budget which has been filed with the court. It is common ground that they do not include the costs of the application.

11. Mr McCreath is saying there is not much in that because the costs of the application will not have been known at that stage because at that point it had not been finally decided. I take that point, but that is not much of an argument, because it would have been open to the claimant's solicitors to put in a specific provision in their offer letter seeking the costs of the application or quantifying those costs. Mr McCreath says it was almost inevitable that had that application run its course the claimants would have ended up with the costs of that application in any event. I am not prepared to speculate about that.

12. On the face of it then, in my judgment it is clear that the cost of the litigation has to be regarded here as the underlying litigation and not any costs incurred in making the third party costs application.

13. Mr McCreath's fallback is to say if that is the case, then the costs of that application are at large and if necessary, since they have not been dealt with, he would make an application for those costs now. I do not agree with that.

14. I agree with what Miss Clarke says which is that this was purporting to be an offer to settle everything by reference to settling their application for a non-party costs order. There was nothing else left to one side. I agree that if the offer is silent as to what happens to the costs of the application, and sometimes proposals are silent in that way, then the court inevitably takes the view that each side must bear their own costs. The claimant is not seeking the costs of that application, and it is certainly not offering to pay the defendant Mr Downer's costs of that application.

15. So for those reasons, in my judgment the correct interpretation is that the application costs do not form part of the costs of the litigation, but they have in fact been compromised in the way that I have suggested. I do not regard that as some kind of contradictory approach on the part of those acting for Mr Downer.

16. That then leaves me with the question of payment on account. I am afraid I am against the claimants on this as well. The thing to do if you ask for a costs order is to then make a provision in your proposal for an amount to be paid by way of an interim payment. In the absence of that, the order must incorporate what has been agreed, and that is the end of the function of this court - i.e. me, as opposed to a costs judge - in dealing with it any further. It is simply not fair. Objectively, whatever subjectively the claimants or indeed the defendants might have thought about that matter, it is simply absent from the settlement agreement, and there is no basis for me to import it because the settlement agreement makes perfect sense without it. In particular it makes sense because, as both counsel agree, as part of the assessment process it is open to the claimants to seek an interim payment which comes by order of the costs judge, and both sides agree that that is a course which is open to the claimant.

17. Mr McCreath says if that is the case, then what difference does it make? The court might as well hear an application for an interim payment now. However, I am afraid that is back to front. I do not have the power to do that on the basis of what has been agreed. That light has been compromised. However, any disadvantage to the claimant from that may well be mitigated if there is in accordance with the rules a speedy application for an interim payment, particularly in circumstances where the basis for the costs that are being sought - though I think some extra costs have been asked for as well - is a budget that has actually been approved in the sum of £186,000. Therefore the claimant will get that sum on an assessment unless it can be shown that there is good reason to award otherwise. So those are my two rulings on that matter.

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This judgment has been approved by the Judge.

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