Case No: CL-2019-000793

Neutral Citation Number: [2021] EWHC 197 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2021

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

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Between:

(1) FERAND BUSINESS CORPORATION **(2) ANGELIKI FRANGOU** **(3) MARITIME ENTERPRISES MANAGEMENT S.A.**	**Claimants**
- and -	
(1) MARITIME INVESTMENTS HOLDINGS LIMITED	**First Defendant/ Additional Claimant**
(2) KOLEN INTERNATIONAL S.A.	**Second Defendant/ Additional Defendant**

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Mr David Allen QC and **Mr Jason Robinson** (instructed by **Wikborg Rein LLP**) for the **Claimants**
Ms Caroline Pounds (instructed by **Tatham & Co**) for the **First Defendant /Additional Claimant**
Mr Richard Sarll (instructed by **Waterson Hicks**) for the **Second Defendant/Additional Defendant**
Hearing dates: 5-8 October 2020

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Costs Ruling

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. This is my Ruling on the single issue left over from the hearing on 29 January 2021 at which the substantive judgment in this claim was handed down, which was whether some or all of the claimants' and first defendant's costs that I directed should be paid by the second defendant should be assessed on the indemnity as opposed to the standard basis.

2. The claimants submitted that all or most of their costs should be assessed on the indemnity basis on (a) the overarching basis that it ought to have been obvious to the second defendant at the pleadings stage and in any event well before trial, that it had no sensible basis (on the documentary evidence or at all) on which to challenge the Claimants' entitlement to the declarations sought and (b) for various discrete reasons that I turn to below to the extent necessary.

3. During the trial, Mr Allen QC had suggested that in various respects the conduct of counsel for the second defendant was improper. However in his written and oral costs submissions, Mr Allen accepted that he need not advance such a case in order to secure indemnity costs and did not do so. After completion of the hearing of the applications to which I refer below, Mr Allen had reserved the right to apply for a wasted costs order against Mr Sarll and possibly his instructing solicitors as well. In the event, Mr Allen indicated during the trial that a wasted costs application would not be made.

4. Ms Pounds in effect adopts Mr Allen's submissions in relation to the first defendant's costs, which she bolsters by pointing out that her client did not seek the declarations sought by the claimants by reference to EJN2, essentially for the reasons that I declined to grant them – as to which see paragraphs 83 – 101 of the substantive judgment – and the reasons why the second defendant's claim against the first defendant failed. As against that, it is to be remembered that the first defendant in essence made common cause with the claimants against the second defendant and for the most part adopted Mr Allen's submissions save and except in relation to issues that concerned the first defendant exclusively.

5. Ms Sarll submits on behalf of the second defendant that none of the costs his client has been ordered to pay should be assessed on the indemnity basis not least because on a number of issues that arose his client has been successful. Other than in one respect to which I refer below, in my judgment this is not a relevant consideration because that point was deployed by him in resisting an order that his client should be directed to pay all the claimants' costs of the proceedings and resulted in a direction from me that the claimants should recover only 90% of their costs of the proceedings. At this stage, the focus of attention is on that part of the case on which the second defendant lost and on its conduct in the period immediately prior to the start of and during the trial. More generally, Mr Sarll maintains that none of this conduct whether viewed separately or in the aggregate passes the threshold test on which a direction that costs be assessed on the indemnity basis depends.

6. Normally an issue such as this is one that would be disposed of in the course of the hearing following the hand down of the substantive judgment. However the arguments advanced by the parties in relation to this issue were pursued with all the forensic hostility that has been deployed throughout this trial. I regret that, as I regretted the way in which is permeated the whole of the trial. In addition and probably because of the extreme hostility that permeates this dispute, the arguments on this issue were much lengthier and more elaborate than is the norm. It struck me therefore that it would be better for all concerned if this issue were resolved by a ruling in writing to be delivered shortly after completion of the hearing.

Issues

7. Although the claimants tended to treat the question that arises as a single one of whether the claimants should recover their costs to be assessed on the indemnity rather than the standard basis, this is wrong. The issue divided into three separate questions being

    i) Whether the claimants should recover the costs of the two applications made on behalf of the second defendant on what was meant to be the first day of the trial (an application to re-amend the second defendant's Defence and to rely on additional witness statements, both of which were dismissed in a judgment delivered at the start of what was meant to be day 2 of the trial – see Ferand Business Corporation and others v. Maritime Investments Holdings Limited and Kolen International SA [2020] EWHC 2665 (Comm);

    ii) Whether the claimants should recover some or all of the costs of the claim other than the costs of the trial on the indemnity as opposed to the standard basis; and

    iii) Whether the claimants should recover some or all of the costs of the trial on the indemnity as opposed to the standard basis.

    Further, it does not follow that because these issues are resolved in one way as between the claimants and the second defendant, they should be resolved in the same way as between the first and second defendants. Although the same three issues arise, the facts and matters relevant are in part different.

Applicable principles

8. The principles that apply when deciding whether an order should be made requiring the costs of a successful party to be assessed on the indemnity as opposed to the standard basis are now well established. As Mr Allen submitted, the discretion is a wide one and can arise in a were wide range of different circumstances. However the key test that a court should apply when deciding whether to direct that cost be assessed on the indemnity as opposed to the standard basis is that identified by Mr Sarll in paragraph 5(1) of his written submissions namely whether the circumstances said to justify such an order take the case outside the norm – see Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson (A Firm) [2002] EWCA Civ 879 per Lord Woolf CJ at para. 19, which in this context means or includes conduct that is unreasonable to a high degree – see Kiam v MGN (No. 2) [2002] EWCA Civ 66. Once those principles are understood it is not necessary to further refine it since all the other cases where the issue has been

explored simply re-state the test in similar language and apply that test to particulars facts.

Claimants' Costs of the Claim

9. The claimants submit that it must have been obvious to the second defendant "*... at the pleadings stage and in any event well before trial ...*" that there was no sensible basis on which to challenge the claimants' entitlement to the declarations sought and on the basis that the second defendant's case was "… *seriously flawed, arguments and allegations [that] left the Claimants with no choice but to proceed to trial and address the falsity of each and every argument at length* …" - see paragraph 23 of Mr Allen's written submissions. Mr Allen submits therefore that the claimants' costs of the claim should be assessed on the indemnity basis or should be from the date when pleadings closed.

10. I reject that submission for the following reasons. First, I accept Mr Sarll's submission that advancing a weak defence to part or even most of a claim will not usually justify directing that the whole of the costs of a claim be assessed on the indemnity basis because being wrong or misguided in some or even most respects is not being unreasonable to a high degree or for that matter conduct which is outside the norm. In relation to cases where a defendant is advancing a defence that is hopeless either in whole or part there are other remedies available, of which an application to strike out or for summary judgment are two and making an effective Part 36 offer is another.

11. Leaving to one side the allegations that the claimant acted outside the norm during the trial by advancing defences claims or theories that it was not entitled to advance on the pleadings or by abandoning pleaded parts of the defence which the claimants had come to trial prepared to answer or persisting with defences which were known to be hopeless following the dismissal of the application to re-amend the defence, a court is not justified in ordering all the costs of a claim to be assessed on an indemnity basis simply because the paying party has lost either wholly or in part even if the defence was weak, mistaken or misconceived. I accept that in some respects the second defendant's conduct prior to trial arguably passed the necessary threshold when viewed in isolation. One example was defending the claim by reference to alleged agreements that were simply then abandoned at trial. However merely because part of the second defendant's conduct prior to trial was unreasonable to a high degree does not lead to the conclusion that the whole of the costs payable by a paying party should be assessed on the indemnity basis unless it can be said that such conduct viewed in the round with everything else rendered the whole of the defence one that was unreasonable to a high degree. In my judgment that is not this case. I reject therefore the submission that the claimants should recover their costs of the entire claim on the indemnity basis as unfounded.

Claimants' Costs of the Applications by the Second defendant to Re-Amend the Defence and for Permission to Rely on Further Witness Statements

12. In my judgment it is plain that the claimants' costs of and occasioned by these applications must be assessed on the indemnity rather that the standard basis applying the principles summarised above. My reasons for reaching that conclusion are as follows.

13. The applications took the whole of the first day to argue and resulted in an 8 page judgment delivered the following day. It is not appropriate that I should repeat everything said in that judgment which must be read in its entirety to understand the difficulties created by the application. In summary however the application to re-amend was an application which was plainly very late in the technical sense that if granted it would have resulted in the trial having to be vacated and was made in circumstances that have plainly been identified as ones that should generally lead to the dismissal of such applications. It resulted from Mr Sarll being instructed to act on behalf of the second defendant at the beginning of September 2020 and thus was the result of the instruction of new counsel apparently taking a different view of the case from those who had gone before. That has long been recognised not to be a good reason for such an application – see Quah Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm) per Carr J (as she then was) at paragraph 47 - and ought of itself to have a reason for considering whether a wide ranging application of this sort should have been made shortly before the start of the trial. The potency of that point was demonstrated by the manner in which the amendments sought were reduced by Mr Sarll as he made his submissions in support of the application.

14. No good reason was offered as to why either application could not have been made much earlier than it was so as to avoid the inevitable disruption to the claimant's preparation for trial and the application did not come close to satisfying to the full the requirements of a proper pleading in the sense required by the Court of Appeal in Swain-Mason and Others v Mills and Reeve [2011] EWCA Civ 14; [2011] 1 WLR 2735. That this is so is apparent on the face of the drafts, from the fact that the drafts went through two iterations and from the fact that the second but not the first contained a new case in fraud not previously pleaded but which was later then abandoned in the course of Mr Sarll's submissions. This factor was particularly clearly illustrated by the approach to the counterclaim his client advanced against the first defendant – see paragraphs 20-21 of my judgment dismissing the amendment application.

15. In part the application sought to resile from admissions on factual issues that had been made in the previous iterations of the defence but with no thought having been given to the impact that might have on the trial and the claimants preparation for it.

16. This was made all the worse because this was the third attempt by the second defendant to set out its defence to the claim with no good explanation or reason offered as to why the issues that the second defendant now apparently wished to raise had not been raised months earlier as they could and should have been. Aside from the instruction of new counsel, the only other explanation offered was impecuniosity – but that did not prevent the second defendant being professionally represented when first its defence and then its amended defence was drafted, filed and served. Further the re-amendments could have been pleaded weeks if not months earlier than the date when the applications were issued, at a time when the second defendant was professionally represented by solicitors and counsel. As I said in paragraph of my judgment dismissing the application:

> "It is plain that an application as wide-ranging as the one made as late as this one has been made will threaten the trial date because if permitted it puts in issue allegations that were at least impliedly admitted and raises new positive cases not before mentioned that involve both issues of law and fact, as well as raising for the first time claims by way of counterclaim

> not previously mentioned. Since the proposed amendments all post-date the service of the witness statements served in accordance with the CCMC directions given in March 2020, it is inevitable that all the new issues would have to be investigated. It may be that additional witness statements would be required, possibly from individuals who are not currently to be witnesses, and it is possible that disclosure will have to be re-visited as well. None of this could be done without vacating the trial."

As the claimants very experienced solicitor said in his witness statement resisting the application, it would have taken several months to carry out the work necessary to respond to the proposed amendments if permitted and would inevitably lead to the trial being lost and for the need for a trial of greater length to be listed many months in the future. The application to adduce the additional statements was equally objectionable – in part at least they were put forward in support of the case set out in the proposed re-amended defence but in part were responsive to the claimants' case without explaining why the material could not have been put forward in the original statements filed on behalf of the second defendant or why it could not have been provided weeks if not months earlier than it was. The air of unreality that surrounded all this was completed by the second defendant's time estimate of only 20 minutes for an application that it must have been appreciated would be contested and which took the better part of a day to resolve.

17. Mr Allen submitted at the time and repeated in the course of his costs submissions that the effect these applications was to create chaos for the claimant in the run up to the start of the trial. I accepted that submission when refusing the applications to amend and to adduce additional evidence and I accept it now. It was precisely this factor that was identified as a cause of real prejudice for a responding party in CIP Properties (AIPT) Limited v Galliford Try [2015] EWHC 1345 at paragraph 19(e). For the avoidance of doubt I am satisfied by Mr Allen's submissions that the effect in this case was at the top of end of the prejudicial effect identified in that paragraph.

18. All these factors have to be viewed together and so viewed lead inevitably to the conclusion that both applications were outside the norm and the making of each was conduct that was unreasonable to a high degree. It therefore follows that the second defendant must pay the claimants' costs of occasioned and thrown away by those applications to be assessed on the indemnity basis. I turn to the position as between the first and second defendants at the end of this Ruling.

The Impact of the Applications on Claimants' Preparation for Trial

19. Mr Allen submits that the consequences for the claimants of the applications to which I have so far referred permeated both the preparation by counsel for the start of the trial and the conduct of the trial itself. He submits that inevitably that has had costs consequences given the volume of work necessary to prepare for trial on alternative bases until the applications were resolved and the work involved in conducting the trial under a guillotine that would not have been applied but for the fact that the whole of the first day of the trial (listed to last four days in all) was taken up in resolving the applications by the second defendant referred to earlier. If and to the extent that submission is correct then Mr Allen submits that merely directing that the claimants should have the costs of and occasioned by the applications to which I have referred

will not relieve the claimants of the costs consequences resulting from those applications.

20. The impact on the trial was expanded upon in detail by Mr Allen as being that

> "The various applications were served on the Claimants by D2 one working day before and one working day after the date by which the Claimants were to and did file/serve their opening submissions. Neither the Claimants, nor Claimants' counsel, can possibly have been expected to read, consider, assimilate, take instructions on, adduce responsive evidence in respect of, and prepare for trial in respect of all those new allegations, new evidence and new documents, including a new serious allegation of fraud. …
>
> The effect of the very late applications on counsel for the Claimants was three-fold. First, counsel were forced away from preparing for the trial that the Claimants and the Court had intended should be prepared. Second, counsel were at a loss to know what case the Claimants were going to have to face only a few days later. Third, because D2 had given a hearing estimate for its various applications of only 20 minutes, counsel for the Claimants were forced to write to the head of the Commercial Court list to complain and propose a more realistic estimate, based on information known at the time (revised on Day 1 once preparation had been carried out over the weekend). This is not reasonable or normal conduct in litigation and the interlocutory judgment recorded expressly that "*This is a factor that I intend to take into account when making the relevant costs orders in relation to each of these applications*" (§3). The disruption it caused before the trial was vast, the first day of the trial was lost and counsel thereafter had to work through the night during the trial to try to catch up with time taken away from their planned preparation, and to plan how to proceed in terms of submission with a guillotined trial. …
>
> The entirety of Day 1 was lost due to D2's very late applications. That wasted the Court's time and increased the pressure on the Court, and Counsel, to hear the witness evidence in the time remaining. The Court will recall that the only way to save the trial, and avoid an adjournment, was to extend the length of the hearing days and guillotine the time available to each party for cross-examination."

21. I accept Mr Allen's submission that this was the effect of the very late applications to which I have referred from the date they were served down to the end of Day 1 of the trial (taken up as it was exclusively with determining the applications) not least because Mr Sarll does not suggest the effect was otherwise than submitted – see paragraph 6(2) of his written submissions - and that it is likely to have increased costs. Assessing costs on an indemnity basis does not involve the receiving party recovering more than the costs that party actually incurred. What it does do is to remove the issue of proportionality from the equation and entitles the receiving party to recover its

reasonable costs over the period to which an indemnity assessment direction applies. In my judgment the real effects of the very late applications being made affected the claimants' preparation for trial and the trial only in the period between the date of service of the first of the applications and the end of the first day of the trial. As Mr Sarll submitted, Mr Allen cross examined Mr Frangos for less than the time allotted under the guillotined procedure and it did not prejudice the claimants.

Claimants' Costs of the Trial

22. Although Mr Allen submits that all the factors he relies on must be evaluated together and in the round, in my judgment some care is needed in applying that principle where it is possible to separate the strands of allegedly unreasonable conduct between that attributable to the very late applications to amend and to adduce additional evidence and that attributable to the way the trial was conducted. If the claimants are to succeed in obtaining an order that the whole of the costs of the trial should be assessed on an indemnity as opposed to a standard basis then it will be necessary for the claimants to demonstrate that the second defendant's conduct during the trial other than that relating to the applications was unreasonable to a high degree or otherwise outside the norm.

23. I do not accept Mr Allen's submission that oral evidence was only necessary at the trial " … *in order to rubbish unfounded and unevidenced theories advanced by …*" by the second defendant - see paragraph 23 of Mr Allen's written submissions. Had that been so, then Mr Allen would not have called any of his witnesses to give oral evidence because it would have been unnecessary to do so once the applications by the second defendant had been dismissed or, indeed, filed any witness statements at all other than perhaps formal statements required to produce some of the documents on which the claimants relied. If and to the extent that it is suggested that the trial was extended by some late intervention requiring the giving of oral evidence that would otherwise have been unnecessary, I reject that submission. This trial was always estimated by the claimants and their advisors at 4 days in length on the basis that it would be necessary for the claimants to adduce oral evidence. The second defendant contended at the CMC apparently that the trial would take 5 days on a similar basis. This trial could have been listed for 4 days only on the basis that it would be necessary for the claimants to adduce oral evidence and that it would be tested in cross examination. In the event, as I have said, a guillotine had to be imposed as a result of the loss of the first day to the hearing of the applications by the claimants referred to earlier. However, in the event, Mr Allen did not find it necessary to use all the time available to him for cross examination.

24. Where things become more difficult for the second defendant is in the case that was advanced by way of cross examination by Mr Sarll on behalf of the second defendant. I turn to those issues in a moment but it is necessary to inject a sense of proportion into all this. First, in the event, the trial was completed within the time that remained for it. This was possible because Mr Allen entirely correctly and sensibly confined the case he advanced to that which was pleaded and because if and to the extent that Mr Allen was entitled to object to lines of cross examination that strayed beyond what had been pleaded he did not do so, accepting the point I made during the trial that to do so would simply lengthen the trial in circumstances where cross examination that was genuinely objectionable would not assist the second defendant since I intended to resolve the case on the issues identified in the pleadings. Secondly, although Mr Allen maintains that the effect of Mr Sarll's cross examination was to "*... traduce...*" his clients. In my judgment that allegation is overblown. First, where such allegations

were made, the second claimant has been entirely vindicated in the judgment. Secondly, the incident concerning the publication in a trade journal of allegations made only in the draft re-amended defence that I refused permission for was not something that resulted from cross examination.

25. That said, I accept that in some respects submissions were made on behalf of the second defendant that strayed beyond the issues as defined in the pleadings – see Judgment, paragraphs 71, 114 and 119-120. Others appeared to lack commercial logic, evidential support or legal justification – see paragraph 116-117 of the judgment by way of example. However, these are examples that cannot be viewed in isolation from issues where the second defendant was successful. I accept too that the allegations made concerning the forgery of the second defendant's signature on a MIHL board minute was one that ought not to have been made and ought to have been withdrawn once it became apparent that it was unsupportable by reference to the evidence of the handwriting expert engaged by the second defendant. This point remains so notwithstanding paragraphs 3-4 of Mr Sarll's supplemental submissions.

26. In other respects the second defendant's case went beyond advancing a case that was weak and stayed into positions that were indefensible – see paragraph 59 of the judgment by way of example – or were abandoned only in the course of the trial – see paragraph 75 of the judgment by way of example. The second defendant's case in relation to the Christine B as pleaded was not advanced at trial. Whilst I have accepted that one of the amendments that the second defendant sought permission to make but was refused was to change his pleaded case as to the underlying agreement the first defendant asserted to have been made concerning the sale of the Christine B, that does not alter the fact that if that was his case it could and should have been pleaded from the outset and it also ignores the point that his case as pleaded was consistent with what was alleged in EJN4 but his revised case was not. In some respects the second defendants case was obviously inherently implausible – see paragraphs 26, and 151-153 of the judgment. Finally, it is fair to say that such were the inconsistencies in the second defendant's case on various issues that I was driven to conclude that his evidence had to be treated with caution – see paragraph 157 of the judgment. All this leads Mr Allen to submit that viewing all these factors in the round I should conclude that the case for an indemnity costs order is "*overwhelming"*.

27. I consider that in the respects set out above, the second defendant passed over the line between advancing a weak defence to advancing one that in a number of respects he ought not to have advanced at all.

28. In my judgment the combined effect of the very late applications on the conduct of the trial and the other factors to which I have referred above lead fairly to the conclusion that the claimants' costs of the trial ought to be assessed on the indemnity rather than the standard basis. In addition, as I have said earlier, the claimants should recover their costs from the date of service of the first of the applications I determined on the first day of the trial must also be assessed on the indemnity basis for the reasons set out earlier.

The First Defendant

29. In my judgment there is no real reason for me to direct that the first defendant should recover its costs prior to the start of the trial on anything other than the standard basis. The difficulties faced by the claimants' advisors were not faced in the same way by

the first defendant because Ms Pounds was able to adopt Mr Allen's submissions on all issues of principle.

30. In my judgment, the first defendant is entitled to recover its costs of the applications by the second defendant to amend its pleadings as against the first defendant and to adduce additional evidence to be assessed on the indemnity basis. The impact on preparation by the first defendant was not and is not suggested to have been the same as it was for the claimants, but the other reasons why I have directed that the claimants' costs must be assessed on the indemnity basis apply with equal force to the application as against the first defendant. However, it follows from these conclusions that there is no reason for directing the first defendant's costs between the date of service of the first of the applications down to the start of the trial should be assessed on the indemnity basis.

31. So far as the trial itself is concerned, I see no reason for making any different order so far as the first defendant is concerned from that I have made in favour of the claimants. I accept that Ms Pounds sensibly adopted most of what Mr Allen said but once it is accepted that the first defendant needed to be separately represented (and no one suggests otherwise) then it was as much a victim of the conduct to which I have referred above as were the claimants. In addition, the second defendant advanced a claim against the first defendant which I refer to in paragraph 171 of the judgment that was advanced but then abandoned on the basis that it ought never to have been made at any rate on the pleadings as they stood.

32. In the result, the second defendant must pay the first defendants' costs of the very late applications to be assessed on the indemnity basis and must pay the first defendants' costs of the proceedings against it to be assessed on the standard basis other than the costs of the trial (that is for the avoidance of doubt days 2 and following of the hearing before me) on the indemnity basis.

Conclusion

33. I direct that the claimants' costs of the second defendant's applications to re-amend the second defendant's defence and to adduce additional witness statements must be assessed on the indemnity basis; and that the second defendant must pay the claimants' costs of the claim to be assessed on the standard basis save and except that the claimants' costs from the date of service of the first the two very late applications down to the end of the trial must be assessed on the indemnity basis.

34. The second defendant must pay the first defendant's costs of the applications to be assessed on the indemnity basis and the first defendant's costs of the trial on the indemnity basis.

35. The parties are directed to submit a draft order for approval that carries into effect these directions as well as the other directions given at the hearing at which the substantive judgment was handed down.