Case No: HC12A02388

Neutral Citation Number: [2014] EWHC 3848 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: Tuesday, 18 November 2014

Before :

Mr Justice Morgan

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Between :

Renewable Power & Light Ltd	**Claimant**
- and -	
McCarthy Tetrault & Ors	**Defendant**

- -
- -

The Claimant did not appear at the hearing on 18 November 2014
Christopher Butcher QC, Jamie Goldsmith and Andrew Lodder (instructed by **Taylor Wessing LLP**) for the **Third Defendant (Grant Thornton (UK) LLP)**

Hearing date: 18th November 2014

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JUDGMENT

Mr Justice Morgan Tuesday, 18 November 2014

(11.13 am)

Ruling by MR JUSTICE MORGAN

1. MR JUSTICE MORGAN: The trial of this action began on 6th November 2014. On 17th November 2014, the claimant served notice of discontinuance in relation to its claim. The notice of discontinuance disposed of the whole of the claim. However, there is a counterclaim which needs to be determined or otherwise dealt with. There are also consequential matters which need to be addressed. I will start with the counterclaim.

2. The counterclaim is effectively in two parts. The first part of the counterclaim is pleaded at paragraphs 114 to 119. The second part of the counterclaim is contained in paragraph 120. Paragraph 121 is a claim to interest pursuant to section 35A of the Senior Courts Act 1981.

3. So far as the first part of the counterclaim is concerned, the defendant does not wish to advance that counterclaim at this hearing, principally because that part of the counterclaim is on the basis that the allegations made by the claimant against the defendant are found to be true. That has never, of course, been the defendant's positive case and the counterclaim was meant to address the eventuality of the defendant being found liable to the claimant, which eventuality the defendant would say should never arise. However, the defendant submits today that this part of its counterclaim should not be dismissed. Alternatively, it is said that I should not make "no order" in relation to that part of the counterclaim.

4. The defendant is not clear as to what may happen next, in view of the fact that the claimant's claim was discontinued mid-trial. The defendant would wish to have available to it any possible protection that these parts of the counterclaim might afford it, just in case the claimant does something by way of reactivation of its claim.

5. It seems that the prospects of the claim being reactivated are very remote, and of course the defendant would not wish to say anything or have me say anything which would encourage the claimant to think that there was any chance of any kind whatever of reactivating its claim. But

for the avoidance of doubt and to be on the very safe side, I am prepared to accede to the defendant's request in relation to paragraphs 114 to 119 of the counterclaim. I will stay that part of the counterclaim on terms which have been discussed in the course of argument and which will be reflected in an order of the court.

6. That brings me to paragraph 120 of the counterclaim. That, as pleaded, reads as follows: "Further or alternatively, if Grant Thornton is found not liable to RPL in negligence it is entitled to and seeks damages in the amount of its costs, fees and expenses in defending the present proceedings assessed on the indemnity basis pursuant to clause 6.1 of the Grant Thornton Contract and clauses 8.3 and 8.7 of the Placing Agreement" and earlier paragraphs of the defence are repeated for that purpose.

7. As pleaded, the counterclaim arises if Grant Thornton is found not liable to RPL in negligence. Technically that hasn't happened. There has not been a finding either way, because the claim against Grant Thornton has resulted in a judgment on the claim. It seems to me it is not appropriate for me to continue the trial and make a finding as to whether Grant Thornton is or is not liable in negligence just for the purpose of addressing the counterclaim.

8. It seems to me that I can read paragraph 120 so that the condition of Grant Thornton being found not liable extends to what has happened here, which is that the claimant has discontinued its claim against Grant Thornton. I do not see any unfairness to the claimant by proceeding in that way.

9. Therefore, I address this counterclaim on the basis that there is before me an effective counterclaim requiring determination and the counterclaim is a claim to an indemnity pursuant to the contractual provisions.

10. The contractual provisions are found in what is described in the pleading as "the Grant Thornton Contract" and in "the Placing Agreement". I will go first to the Grant Thornton Contract and then separately consider the Placing Agreement.

11. The relevant clause in the Grant Thornton Contract is clause 6.1. That is a lengthy provision. The parties know the full extent of the wording of that provision. In this judgment I will refer only to the parts of the clause which are most relevant.

12. Approaching it that way, by clause 6.1 of the Grant Thornton Contract, RPL agreed to indemnify Grant Thornton -- and I now quote but leaving out words:

"From and against any and all actions, claims, demands, proceedings and judgements (collectively “Claims”) and any and all losses, liabilities, damages, costs, charge and expenses (collectively “Losses”) of whatever nature ... or which are suffered or incurred by Grant Thornton ... and which relate to or arise from directly or indirectly Grant Thornton's engagement hereunder ... and/or the transaction(s) or matters to which it relates and [RPL] shall reimburse Grant Thornton ... for all costs, charges and expenses (including legal fees) as they are incurred by Grant Thornton ... in connection with investigating, dealing with or defending any claims (whether actual, pending, threatened or potential) which so relate or arise."

13. Clause 6.1 is subject to a proviso which I will read in full. It is in these terms:

"Provided that the company will not be responsible for any Claims or Losses to the extent that they are found in final judgement by a court of competent jurisdiction to have resulted from a criminal or fraudulent act or the wilful default or negligence of Grant Thornton, or in circumstances where Grant Thornton is prohibited from receiving an indemnity pursuant to the Financial Services Authority Rules or Financial Services and Markets Act 2000, or the rules of any appropriate regulatory authority, but only to the extent of such prohibition."

14. Clause 6.1 is expressed in wide terms. Within those terms is the phrase:

"... all costs, charges and expenses including legal fees ..."

15. In the remainder of this judgment I will concentrate on that phrase and how it applies, because the thrust of the defendant's claim today is that it wishes to have an order for its legal costs, the costs of the proceedings, both in defending the claim and in presenting the counterclaim. But

although I will concentrate on that phrase, I do not mean to indicate that Grant Thornton has no right to be indemnified in other respects.

16. If I reach the conclusion that Grant Thornton is entitled to rely on clause 6.1, I will make a declaration to that effect, and the declaration should follow the width of the wording of clause 6.1. If Grant Thornton later wishes to say that it is entitled to be indemnified in other respects -- one possibility is in relation to management time -- then I will give Grant Thornton permission to apply to the court for an appropriate order to enable it to advance such a claim.

17. There may be legal argument as to whether such a claim can be put, and of course there is likely to be some argument as to the quantification process, but I will leave that door open, I do not intend to close it in what I am now about to say, focusing on the legal costs.

18. The first point to address in relation to legal costs is that clause 6.1 refers to "all costs" et cetera. However, it is accepted by Mr Butcher QC on behalf of the defendant, having in mind the decision of the Court of Appeal in Gomba Holdings UK Ltd v Minories Finance Limited (No. 2) [1993] Ch 171 that “all costs” is to be interpreted as reasonable costs reasonably incurred, subject to the proviso that the burden of asserting and establishing unreasonableness is on the paying party and not on Grant Thornton as the receiving party. That seems to be right and I will proceed on that basis.

19. Before applying clause 6.1 to the facts of this case, I will refer to the other contractual provisions relied upon by Grant Thornton. They are in the Placing Agreement, and it is necessary to have regard to clauses 8.3, 8.4, 8.6 and 8.7.

20. Reading the relevant parts of 8.3 in accordance with 8.7, the position is that RPL agreed to indemnify Grant Thornton and, again, I will quote only the relevant words, as follows:
"To the fullest extent permitted by law ... against any or all Claims ... and any or all Losses suffered or incurred by [Grant Thornton] ... by reason of, or resulting from, or directly or indirectly arising out of, or attributable to, or in connection with the performance by [Grant

Thornton] ... of its ... obligations and services, under or in connection with this agreement, or otherwise in connection with Admission and/or the Placing ... in any breach or alleged breach by the Company or the Directors of any of its or their obligations under this Agreement, and/or any breach or alleged breach of the Warranties ... including in any such case all proper fees, costs, charges and expenses (including all proper legal fees and expenses) (together with applicable VAT) which [Grant Thornton] may suffer or incur in investigating, seeking advice in relation to, responding to, preparing for, defending, disputing or enforcing any such Claim or Loss, or in establishing any claim for indemnification under the foregoing provisions ..."

21. That right to an indemnity is subject to clause 8.4, which cross-refers to clause 8.6, where there is a definition of "Excluded Loss".

22. I will refer to the definition in clause 8.6 and then return to clause 8.4. The definition of "Excluded Loss" has three limbs. I think it is sufficient to refer to clause 8.6.1, the first limb, which refers to:

"Loss resulting directly from the fraud, negligence or wilful default of [Grant Thornton]."

23. Clause 8.4 then provides that the indemnities in clause 8.3 shall not extend to any loss or losses if and to the extent that any of the same has been finally determined by a court of competent jurisdiction from which there is no right of an appeal to be an Excluded Loss, or, where there is a right of appeal, that right has expired.

24. Clause 8.3 refers to "proper fees" et cetera, and then it refers later to "proper legal fees" et cetera. Again, it is accepted by Grant Thornton, I think rightly, on the authority of the Gomba Holdings case that the reference to "proper fees" and "proper legal fees" brings in the concept of reasonable fees reasonably incurred with the burden of asserting and establishing unreasonableness being on the paying party and not on Grant Thornton. That is the indemnity basis provided for in the Civil Procedure Rules.

25. I will now seek to apply clause 6.1 of the Grant Thornton Contract so construed to the facts of this case. Grant Thornton has incurred costs, charges and expenses, in particular legal fees, in these proceedings. I make no distinction between the defence and the counterclaim because the counterclaim is pleaded as a set off and therefore a defence to the claim.
26. Accordingly, the costs in question prima facie come within clause 6.1 of the Grant Thornton Contract. I now need to apply the proviso to 6.1 to the facts of this case. The proviso is in two parts.
27. The first part relates to matters which are the subject of a final judgment by a court of competent jurisdiction. That does not apply here.
28. The second part refers to circumstances where Grant Thornton is prohibited from receiving an indemnity pursuant to certain rules or statutory provisions, and so on.
29. It has not been pleaded by the claimant in its Defence to Counterclaim that that part of the proviso applies. Mr Butcher is not aware of any provision which would bring the case within that part of the proviso.
30. It seems to me somewhat unlikely that there is a rule or a statutory provision which would have that effect. But for today's purpose, I am content to say that since the point is not taken by the claimant, it is a non-point and I need not rule upon it. Accordingly, I hold that the claim to an indemnity is not excluded by the operation of the proviso.
31. In the course of argument I raised with counsel whether it could be said by the claimant that clause 6.1 did not apply to a claim made against Grant Thornton by the other contracting party, RPL, but only to a claim made by a third party.
32. There are no express words in clause 6.1 to that effect. I consider, after due deliberation, that it is not appropriate to imply a limitation of that kind into clause 6.1. A claim by RPL against Grant Thornton, speaking generally, will either be upheld or dismissed. If the claim is upheld, it

would seem that it would always fall within the proviso, so that the indemnity would not arise and it would not be necessary to imply a limitation to prevent the indemnity being relied on.

33. But what of a claim made by RPL against Grant Thornton, which fails? The proviso would not apply in such a case.

34. If RPL made an allegation of negligence against Grant Thornton which failed, then I consider that the suggested implied limitation is not appropriate. Why should Grant Thornton not receive an indemnity from RPL in such a case just as much as in a case where a third party makes an allegation against Grant Thornton which is not within the proviso?

35. A somewhat similar point arose in John v Price Waterhouse [2002] 1 WLR 953. That case concerned the indemnity provisions, as between a company and its auditors, in article 136 of Table A to the Companies Act 1948.

36. In that case it was argued that the general words of article 136 did not extend to claims by the company against the auditors but only to claims by third parties against the auditors. The argument was rejected; see paragraphs 24 and 25.

37. Article 136 is in different terms from clause 6.1 of the Grant Thornton Contract, but it provides some further support for the conclusion which I would in any event reach, that clause 6.1 is not to be limited to claims by third parties against Grant Thornton.

38. Accordingly, I find that Grant Thornton is entitled to an indemnity for its costs in defending these proceedings, provided that such costs are reasonable costs reasonably incurred, the burden of establishing unreasonableness being on RPL; that is the indemnity basis of assessment.

39. I will now apply 8.3 of the Placing Agreement to the facts of this case. Again, Grant Thornton has incurred legal costs in defending the claim. Those costs are not "Excluded Loss" within clauses 8.4 and 8.6 of the placing agreement. As before, it is not appropriate to imply a term limiting clause 8.3 to claims against Grant Thornton by third parties and not by RPL itself. Accordingly, Grant Thornton is entitled to an indemnity for its proper costs of defending the

claim against it. If there were any doubt about whether that indemnity extended to the costs of the counterclaim, it is removed by the closing words of clause 8.3, which extend to the cost of establishing any claim for indemnification under these provisions.

40. The next question is: how procedurally is the amount of the indemnity in relation to costs to be quantified? Should I enter judgment for an indemnity to be assessed and then direct an account or an inquiry, perhaps before a costs judge.? It seems to me that the most convenient course is simply to make a declaration of Grant Thornton's entitlement to an indemnity and then to make an order for costs which reflects that entitlement, and then to direct a detailed assessment of the relevant costs on the indemnity basis. It seems to me that procedural course is supported by the approach in Gomba Holdings.

41. In addition to its submissions relying on the contractual indemnity provisions, Grant Thornton submitted that this was an appropriate case for an award of costs on the indemnity basis pursuant to the court's general powers and discretion in relation to costs. It was submitted that the case was out of the norm and in all the circumstances justified an award of costs on the indemnity basis.

42. In support of its contention, Grant Thornton would have wished to make submissions as to the inherent weakness of the claimant's case, and then as to various features of the claimant's conduct, in particular in relation to disclosure.

43. I have not encouraged detailed submissions of that kind to be made at this hearing because it seems to me it is unnecessary for me to consider them. Having reached the conclusions I have reached on the contractual right to an indemnity, I see no need to consider what I might have decided if it had been necessary to do so as to the general powers and discretion of the court.

44. So I do not base my order for indemnity costs on considerations of that kind, I leave those matters entirely open.

45. I think I have now dealt with the arguments as to the making of an order for costs on the indemnity basis. I am asked to do two other things in relation to costs. The first is to determine that Grant Thornton is entitled to interest on its costs in relation to costs that it has already paid before today's date. I have power to make such an order. I am satisfied that it is appropriate to do so in this case. I will determine that the rate of interest on such costs is to be 1.5 per cent over base rate from the date of payment until the date of this order and at the Judgment Act rate of 8 per cent thereafter.

46. I am also asked to order that the claimant make a payment on account of the costs which I have ordered the claimant to pay subject to detailed assessment. I have not been provided with a complete or full summary or statement of Grant Thornton's costs. This is not a case where the rules require that to be provided. And in view of the fact that the claimant has discontinued in the course of the trial, there is no criticism to be made of Grant Thornton that it has not provided a more complete breakdown of its costs.

47. I have, however, been provided with a short summary of what the costs are likely to be. The summary, not including interest, discloses a figure just below £2.4 million. Having regard to the fact that the costs will be assessed and become payable on the indemnity basis, I will order payment on account of £1.5 million. I will hear counsel on the period which I should allow for that payment to be made.

48. I believe that I have now dealt with all of the substantive points which have been argued on this application. In the course of argument I have indicated certain drafting points as to the order. I will not deal with those detailed points in this judgment.