Case No: HT-2013-000071

Neutral Citation Number: [2017] EWHC 464 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/03/2017

Before :

MR STEPHEN FURST QC
(sitting as a Deputy High Court Judge)

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Between :

CAR GIANT LIMITED **ACREDART LIMITED**	**Claimants**
- and -	
THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF HAMMERSMITH	**Defendant**

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Mr Neil Mendoza (instructed by **IBB Solicitors**) for the **Claimants**
Miss Tiffany Scott (instructed by **Browne Jacobson**) for the **Defendant**

Hearing dates: 2nd March 2017

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JUDGMENT

COSTS JUDGMENT

Introduction

1. This judgment deals with costs.

2. On 2nd March 2017 I gave judgement in favour of the Claimants (“Car Giant”) in the sum of £179,125 together with interest in the sum of £15,853.81. The action concerned a claim for damages for dilapidations following the expiry of the Defendant’s (“LBHF”) lease.

3. On 16th April 2014, LBHF made a CPR Pt. 36 offer in the sum of £250,000. It is evident that Car Giant did not beat that offer and accordingly it is common ground that Car Giant should pay LBHF’s costs from the 7th May 2014 (the expiry of the “relevant period”) together with interest on those costs at 1% above base rate.

4. In such circumstances, the usual order would be that LBHF should pay Car Giant’s costs to 7th May 2014, with all such costs being subject to a detailed assessment on the standard basis.

Applications

5. However, in this case, LBHF makes the following applications:

   5.1. for payment of its costs incurred before 7th May 2014;

   5.2. that the basis of assessment of the costs both before and after 7th May 2014 should be on an indemnity basis;

   5.3. to amend the Costs Budget in accordance with an application issued on 20th February 2017;

   5.4. for an indication as to the reasonableness of exceeding the Costs Budget in certain respects;

   5.5. for interest on costs;

   5.6. for payment on account of costs.

6. It is convenient at this point to set out, in summary form, some of the history of this litigation, insofar as relevant to these applications.

History

7. LBHF’s lease expired on 21st February 2011. Before that date there were direct negotiations between the clients. LBHF contends that in about September or October

2010 LBHF made an offer of settlement of £250,000. The precise circumstances in which that offer was made and the terms attached to that offer (if any) are difficult to ascertain because whilst it is referred to in an exchange of emails, the offer itself was apparently not made in writing and I have no direct evidence from the maker of the offer. However I accept the evidence of Mr Ryan Diamond, Car Giant's solicitor, that the offer was made by Mr Hooton, Head of Property at LBHF, "to move negotiations forward but crucially all figures discussed were subject to the final authorisation/approval of the relevant Council committee at the Defendant." This account is consistent with the emails at about this time (including an email dated 5th August 2010) and in particular with the fact that any offer was conditional on approval by the relevant committee at LBHF. No such approved offer was made.

8. The following year, in June 2011, an offer was made by Mr Ian Moore, a partner of Jones Lang LaSalle, then advising LBHF, of £113,000, excluding VAT to settle the claim. This offer is obviously less than the sum recovered by Car Giant.

9. In September and October 2012 there was contact between Mr Outterside of Vail Williams (the valuer who gave evidence on behalf of Car Giant at trial) and Jones Lang LaSalle, representing LBHF. It would seem that Mr Matthew Haines of Jones Lang LaSalle had been instructed by LBHF to prepare a s.18(1) valuation. Whether this was prepared or if it was, whether it was provided to Car Giant, is unclear. I am told that there were without prejudice discussions between valuers but I have not been given any details of those discussions.

10. These proceedings were issued on 24th May 2013.

11. As I say above, LBHF made the CPR Pt. 36 offer by letter dated 16th April 2014. The letter ended by stating that: "Our client had obtained valuation evidence (privilege in respect of which is not waived) and it is therefore confident this Offer will not be beaten by your client at trial." The following day Car Giant wrote to LBHF noting this statement and commenting that it was "the sort of thing that's preventing us from narrowing our differences and resolving the claim." The same email attached Car Giant's s.18 valuation.

12. There were then meetings between valuers but at the end of 2014 or the beginning of 2015 the question of ADR was raised. The letter of 25th January 2015, from LBHF's solicitors suggested that "…if the issues in dispute can be sufficiently identified and narrowed then it may be that the nature of those disputed issues is such that an alternative dispute resolution procedure can be considered." Car Giant's solicitors responded to this suggestion by letter dated 2nd April 2015. This letter argued that the cost of the repair works carried out (which by that stage were known) did not limit Car Giant's recovery since some units had been let on a limited repair basis because of their poor state of repair and other units had been let at less than market value in return for a full repairing covenant. In the event this was not an argument pursued by Car Giant's valuer as the basis of the calculation of the diminution in value of the reversion at trial. The letter went on to note that the discussions between the valuers appeared to have reached an impasse and that further discussions were unlikely to bear fruit until there was a significant shift in LBHF's position.

13. The offer of some form of ADR was put forward by LBHF's solicitor's letter of the 15th May 2015. Car Giant's solicitors responded on 14th August 2015 suggesting that ADR would be appropriate but only after the valuers had exchanged reports.

14. In the meantime, on 1st April 2015, Mr Haq, an LBHF employee, wrote an internal email referring to an offer apparently put forward by Mr Perry and himself at some earlier date in the sum of £315,000 which offer, the email stated, was rejected by Car Giant. This offer is briefly referred to in Mr Timothy Rayner's (LBHF's solicitor) statement but without any further explanation. It is not referred to by Mr Ryan Diamond.

15. Although the question of mediation was mentioned later in 2015 and early in 2016, it once again surfaced directly in October 2016. Car Giant now agreed to mediate, that mediation took place in January 2017 but was not successful. Of course this was only shortly before the trial in February 2017 when considerable costs had no doubt been incurred by both parties.

16. Mr Ryan Diamond states that Car Giant's position was that negotiations or ADR were unlikely to be successful prior to disclosure and/or full explanation of the position taken by LBHF's valuer. Certainly that was the position taken by Car Giant in 2015. Mr Diamond also points out that Mr Haines was disinstructed in about August 2015 and that Mr Lenson, LBHF's valuer at the hearing, was only in a position to take matters forward from about July 2016 and it was only then that LBHF's position became clear. Mr Diamond also maintains that Mr Lenson took a different approach from that adopted by Mr Haines. Some delay was also caused in advancing meetings between valuers in the Autumn of 2016 by Mr Outterside's illness. Mr Diamond concludes: "Having finally reached a point where the Defendant's position on valuation/diminution was finally clear the Claimants now felt comfortable proceeding with mediation on the basis that both parties had now set out their respective positions."

17. By contrast Mr Timothy Rayner maintains that there was an unreasonable delay on the part of Car Giant in agreeing to mediate and that Car Giant fundamentally changed its case very shortly before trial. He points to the history of the matter, briefly summarised above, and the delay on the part of Car Giant in responding to his suggestion of ADR. Indeed it was not until October 2016 that Car Giant finally agreed to mediate. As mentioned above Mr Outterside had argued that the cost of the repair works carried out should not limit Car Giant's recovery but when reports were exchanged the justification for this approach was different. Now Mr Outterside argued that the cost of repairs, whether carried out or not, should form the central element of the s.18 valuation. As regards Mr Diamond's contention that Car Giant were justified in postponing the mediation until the valuers' positions were known, LBHF point to the letter of 11th October 2014 from Car Giant's solicitor and an email dated 1st December 2014 (a without prejudice document) from which it is argued that it is apparent that Car Giant knew perfectly well the position being taken by LBHF and in particular Mr Haines. A similar point is made by reference to two letters in April and May 2015.

18. The final matter of complaint concerns the preparation of the trial bundles. Put shortly Mr Rayner complains that the trial bundle index was provided late, not until 20th January 2017, that it was missing documents (including the lease in question and correspondence), that Car Giant refused to include any post-proceedings correspondence and that

subsequently Car Giant asked for further documents to be included. I take this shortly because on any view, LBHF are entitled to their costs in this period.

Costs prior to 7th May 2014

19. As I say the usual order would be that LBHF pays Car Giant's costs in respect of this period. The basis on which it is said that Car Giant should pay LBHF's costs can be summarised as follows:

    19.1. LBHF has always acknowledged that it was liable to pay damages for the disrepair subject to the cap imposed by s.18 Landlord and Tenant Act 1927 and thus the only question for determination at trial was the effect of this limitation;

    19.2. in this respect LBHF was the successful party in the sense that the judgement largely favoured Mr Lenson's approach to that of Mr Outterside;

    19.3. whilst there were certain matters where the court did not follow Mr Lenson, such as on the question of the speculative investor and the special assumption as to rent deposits, this does not detract from the submission that LBHF was the effective winner;

    19.4. LBHF also relies upon Car Giant's failure to accept to accept the offer for £250,000 made in about October 2010.

20. In accordance with CPR Pt.44.2 the court is given a wide discretion as to the award of costs. The general rule is that the unsuccessful party will be ordered to pay the successful party's costs but the court may make a different order and CPR Pt 44.2(4) requires the court to have regard to all the circumstances including certain matters specified in Pt. 44.2(4)(a) to (c).

21. In my view Car Giant is properly to be regarded as the successful party in respect of the period to 7th May 2014. It started the action seeking to recover damages, in which it was eventually successful and prior to 16th April 2014, there was no CPR Pt. 36 offer. As regards the offer made in or about September or October 2010, I have already found that that offer was subject to the Council's approval and there is no evidence that that was forthcoming.

22. However LBHF is correct in saying that my reasoning was closer to the reasoning adopted by Mr Lenson than Mr Outterside. However it is to be noted that Mr Lenson contended that the diminution in value was limited to £110,000 whereas I found that Car Giant's recoverable damages were £179,125.

23. In my view the conduct of Car Giant prior to 7th May 2014 cannot be said to be so egregious that it would be right to deprive it of its prima facie entitlement to costs in this period as the successful party. However, I think it is right to reflect the fact that ultimately LBHF was more successful in its general approach by reducing Car Giant's entitlement to 50% of its costs to the 7th May 2014, to be assessed on the standard basis.

Indemnity Costs

24. In the light of my decision as to costs prior to 7th May 2014, the only question is whether LBHF's costs after that date should be assessed on the standard basis or on the basis of indemnity costs.

25. Under CPR Pt.36.17, where a claimant makes a proposed offer of settlement, and obtains a judgment at least as advantageous as that offer, the court must, unless it considers it unjust to do so, order that the claimant is entitled to indemnity costs from the date of expiry of the relevant period. It is noticeable that there is no such presumption where the claimant fails to better a defendant's offer. Nevertheless it is clear that the court may order that the costs are to be assessed on an indemnity basis under CPR Pt.44.3.

26. The notes to the White Book state that the Court of Appeal has declined to give guidance to judges intending to make orders for costs on the indemnity basis. Nevertheless it has been said that such an order might be appropriate where the facts of the case or the conduct of the parties was such as to take the situation away from the norm. **(Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson** [2002] EWCA Civ 879.) Unreasonable conduct to a high degree might suffice such as a refusal to accept reasonable offers (**Franks v Sinclair (Costs)** [2006] EWHC 3656 (Ch) and **Igloo Regeneration (General Partner) Ltd v Powell Williams Partnership** (Costs) [2013] EWHC 1859 (TCC).) Similarly an unreasonable refusal to engage in mediation might also justify an order for indemnity costs (**Garritt-Critchley and Others v Ronnan and Solarpower PV Ltd** [2015] 3 Costs LR 453 and **Reid v Buckinghamshire Healthcare NHS Trust** [2015] WL 8131473.)

27. In this case it is argued that there was an unreasonable delay in agreeing to mediate or take part in some form of ADR. The delay was from 15th May 2015 (I do not regard the letter of 26th January 2015 as an unequivocal invitation to mediate) until October 2016. In my view a court should be slow to conclude that this delay is unreasonable or that, if it is, it would justify an order for indemnity costs:

    27.1. In such situations mediation has taken place and by definition has been unsuccessful. Whilst, in some cases, early mediation is more likely to succeed, it cannot be said to be true in all cases and it cannot be said in this case that had mediation taken place in about May 2015 it would have been or was likely to be successful. In other words any delay in mediating cannot be shown to have caused any increased costs;

    27.2. The courts should be slow to criticise a party's behaviour where decisions such as when to mediate are matters of tactical importance where different views may legitimately be held. In this case Car Giant took the view that mediation was more likely to succeed when the experts' views had been fully set out. That is a perfectly possible point of view. LBHF contends that Car Giant knew perfectly well what its valuer's position was from the meetings that took place between them. I am unable to investigate that since these meetings appear to have been without prejudice and, in any event, whilst Car Giant's valuer may have understood the position being taken by LBHF's valuer in general terms, the legal team might legitimately have taken the view that they wished to see this in writing with a fully developed argument. LBHF's argument on this point is not helped by the fact that in making the offer on 16th April 2014 it indicated that it would not provide its valuation evidence, even on a without prejudice basis, in

support of its offer or that it was without a valuer between about August 2015 and July 2016 to facilitate discussions with Car Giant's valuer;

27.3. I should add that there is also criticism of Car Giant's solicitors in their delay in responding to letters on this topic. Whilst I think there is some validity in this criticism, the delay is not such or so great that it would justify the order sought.

28. LBHF also relies upon Car Giant's alleged failure to accept offers made by LBHF to justify an order for indemnity costs. I have already held that the October 2010 offer was subject to the Council's approval, which was never given, but in any event pre-dates the CPR Pt. 36 offer. A failure to accept the CPR Pt. 36 offer cannot in itself justify indemnity costs, as this would be to align the position where a claimant makes an offer with that made by a defendant, notwithstanding the distinction made by CPR Pt. 36.17, as set out above. Finally there is the offer said to have been made in about April 2015. There is a surprising lack of evidence about this offer, particularly bearing in mind that Mr Haq was a witness at the substantive hearing. Given that it is only referred to in an internal LBHF email, I assume the offer was made orally and, given what occurred in October 2010, it is likely that it was subject to Council approval. Whether such approval was given is unknown but it is probable that it was not given otherwise presumably some document would be available to evidence it. Accordingly whilst I accept that there were settlement discussions and an offer of £315,000 may well have been indicated I am not satisfied that it ever became sufficiently formalised so that it should influence my decision on costs.

29. Accordingly LBHF's costs after 7th May 2014 should be assessed on the standard basis.

Costs Budget

30. LBHF seek an order adjusting the costs budget by £8,084 said to be attributable to costs incurred post-trial and in particular the costs hearing. Since I have come to the view that LBHF should pay Car Giant's costs of the hearing on costs, I need not consider this matter further. Insofar as the additional costs are said to be attributable to considering the original judgement then I am not satisfied that any such increase is justified.

Indication of reasonableness

31. Whilst LBHF recognises that it is for the Costs Judge to carry out a detailed assessment of costs and to apply CPR Pt.3.18 as he sees fit, it seeks an indication from me that certain costs which it incurred in excess of the latest cost budget were reasonably incurred. CPR Pt.3.18 provides that in assessing costs the court will have regard to the last approved or agreed budget and not depart from it unless satisfied there is good reason to do so.

32. In summary the increases in the budget and the reasons for the excess are said to be as follows:

32.1. Expert reports, £55,768.38. Mr Lenson attended the mediation when this was not budgeted for and had greater involvement in trial preparation and at trial than had been assumed;

32.2. Trial preparation, £18,732.75. The budget assumed that Car Giant's solicitors would produce the trial bundle, in fact LBHF incurred significant costs assisting in this process;

32.3. Trial, £10,606.05. It had been assumed that Mr Lenson would attend at trial on one day; in fact he attended for all three days of the hearing. In addition a grade D fee earner attended trial on all three days because he had primary knowledge of the trial bundles and they had to be added to at or shortly before trial;

32.4. Mediation, £3,858.75. I am not clear as to why the budget is said to have been exceeded in this case.

33. In my view, whilst there are authorities showing that the courts can give such indications as are sought here, the court should be slow to do so.

34. The circumstances in which a court should find "good reason" to depart from the approved budget were analysed in considerable detail in **Merrix v Heart of England NHS Foundation Trust** [2017] EWHC 346 (QB) and the question is likely to be considered by the Court of Appeal shortly. It is unclear whether the trial judge in making such comments should temper them in the light of CPR Pt.3.18 and, in any event, if such comments or observations are made as to what weight a Costs Judge would or should place on them. I can understand that there might be cases where the trial judge has a particular view of costs or on an aspect of costs, having conducted the trial or where he has had to decide an issue which is directly relevant to the assessment of costs. Absent such circumstances it would seem to me that a court should not seek to trammel the Costs Judge's jurisdiction, particularly where the Costs Judge has much greater experience of such matters than I have. In this case, there is nothing in the nature of the applications to exceed the costs budget which cannot be explained equally well to the Costs Judge and it is for that reason that I have briefly summarised the nature of this application. He will then be able to exercise the jurisdiction under CPR Pt.3.18 as he thinks fit in the light of the assessment of costs as a whole.

35. For these reasons I decline to give any indication.

<u>Interest on costs</u>

36. It is accepted that in accordance with CPR Pt.36.17(3)(b), LBHF should have interest on its costs, as awarded above, at 1% above base and I so order.

37. It would seem to me appropriate that Car Giant should also have interest on its costs, as awarded above, under CPR Pt.44.(6)(g), again at 1% above base.

38. In each case the interest is payable as from the date that the party in question discharged any relevant invoice or disbursement.

<u>Payment on account</u>

39. Lastly LBHF seeks an order for payment on account of its costs.

40. I have had regard to the principles as discussed in **Excalibur Ventures LLC v Texas Keystone Inc. and Others** [2015] EWCA 566 (Comm).

41. The present approved costs budget for LBHF's costs amounts to approximately £110,000. I have taken into account the fact that, whilst LBHF's assessed costs will be significantly higher than the costs which Car Giant will be entitled to recover, Car Giant will be able to set off its costs entitlement against the sum recoverable by LBHF.

42. Assuming that the figure of £110,000 represents a reasonable estimate of recoverable costs for the whole action, I cannot imagine that Car Giant will recover more than £25,000 in respect of its recovery of 50% to the 7th May 2014. There will of course be interest payable which will affect these figures. Nevertheless it would seem to me that a reasonable sum on account of costs would be 80% of £85,000 i.e. £68,000 and I order that Car Giant pays that sum to LBHF within 14 days of today.

Costs of the applications

43. It is apparent that LBHF has been largely unsuccessful on its applications and accordingly it should pay the costs of the costs application to be assessed on a standard basis.