Tonkin v UK Insurance (No 2) [2006] ADR.L.R. 05/18

JUDGMENT : HIS HONOUR JUDGE PETER COULSON, Q.C.: TCC. 18th May 2006

Introduction

1. The result of this action is a judgment in favour of the Claimants in the net sum of £199,262.67 and the dismissal of the Defendant's Counterclaim. There are now major issues as to costs. I propose to identify, as shortly as possible, the facts relevant to those disputes and then go on to address and determine each issue as briefly as I can.

Relevant Facts

2. On the 19th April 2004, the Defendant made a written "Without Prejudice" offer to the Claimant. Although I was told about the ***fact*** of that offer during the trial and I refer to it at paragraph 138 of my substantive Judgment, I do not know what its terms were, and the Claimants object to my being shown the letter today.

3. On the 3rd September 2004 the Defendant made a pre-action offer of £330,641.77 plus costs. That offer was in accordance with CPR 36.10. The Claimants' response was a Part 36 offer, to the effect that they would accept £530,000, plus costs, plus other sums by way of professional fees.

4. The action began on the 9th February 2005. On the 21st February 2005 the Defendant paid the sum of £330,641.77 into Court. That was within the 14 days stipulated by CPR r.36.10(3)(a). The payment in was not accepted. The action proceeded to a failed mediation in August 2005 and, thereafter, a trial before me earlier this year.

5. The Judgment which I handed down today is almost entirely adverse to the Claimants. Amongst other matters:
   a) I found for them in an amount which was less than the offer or the payment into Court.
   b) I found that they had refused two sensible offers of ADR.
   c) I found that they were wrong on almost every issue, particularly those relating to the relevant and appropriate reinstatement scheme. I found that the scheme that they have relied on since September 2003 was not a proper reinstatement scheme and was, in any event, a wholly inadequate basis for assessing the value of their claim. On that basis alone it seemed to me that the Claimants' case was and always remained very weak.
   d) I found that the Claimants' conduct was unreasonable and at times reprehensible. I have in mind particularly the decision to secretly tape-record the meeting in August 2003 and the use of the tape-recorded material to make an unsuccessful estoppel claim. A general failure to be open and frank with the Defendant, a persistent attempt to reverse the burden of proof, an unjustified and personal attack on the bona fides of the Defendant's principal expert and a failure to disclose all relevant documents were all findings adverse to the Claimants that I made in relation to their conduct in my Judgment.
   e) I also found that, but for the Defendant's efforts in putting forward a completely alternative scheme, which they were not obliged to do, the Claimants would not have recovered anything at all.

6. Although the judgment sum was £199,262.67 this took account of the fact that an interim payment of £60,800 was made last year pursuant to my order. Accordingly, for the purposes of comparing the result of the judgment with the payment into court and the Part 36 offers, it is necessary to add the interim payment to the judgment sum, meaning that the Claimant's total gain from the litigation was £260,062.67.

The Admissibility of the Offer

7. The offer of the 19th April 2004 is the subject of a dispute. It was a "***Without Prejudice"*** offer. It was not marked ***"Without Prejudice save as to costs"***. It was, therefore, right that I was not told about the details of that offer during the trial. The question is whether I should now be told about the amount of the offer and any other relevant terms. As I have indicated, the Defendant would like me to see the offer; the Claimants object to such a course.

8. The starting point seems to me to be that, because it was marked ***"Without Prejudice",*** the letter must be privileged and, therefore, inadmissible in these proceedings. Miss Jackson quite accepts that it should not be treated as if it had been written ***"Without Prejudice save as to costs"*** because it did not contain any such reservation. Therefore, the only way in which I could have regard to the terms of the offer is if the privilege has been waived.

9. I have concluded that the privilege in the communication has not been waived. I think that Mr Terry is right to submit that the passing reference to the offer in the Defendant's later open letter of the 1st May 2004, which purported to repudiate liability, did not amount to a waiver of the contents of this "Without Prejudice" letter. I also accept his submission that, contrary to the position in ***Great Atlantic Insurance Co v. Home Insurance Co*** [1981] 1 W.L.R. 529, this is not a case where the parties are seeking to ***'cherry pick'*** the information provided to the Court. I consider that it was important that I was told of the ***fact*** of the offer during the trial, but I have concluded that its details have always been and must remain privileged.

10. Accordingly, I now turn to deal with all the questions of costs that arise in this case without a sight of or reference to the "Without Prejudice" offer of 19th April 2004.

The Successful Party

11. Subject to three specific points, Mr Terry, on behalf of the Claimants, properly accepts that the Defendant is the successful party and is, therefore, entitled to the bulk of its costs. There are a number of reasons for that. One obvious reason is that the Defendant's offer of the 3rd September 2004 and the subsequent payment in were both in the sum of £330,641.77. The Claimants only recovered £260,062.67 through the Judgment. They, therefore, failed to beat the Part 36 offer and the payment into Court.

12. As I say, Mr Terry raises three qualifications to the general proposition that the Defendant was the successful party. They are: the costs prior to the 25th September 2004; the costs of what he calls the liability issues; and the costs of the Counterclaim triggered by the fraud allegations. I deal with each of those below.

a) Costs prior to the 25th September 2004.

13. The 21 days pursuant to CPR 36.10 expired at the end of the 24th September 2004. Although the Claimants accept that they must pay the Defendants' costs thereafter, they maintain that they are entitled to their costs up to that date. I should say at the outset that given that, in September 2004, the Claimants were still locked into the FOS adjudication process on which they had insisted, it is difficult to see what costs of the action could be caught by any decision on this point in any event. The action itself did not start until the 9th February 2005.

14. However, I have concluded that I should reject Mr Terry's submission on this point as a matter of principle. It seems to me that it is predicated on the assumption that the Defendant was the successful party only because it beat the offer and that, therefore,

the costs up to the last date on which the offer could be accepted should be borne by the Defendant. As Miss Jackson pointed out in her submissions, even if the offer had not been made, the Defendant has been the successful party as a result of the findings in the Judgment. The Defendant won on all the important issues. As I have said, but for the Defendant's alternative scheme, the Claimants would not have recovered at all.

15. Accordingly, it seems to me that it is not appropriate to give the Claimants their costs, if any, prior to the date on which the offer should and could have been accepted. At that time the Claimants were relying on the September 2003 reinstatement scheme. But, both before and after that date, that scheme, which formed the central part of their case, was, for the reasons set out in the Judgment, fundamentally flawed.

b) Costs of the liability issues.

16. The second point raised by the Claimants is to the effect that, since the Defendant wrongly maintained that it had no liability to the Claimants at all from the commencement of the action in February 05 until July 05, the Defendant should pay the costs of the liability issues. I consider that there are difficulties with that submission as a matter of principle.

17. It can be appropriate, of course, for a Court to consider and award costs on an issue-by-issue basis: see ***Summit Property Ltd v. Pitmans*** [2001] EWCA Civ 2020. But, so it seems to me, that is not an approach that should be followed as a matter of course when the successful party has beaten an offer, or a payment into court. I quite accept that in the Court of Appeal case of ***Excelsior Commercial and Industrial Holdings Ltd v. Salisbury Hammer Aspden & Johnson*** [2002] EWCA Civ 879, which was concerned (in part) with a failure to beat a payment in, the Lord Chief Justice indicated, at paragraph 10 of his judgment, that it might be possible for a Court, when considering costs, to look at success or failure on particular issues. However, it does seem to me that that remark arose in the context of the Lord Chief Justice's own decision in ***Rediffusion Music Ltd v Phonograph Performance Ltd*** [1999] 1 WLR 1507, which was not a case about the failure to beat a payment in. In any event, the remarks in that paragraph are clearly *obiter dicta*.

18. It seems to me that, in cases where there is a payment in or an offer pursuant to Part 36, the crucial provisions are those of Part 36.20 which specifically concern the consequences if an offer, or a payment in, is not beaten. CPR 36.20 governs the situation where a Claimant has failed to better a Part 36 payment, or has failed to obtain a judgment which is more advantageous than a Defendant's Part 36 offer. That is this case. Rule 36.20(2) provides that: *"Unless it considers it unjust to do so the Court will order the Claimant to pay any costs incurred by the Defendant after the latest date on which the payment or offer could have been accepted without needing the permission of the Court."*

19. I therefore accept Mr Terry's submission that there will be exceptional cases where it would be unjust for the usual order to be made, namely that the Claimant, who has failed to beat the Part 36 payment or offer, should pay all of the Defendant's costs. However, that means that in the present case, the Claimants must demonstrate that it would be unjust for the Defendant to recover its costs in relation to the liability issues. It seems to me that it would not be unjust for the usual order to be made in the present case. Indeed, in my view, in all the circumstances, it is any result other than the Claimants paying the Defendant's costs in relation to those matters that would be unjust. That is because, for the reasons that I have indicated in the Judgment, the principal issues between the parties always concerned the merits of the different reinstatement schemes. Those were the issues between the parties before the action; those were the issues between the parties during the action; those were the issues that I determined. On those, the Defendant was entirely successful. That is why I said in my Judgment that I had no doubt that those were the only issues that mattered and that the question of the repudiation in May 04 (and thus the Defendant's liability) made no difference at all either to the real disputes between the parties or to the costs incurred by the parties. Therefore it seems to me that it could not be unjust to decline to award this small proportion of the costs to the losing Claimants.

20. In that sense, the factual situation here is very similar to the one in ***Excelsior*** which the Lord Chief Justice was dealing with at paragraph 10 of his judgment. The reason why his remarks were *obiter* was because it was made plain that the 5th Defendants, although they lost on an issue concerned with their retainer, should not be deprived of any part of their costs simply because they had raised, and been unsuccessful on, that particular matter. The reason why they were not deprived of any part of their costs was because the Court of Appeal concluded that the retainer issue had no effect on the running of the trial, or the costs incurred. Precisely the same applies here. Indeed, *a fortiori,* given that the issue of liability was resolved as long ago as last July, it seems to me that it could not possibly be said that this was a matter on which the exception at Part 36.20(2) should apply.

c) Costs of the Counterclaim

21. The same point of principle that I have set out above applies again in relation to this point. Again, it would have to be demonstrated by the Claimants that it would be unjust for them to pay these costs, always assuming that there were separate costs incurred as a result of the fraud allegations and the concomitant Counterclaim. I do not consider that it would be unjust, for the same reasons I have explained above. In any event, for the reasons set out below, I would not exercise my discretion in the Claimants' favour in any event.

22. The Counterclaim arose out of the fraud allegations, which were themselves added part way through the trial as a direct result of Mr Tonkin's own evidence. Although, for the reasons set out in the Judgment, I dismissed those allegations, I understood how and why it was that those allegations came to be made. Indeed, in that part of my Judgment dealing with those allegations, I identified two matters which were adverse to the Claimants. One was their failure to make proper disclosure. The other was the fact that although the fraud allegations themselves failed, they were linked to a major theme inherent in the Defendant's case, namely the lack of openness with which the Claimants had pursued their claims. That was a very important part of the Defendant's case and I found in my Judgment that it had been made out. What is more, I found that it explained much of what had gone wrong since the fire in 2002. Accordingly, it is not, in my view, appropriate to distinguish between the costs of this issue, on which the Defendant was entirely successful, and the specific allegations of fraud, on which it was not.

23. I should also add that in my judgment the fraud allegations themselves added no more than one day's time and effort to the trial. In those circumstances, I would be reluctant to make a separate order in relation to those costs, in any event.

24. For all those reasons I have concluded that it would not be appropriate or just to deprive the Defendant, who was so obviously the successful party, of any part of its costs.

d) Summary

25. Thus, for all these reasons, I order that the Claimants pay the Defendant's costs of, and incidental to, the action.

The Basis of Assessment

26. The issue between the parties that is probably worth the most in financial terms is the basis on which those costs should be assessed. The Defendant seeks an order that the costs be assessed on an indemnity basis. The Claimant seeks an assessment on the standard basis. I deal with this issue by summarising the relevant principles of law, and the factors relevant to conduct in this case, before then setting out the Claimants' arguments and my conclusions.

(i) Principles

27. Indemnity costs are no longer limited to cases where the Court wishes to express disapproval of the way in which the litigation has been conducted. An order for indemnity costs can be justified even where the conduct could not properly be regarded as lacking in moral probity or deserving moral condemnation: see Lord Justice May in ***Reid Minty v Taylor*** [2002] 1 WLR 2800. However, such conduct would need to be unreasonable "to a high degree. Unreasonable in this context certainly does not mean merely wrong or misguided in hindsight": see Lord Justice Simon Browne in ***Kiam v. MGN Ltd (No. 2)*** [2002] 1 WLR 2810.]

28. Conduct that has led to orders for indemnity costs include the use of litigation for ulterior commercial purposes: see ***Amoco (UK) Exploration Co v. British American Offshore Ltd*** [2002] BLR 135; the maintenance of an inherently weak case up to and beyond the first day of trial; see ***Atlantic Bar and Grill Ltd v. Posthouse Hotels Ltd*** [2000] C.P. Rep. 32; and the making of an unjustified and personal attack on the Claimant by the Defendant; see ***Clarke v. Associated Newspapers Ltd***, unreported, 21st September 1998.

29. There have been some recent decisions in the TCC concerned with indemnity costs and in particular the question of conduct. In ***Waites Construction Limited v GP Greentree Achurch Evans Limited*** [2006] BLR 45 I said: *"...I do not believe that unnecessary or unreasonable pursuit of litigation must involve an ulterior purpose in order to trigger the Court's discretion to order indemnity costs. I consider that to maintain a claim that you know or ought to know is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs."*

The same principle also arose in ***EQ Projects v Alavi*** [2006] BLR 130. However, it is important to note that, as a general rule, the mere fact that a weak claim, as opposed to a hopeless claim, was pursued will not, on its own, be sufficient to warrant an order for indemnity costs.

30. Similarly, it is not appropriate to order a losing party to pay costs on an indemnity basis simply because a payment in or offer was not beaten: see the decision of the Court of Appeal in ***Excelsior*** referred to above. In my view, and on a related point, it is also not appropriate to order indemnity costs simply because the losing party did not agree to ADR. However, both these failures are factors which must be considered by the Court when exercising its discretion as to whether or not to order indemnity costs.

(ii) Conduct

31. It seems to me that the following particular factors are relevant to questions of conduct in the present case. I have identified some of the consequences of the substantive Judgment in paragraph 5 above. In addition:
    a) The Claimants were not just the unsuccessful parties in these proceedings. The whole of the action was a complete waste of time and money because the Claimants recovered less than they could have had if they had accepted the offer of September 2004, made 5 months before the proceedings even started.
    b) The Claimants rejected the proposals as to ADR, a matter referred to in my Judgment at paragraphs 142 and paragraphs 144 to 145. As I made plain, I consider that that was a grave mistake, not because ADR is some sort of universal panacea for the avoidance of troublesome litigation - it most definitely is not - but because in this case, for these disputes of architectural detail, the ADR proposals made very good sense.
    c) Having effectively insisted on litigation, the Claimants then lost the vast bulk of the issues encompassed within that litigation. I have already referred to their failure in respect of the proper reinstatement scheme. This was not just because the scheme proposed by the Claimants was not a proper reinstatement scheme, but, just as importantly, because the scheme was wholly inadequate and incapable of generating reliable figures. I also rejected the Claimants' case on estoppel and on delay, two issues which took up a good deal of time at the trial. The Claimants' case on many of these points was, and ought to have been known to the Claimants to be, very weak indeed.
    d) The Claimants, particularly Mr Tonkin, conducted himself in an extremely aggressive way from early in 2003 onwards. I have identified that conduct in the Judgment. I am not going to repeat it here. I have summarised some of the points in paragraph 5 above. It seems to me that one of the consequences of that conduct was that the Defendant was put to a vast amount of additional work both before the action started and then afterwards, particularly by reference to the nature and volume of the Claimants' solicitors' correspondence.
    e) It is worthwhile simply making this observation in respect of that correspondence, and the way in which the Claimants' case emerged after the action had started. It seems to me that the Claimants' case emerged in a piecemeal and uncertain fashion. Important elements of the claim, and the basis for them, changed repeatedly, both before and during the trial. All of that was then compounded by the barrage of the material from the Claimants and their solicitors. For example, there were four written statements from Mr Tonkin alone. There were also lengthy letters from his solicitors sometimes running to 15 letters a week. I accept the Defendant's submission that the volume and frequency of that correspondence cannot be justified in any sort of litigation, let alone litigation over sums that, on any view, could not have been greater than £750,000.

(iii) Conclusions and the Claimants' case

32. In the light of the principles set out at paragraphs 27 to 30 above and the particular elements of conduct identified at paragraphs 5 and 31 above, it seems to me that the Defendant has made out an overwhelming case to have its costs assessed on an indemnity basis. Every potential ground for an order for indemnity costs is present in this case. It therefore behoves me to look very carefully at what the Claimants say in response. Mr Terry has made three points and I deal with each of those below:

a) The difference between the standard and indemnity bases.

33. Mr Terry points out the difference between an assessment on a standard basis and an assessment on an indemnity basis and how, in respect of the latter, proportionality does not have to be established by the payee. That is a correct submission. In one sense it highlights the Claimants' potential difficulties now, but the fact that an order for indemnity costs may prove to be both expensive and difficult for the Claimants to meet is not of itself a reason not to make such an order.

34. Mr Terry asks why the Claimants should be, as he put it, deprived of the opportunity to raise questions on the proportionality of the costs incurred by the Defendant. Miss Jackson's answer is to point to the matters which I have outlined briefly in paragraphs 5 and 31 above, and say that those matters more than justify the making of such an order. She says expressly that, to the extent that the Defendant's costs are out of proportion to the sums recovered by the Claimants, then that is fairly and squarely the Claimants' responsibility and is due to the conduct outlined above. It seems to me that that submission is well founded. Indeed, I cannot see any answer to it.

b) Appropriateness

35. Mr Terry asked rhetorically why it would be appropriate to make an order for indemnity costs in the present case and to strip the Claimants, as he put it, of the protection normally afforded to losing litigants to require the Defendant to establish that the costs were reasonable and have been reasonably incurred. He answers his own question by (correctly) pointing out that the pursuit of a weak case and the failure to beat an offer are not, taken individually, sufficient to justify an order for indemnity costs. However, of course, those two failures exist here, not individually, but together. Moreover, in the present case, there are the additional factors in relation to the Claimants' conduct, the complete failure of the Claimants' claims at trial, and the failure in respect of the ADR proposals, amongst many others.

c) "Commercial" party

36. In referring to the decision of Langley J. in ***Amoco,*** referred to above, the commentator in the White Book at Vol 1, page 1160 states: *"If a (commercial) party embarks upon, or brings upon itself and pursues, large scale litigation which results in a resounding defeat involving the rejection of much of the evidence adduced in support of its case, that provides a proper basis on which to award costs on the indemnity basis. In the particular case the claimant had conducted itself throughout the relevant events on the basis that its commercial interest took precedence over the rights and wrongs of the situation and it was prepared to risk the outcome of the litigation."*

37. Mr Terry submits that the qualification introduced by the word "commercial" at the start of that passage means that the principle outlined in ***Amoco*** is not ordinarily applicable in a case which involves private individuals (such as this one). I do not accept that submission. It seems to me that Langley J. was merely applying the CPR to the facts of that case; because, in that case, the Claimant had put its commercial interest before everything else, the Claimant had to pay indemnity costs. It seems to me that the CPR principles relating to indemnity costs, which I have set out above, apply to all litigants, commercial or otherwise. They therefore apply to the Claimants in this case. Moreover, I am bound to say that it seems to me that in the passage from the commentary that I have set out above, the word in brackets adds nothing to the summary of the case. Put another way, I consider, for the reasons that I have given, that this paragraph is of equal application to private litigants.

38. More widely, it seems to me that it cannot be right to suggest that conduct by a commercial organisation might require or justify an order for indemnity costs, whilst precisely the same conduct by an individual litigant cannot or would not justify the same order. The adverse effect on the other party is precisely the same. It therefore seems to me that whilst the fact that, in the present case, the Claimants are private individuals is a matter which I am bound to take into account in exercising my discretion on the question of costs, and the basis on which they are to be assessed, it does not seem to me that it is a factor which, as a matter of principle, can be given undue weight.

39. I have throughout this case been very troubled by the fact that the Claimants are private householders involved in this litigation with the Defendant. Indeed, I refer expressly to my concerns on that point at paragraph 10 of my substantive Judgment. I have endeavoured, as I said there, to ensure that, despite the Defendant's greater financial standing and experience of commercial matters, this litigation was a level playing field, and that the Defendant had no advantage whatsoever in its conduct. To that end I have made a number of specific orders in the Claimants' favour, despite the failure on the part of the Claimants to comply with previous orders of the Court. I consider that there has been, at all times, a proper equality of arms.

40. However, like others before me, I have been unable to protect the Claimants from the consequences of their own decisions. As I set out in the substantive Judgment, the Claimants repeatedly did what they wanted to do, sometimes in the teeth of advice to the contrary. It is difficult not to conclude that each time the Claimants had a decision to make, or a choice to make, they made the wrong one. That has led them to the position in which they now find themselves. It was an approach which led them to refuse a reasonable offer to settle before the action even began; to refuse two sensible ADR proposals; to refuse a payment into Court; to pursue a very weak claim all the way through to judgment; and to act, both before and after the commencement of proceedings, in a way that could only be described as unreasonable.

41. If the Claimants had been reasonable in just one of the ways outlined above, the costs that the parties are now arguing about would never have been incurred. Those circumstances do, in my judgment, make this a relatively extreme case. It is one, therefore, where I feel obliged, despite my personal sympathy for the Claimants' plight, to order that the Defendant's costs must be assessed on an indemnity basis. Anything less would not, in the circumstances, be a fair disposition of the dispute and would not be in accordance with the overriding objective.

Payment on Account

42. I am told that the Defendant's costs are £534,000-odd. I have seen a breakdown to that effect. The Defendant seeks an interim payment in respect of those costs in the sum of £350,000, to be effected by setting off the £200,000-odd that is the subject of the judgment together with a payment by the Claimants of a further £150,000.

43. There is no dispute that I can order such an interim payment. Indeed, CPR 44.3(8) encourages the trial Judge each time to make an interim payment in respect of costs. Mr Terry did not really oppose such an order in principle. I consider that, in the circumstances, I should make such an order. The question is the amount. Mr Terry urges me to keep the amount at the figure in the judgment so that no further sum would presently be payable by the Claimants to the Defendant.

44. The aim of a Court making an interim payment on account of costs is to try and identify the minimum amount which it considers that the successful party is likely to recover. I do not consider that, in the present case, £200,000 is a sufficient sum by way of an interim payment. It seems to me that, on any view, the Defendant would recover more than that, particularly given my ruling in respect of indemnity costs.

45. However, again bearing in mind, amongst other things, the Claimants' position as private individuals, it seems to me that there is a relatively simple solution to this dispute which, in my judgment, does broad justice between the parties. Although it does not give Miss Jackson the sum that she seeks, I consider, contrary to her submissions, that it is a fair result.

46. Last year I ordered an interim payment of £60,800 in favour of the Claimants. A true set-off against costs, that is to say, a set-off against the net gain to the Claimants of my Judgment, would therefore include this sum. It would thus be in the total sum of £260,062.67 (paragraph 6 above). Therefore, I shall order that there be an interim payment on account of the Defendant's costs in the sum of £260,062.67. Of course, the judgment sum of £199,262.67 will be set-off against that amount. Thus, it is the remaining £60,800 (which was the amount of the interim payment I ordered in the Claimants' favour last year) that must be repaid by the Claimants to the Defendant on account of the Defendant's costs. I will consider the date by which that interim payment is to be made.

47. Obviously, thereafter, there will need to be a detailed assessment of the Defendant's costs. It would be helpful if counsel could agree an order based on the terms of this judgment and draw it up for me to approve.

MR JEFFREY TERRY (instructed by DWF, Manchester) for the Claimant
MISS ROSEMARY JACKSON and MR JONATHAN SELBY (instructed by TRAVERS SMITH, EC2) for the Defendant