Indemnity Costs—When Does a Party Become Liable?

3 November 2022

Introduction. The judgment following a consequentials hearing in the case of *Mr. Pisante and ors v Mr. Logothetis and ors* was handed down by Mr. Justice Baker on 13 October 2022 and provides some helpful guidance on when a party will become liable for indemnity costs.

By way of reminder, costs assessed on the indemnity basis are not subject to a principle of proportionality and, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

The trial of the main proceedings took place across two weeks in July 2021, and judgment was handed down in January 2022. The first defendant, Mr. Logothetis, was found to have fraudulently misrepresented the basis on which his company, Lomar, would be contributing to a joint venture and the first claimant, Mr. Pisante (acting via his company, Swindon Holdings), was induced by that misrepresentation to indirectly invest in the joint venture.

Indemnity Costs. The Claimants sought their costs on the indemnity basis on two grounds:

First, they submitted that the Court should recognise a presumptive rule that where fraud is proved, the successful claimant's costs should be assessed on the indemnity basis, similar to the way in which a defendant who successfully defends a fraud claim is ordinarily entitled to his or her costs on the indemnity basis. It was argued that a general policy along these lines would reflect the court's policy of fully compensating victims of fraud, as well as reflecting the fact that a defendant who exacerbates his or her dishonesty by continuing to deny it, acts unreasonably.

Second, they argued that the Defendants' conduct of the litigation was so unreasonable and outwith the norm that it was appropriate to make an order for indemnity costs.

The court rejected the first argument noting that "*the fact that the allegation successfully made was of dishonest wrongdoing does not, without more, make it more appropriate than in any other kind of case that a claimant's costs should be recoverable though incurred disproportionately or that the claimant should not have to show that its costs were reasonably incurred and reasonable in amount*".

However, the Court was far more sympathetic to the Claimants' submissions concerning the Defendants' conduct of the litigation. As Mr. Justice Baker put it, "*the conduct of the defence in this case involved significant unreasonable behaviour that went beyond the norm, from the outset and from time to time throughout*".

The unreasonable conduct involved:

- The redaction of highly relevant and adverse material during disclosure for which the judge held there was "*no arguable justification*". An in-house lawyer for the Defendants assumed personal responsibility for approving the redactions (though he had taken account of legal advice from external counsel) and during cross-examination had "*professed himself unable to see, though it was completely obvious, that there was in fact no sensible justification for those redactions*".

- Pursuing the case to trial when there was clear documentary evidence that Mr. Logothetis had made the misrepresentations complained of. Further, Mr. Logothetis had then, in his evidence, sought to "*explain away the contemporaneous material*" by concocting an alternative interpretation in "*an attempt to create plausible deniability*".

- Certain of the Defendants were criticised in the main judgment for being confrontational and less than forthcoming during cross-examination, including one witness who was described as an "*unsatisfactory witness*" who allowed himself to become "*highly agitated*". The judge also noted that certain witnesses were in "*a position to say more*" as to Lomar's financial position but were "*unwilling to do so*".

- The Defendants' response to the Claimants' "*serious and measured*" Letter Before Action was "*wholly inappropriate, polemic in terms, calculated to intimidate*".

In their response to the Letter Before Action, the Defendants had described the Claimants' claims as "*vexatious*", "*defamatory*" and "*nothing more than a thinly veiled attempt to coerce Mr Logothetis to settle […] with the threat of negative publicity*". The Defendants' letter had gone on to suggest that those representing the Claimants would be reported to the SRA and Bar Council and that a wasted costs order could be sought against the Claimants' solicitors.

Mr Justice Baker concluded his thoughts on the response letter by saying "*It is the mildest of responses by the court, and a just consequence, that defendants who so sought to bully the claimants as to the merits of their claim should be required as fully as the costs rules will permit to indemnify the claimants in respect of their costs after they have made the claim good*".

Key Takeaways. The judgment serves as a stark reminder that behaviour during the course of proceedings can have serious ramifications when assessing costs.

It is an all too common feature of English litigation for solicitor firms to exchange aggressive correspondence (often in the hope that it will intimidate an opponent), but as this Judgment shows, the court is rarely receptive to such tactics and indeed, is willing to punish litigants when they go too far. Practitioners would be well advised to take account of the guidance in this decision especially when under pressure from clients to behave in a certain way.

And of course it goes without saying that practitioners should never redact, or allow to be redacted, relevant and adverse material.

The full judgment is available here: https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2022/2575.html&query=(pisante)

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