Neutral Citation Number: [2021] EWHC 1150 (Ch)

Case No: CR 2017-007339

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (CHD)

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

Date: 30 April 2021

Before :

John Kimbell QC, sitting as a Deputy High Court Judge

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Between :

(1) Adrian Charles Hyde **Applicants**
(2) Kevin Anthony Murphy
(As Joint Liquidators of One Blackfriars Limited)

- and –

(1) Anthony David Nygate (in his capacity as representative of the estate of James Joseph Bannon, Former Joint Administrator of One Blackfriars Limited Appointed under CPR 19.8(1))
(2) Sarah Megan Rayment
(As Former Joint Administrators of One Blackfriars Limited)

Respondents

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Justin Fenwick QC and Ben Smiley (instructed by **Mayer Brown**) for the **Applicants**
Simon Davenport and Tom Poole (instructed by **Humphries Kerstetter**) for the **Respondents**

Hearing date: **12th April 2021**

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APPROVED JUDGMENT
(COSTS AND INTEREST)

John Kimbell QC, sitting as a Deputy High Court Judge:

1. This judgment is concerned with consequential matters relating to costs and interest arising from my judgment dated 23 March 2021 Re One Blackfriars Ltd [2021] EWHC 684 (Ch).
2. For the reasons summarised in paragraph 465 of that judgment, I dismissed the entirety of the claim brought by the Applicants, who are the Joint Liquidators of One Blackfriars Limited, against the Respondents, the Former Administrators, of the company. I found that the Applicants had not proved any of the breaches of duty alleged to have been committed by the Former Administrators.
3. On 12 April 2021, I heard oral submissions over the course of one day on interest and costs from Mr Davenport QC on behalf of the Applicants and Mr Fenwick QC on behalf of the Respondents. Both parties served helpful skeleton arguments. The hearing, like the trial itself, was fully remote, with all the advantages of convenience and ease of access that that format brings with it.
4. The parties also helpfully produced a new electronic application bundle, Bundle J. This was uploaded to the same remote Opus 2 platform which had been used at trial. This had the further advantage that I had access to the full trial bundle during the submissions on consequential matters.
5. In compliance with an e-mail request which I sent to the parties prior to the hearing, a note of matters agreed has been produced. This records the following three matters as being not in dispute:

    (1) That the applicants pay the respondents' costs of the proceedings, including the costs of the applicants' application to adjourn the trial made orally on 1 April 2020.

    (2) That the applicants pay interest on the respondents' costs from the dates of payment of cost invoices.

    (3) That the applicants make an interim payment to the respondents on account of the costs ordered.

The Issues

6. The following six issues concerning costs and interest were therefore in dispute:

    (1) The costs of the Respondents' application for security for costs issued on 16 March 2020.

    (2) The basis of assessment of the Respondents' costs of the proceedings.

    (3) The quantum of the interim payment on costs and whether any direction ought to be made as to the source of payment.

    (4) Whether the Respondents should have liberty to apply under Section 51 of the Senior Courts Act 1981.

    (5) The rate to be applied to interest on costs.

    (6) The date on which interest under the Judgments Act 1838 should start to be payable.

7. The Applicants have also made an application for permission to appeal. I will deal with that in a separate judgment.

8. I will refer to the Applicants as "the Joint Liquidators" or "the JLs" and the Respondents as "the Former Administrators" or "the FAs".

Issue 1: the costs of the security of costs application dated 16 March 2020.

9. The dispute which led to the issue of an application by the FAs for security for costs on 16 March 2020 (with a view to it being heard at the PTR on 1 April 2020) was essentially about the terms of a deed offered by AmTrust on behalf of the JLs by way of security for costs. The dispute about the wording of the deed itself was resolved by agreement on the morning of the PTR on 1 April 2020. The only dispute which remained therefore concerned the costs of the FAs' application.

10. Paragraph 1.2 of the order I made on 1 April 2020 required the parties to file a consent order as to the manner in which costs of the security for costs application should be dealt with. This was done.

Written submissions were subsequently served by both parties. The dispute on costs was subsequently reserved by me to trial, which is why the matter needs to be resolved today.

11. Somewhat unusually, both parties are seeking their costs of the application. The FAs are seeking costs of £43,700 and the JLs are seeking costs in the more modest sum of £8,847.

12. Even more unusually, as part of their submissions, both parties revealed their respective without prejudice save as to costs positions prior to the exchange of written submissions on costs. The FAs offered to accept £27,500 on 6 April 2020. On the same day, the JLs offered to accept £10,000 and alternatively proposed costs in the case. Thus, the sum the JLs offered to accept is larger than the sum the sum being sought today.

Evidence

13. Both parties served witness statements in relation to the application. The FAs served a witness statement by Mr Oulton of Mayer Brown and the joint liquidator served a response witness statement by Mr Russell of Humphries Kerstetter.

Factual background

14. On the basis of that evidence, the factual background to the application may be summarised as follows.

15. On 31 October 2019, the FAs sought £850,000 in further security for their costs. Eventually, on 6 January 2020, that sum was agreed by the JLs.

16. On 12 February 2020, a draft AmTrust deed was provided by the JLs. This was on different terms to the DAS wording which had been used previously as security for costs.

17. On 28 February 2020, the FAs raised a number of queries about clauses 5 and 6 of the AmTrust deed. In relation to clause 6, the concern was about the circumstances in which there might be a reduction in the maximum liability of AmTrust.

18. By 5 March 2020, there had been no response to those queries from the JLs so Mayer Brown set a deadline of 5.30 pm on 9 March for a response.

19. On 11 March 2020, Humphries Kerstetter on behalf the JLs said, amongst other things, that clauses 5 and 6 of the deed were "non-negotiable".

20. On 16 March, the application was therefore issued by the FAs along with the ninth witness statement of Mr Oulton. The application notice sought a payment into court of the sum of £850,000; alternatively, that the JLs provide an "unequivocal undertaking or guarantee in terms directed by the court".

21. On 23 March 2020, a redraft of the AmTrust deed was provided. The following day a witness statement of Mr Russell was served in response to the application.

22. On 27 March 2020, skeletons were exchanged. In their skeleton, the FAs explained why clause 6 was unsatisfactorily uncertain from their point of view. They also raised concerns about clause 7.3, clause 18 and the provision which required notice under the deed to be served by post.

23. On 30 March 2020, the FAs said that if their clause 6 queries could be resolved then they would not insist on any changes to clause 7.3 or clause 18.

24. On 31 March 2020, the day before the PTR, and therefore the day before the application for security for costs would have been heard, AmTrust agreed to amend the provision relating to notice by post, and late in the evening, at 20.38, the underlying ATE policies (which had been referred to by Mr Russell in his witness statement) were disclosed to the FAs.

25. On the morning of 1 April 2020, a compromise amended wording to clause 6 was agreed. That resolved the underlying dispute on security. Only the issue of costs of the application remained.

Submissions

26. Against that factual background, the JLs submitted, in summary, that they ought to be awarded the costs of the application for three reasons:

    (1) The FAs did not succeed in their application since it was not disposed of on terms that the applicants pay £850,000 into court or provide an unequivocal undertaking, or guarantee on terms directed by the court;

    (2) The terms of the deed ultimately accepted were almost identical to that provided on 12 February 2020, five days before the application was issued;

    (3) The FAs were unreasonable in failing to accept the offer to pay £10,000 in costs, or alternatively to agree to costs being in the case, which would have avoided the need to file written submissions.

27. The FAs submitted, in summary, that:

    (1) It was reasonable for them to issue a security application given the prior history of the JLs in respect of security for costs, the delay in the additional security being provided and the issues with the additional security, its terms and finally the imminent PTR;

    (2) That the issues raised in relation to clause 6 were not unreasonable, and needed to be resolved;

    (3) That the FAs consistently sought a consensual resolution of the security application and, when provided with the ATE policies the night before the hearing, they identified a compromise which was acceptable to both parties. It was not a climb down, but their concerns had been finally addressed as raised.

    (4) There should be no material reduction in costs because they were reasonable and proportionate.

Decision

28. I prefer the submissions of the FAs. In my judgment, it is wholly artificial to say that the FAs did not succeed in their application. The principle that security should be provided, and the sum to be

provided, had already been agreed in January 2020. The only issue that remained was the form in which the security was to be provided, and the only two practical options were either a cash payment into court or an unequivocal undertaking or guarantee.

29. The AmTrust deed offered by the JLs was, as I have outlined, on different terms to that previously offered by DAS for the previous tranches of security but the particular problem was with clause 6. It was unclear to the FAs on the new wording what the circumstances were in which AmTrust's maximum limit of liability might be reduced due to payment being received from other sources. It was, in my judgement, entirely legitimate for the FAs to be concerned about this and to seek clarification as to why clause 6 was worded as it was.

30. Given the message sent by Humphries Kerstetter on 11 March 2020 that clauses 5 and 6 were "non-negotiable", and with the PTR looming in a fortnight, it was, in my judgement, entirely reasonable for the FAs to issue an application, particularly in circumstances where the issue of security had been rumbling on since 31 October 2019.

31. Mr Oulton's witness statement fairly set out the background and the reasons for the FAs' concerns. The witness statement by Mr Russell was also helpful, in that it sought to respond to those concerns and explain why the deed was worded as it was. In doing so, he referred to the underlying ATE policies. Having done so, the FAs became entitled under CPR 31.14(1)(c) to inspect those documents. This they did on 31 March 2020. That, it seems, assisted in the ultimate resolution of the issue on clause 6. Thus, the issuing of the application by the FAs and exchange of evidence positively assisted in resolving the dispute.

32. It was the combination of the sight of the policies and the agreed amendments to the wording which led to production of an unequivocal undertaking or guarantee, which is what the FAs were seeking in their application (in alternative to a payment of cash into court). Having asked and been provided with a copy of a marked-up version of the agreed version of clause 6, it is clear to me that those

amendments cannot be dismissed as insignificant. The final wording was not identical or virtually identical to the draft provided before the application was issued. In my judgment, the amendments provided genuine clarification and comfort to the FAs as to the precise circumstances in which AmTrust's maximum liability might be reduced.

33. The FAs therefore, in my judgment, succeeded in their application and are entitled to their costs on a standard basis.

Summary assessment

34. It is appropriate that the costs should be assessed summarily.

35. As to the quantum of the costs sought, the sum of £43,700 does seem to me to be a very high figure, and it is of course much higher than the JLs' very modest costs, originally estimated by Mr Poole in his skeleton argument at £20,000, but then subsequently revised down to £8,847.

36. It is not sufficient to say, as Mr Fenwick does, that the costs sought are proportionate to the sum sought in security, that is £850,000. Whilst the sum sought is a factor, one should also consider reasonableness and proportionality by reference the substance of the dispute. The only thing that remained substantially in issue was the precise terms on which security was to be provided. In other words, the dispute was mainly about the wording of one clause and understanding how it worked.

37. I note that the FAs would have been prepared to accept £27,500 before the exchange of written submissions.

38. Looking at the matter in the round, as I have to, I consider that a reasonable sum to summarily assess for the costs of the security for costs application is £25,000.

39. That deals with issue number 1.

Issue number 2: The basis of assessment of the costs to be paid by the joint liquidators.

40. The FAs seek an order that the entirety of their costs be assessed on an indemnity basis. The JLs say that the FAs' costs should be assessed on the standard basis.

41. It is common ground that, in exercising my discretion, I must have regard to CPR 44.2(4) and (5). They provide as follows:

> "(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
>
> (5) The conduct of the parties includes –
>
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
>
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."

42. It is also common ground between the parties that the critical question is whether the conduct of the case or its circumstances takes it "out of the norm", that being the test laid down in Excelsior

Commercial & Industrial Holdings Limited v Salisbury Hamer Aspden & Johnson [2002] EWCA Civ 879, per Lord Woolf at [32] and per Lord Justice Waller at [39].

43. Beyond this common point of departure, the parties' submissions diverged. Each drew my attention to particular cases in which one or more particular considerations fed into the application of the critical test and received particular emphasis.

44. For the FAs, Mr Fenwick made six points:

(1) It is not necessary that the conduct or circumstances be exceptional or even rare; rather, the court should consider whether it is something outside the ordinary -- and with emphasis -- and reasonable conduct of proceedings, for which he cited Whaleys v Bennett and Cubitt [2016] Costs LR 1241 at [21] to [25] and [28].

(2) Neither lack of moral probity nor conduct deserving of moral condemnation needs to be established to justify indemnity costs. A claimant who continues to pursue a claim which she or he knows or ought to know is deemed to fail on the facts or on the law should be liable for indemnity costs, even if the claim is not pursued due to any ulterior motive.

(3) When a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails. Authority for that proposition comes from Tomlinson J, as he then was, in Three Rivers District Council v Bank of England [2006] 5 Costs LR 714 at 25(5).

(4) When a claimant has shown no interest in proportionality by casting its own claim disproportionately and requiring the defendant to meet such a claim, there is no injustice in denying the claimant the benefit of an assessment on the standard basis. Such a claimant forfeits its rights to the benefit of the doubt on reasonableness. Mr Fenwick cited Digicel (St Lucia) Limited v Cable & Wireless plc [2010] 5 Costs LR 709, per Morgan J at [68] to [69].

(5) Experts' conduct can justify an order for indemnity costs, see Balmoral v Borealis [2006] EWHC 2351 (Comm), Williams v Jervis [2009] EWHC 1837 (QB), Bank of Ireland v Watts [2017] 5 Costs LR 899, and Hosking v Apax Partners LLP [2019] WLR 3347.

(6) While a defendant who makes and beats a settlement offer is not automatically entitled to indemnity costs, such a costs order may nevertheless be made even if the claimant's conduct in refusing the offer was unreasonable such as to be out of the norm. If the refusal of the offer is in the context of a speculative, weak, opportunistic or thin claim, then an order for indemnity costs may well be made. Authority for that proposition is Burgess v Lejonvarn [2020] 4 WLR 43, per Lord Justice Coulson at paragraph 43.

45. Mr Davenport referred me to three cases

(1) Bank of Tokyo-Mitsubishi UFJ Ltd and Another v Baskn Gida Sanayi Ve Pazarlama AS [2010] 5 Costs LR 657. In that case, Briggs J, as he then was, provided a summary of the principles applicable to applications for indemnity costs. Mr Davenport relied in particular on the following passage:

> "... the primary considerations relevant to the order for indemnity costs are first, whether the conduct of the party against whom the order is sought is such as to take the case out of the norm, and secondly [and this is the point particularly emphasised by Mr Davenport], **whether that party's conduct can properly be categorised as either deliberate misconduct, or conduct which is unreasonable to a serious degree**."

(2) Mr Davenport also drew my attention to the decision of Coulson J, as he then was, in Elvanite Full Circle Limited v Amec Earth & Environmental (UK) Limited [2013] 4 Costs LR 612 at paragraph 16, in which three points were made by way of summary on which Mr Davenport relied.

a. First, indemnity costs are appropriate only when the conduct of a paying party is unreasonable to a high degree. Unreasonable in this context does not merely mean wrong or misguided in hindsight, see Simon Brown LJ, as he then was, in Kiam II v MGN [2002] 1 WLR 2810.

b. Secondly, the court must therefore decide whether there is something in the conduct of the action or the circumstances of the case in general which takes it out of the norm in a way which justifies an order for indemnity costs. That is the Excelsior principle.

c. Thirdly, Mr Davenport emphasises this point:

> "The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, provided that the claim was at least arguable. But the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) may well lead to such an order: see, for example, Wates Construction Limited v HGP Greentree Alchurch Evans Limited [2006] BLR 45"

(3) Finally, Mr Davenport relied on Bank of Ireland v Watts Group plc [2017] EWHC 2472. In that case Coulson J, as he then was, declined to make an order for costs on an indemnity basis where the claimant, Bank of Ireland, had lost the litigation "badly". The court also declined to make such a costs order despite the fact that the Bank of Ireland had failed to beat three valuable Part 36 offers which had been made during the course of the litigation.

46. Mr Davenport referred me in particular to paragraph 8 in Bank of Ireland v Watts Group plc [2017] EWHC 2472in which the following was said:

> "Furthermore, when considering the proper basis of the assessment of costs, the court must avoid the dangers of hindsight. It must be wary of the suggestion by the successful party, in this case Watts that, in truth, the result in the case was inevitable. Amongst other things, such an approach runs the risk of unfairly denigrating the presentation of the successful party's case

at trial. This case is a good example of that. In my judgment, one of the important reasons for Watts' success in these proceedings was the excellence of Ms Stephens' cross-examination of the Bank's factual witnesses. The answers she elicited in her careful and well-prepared exchanges with them were decisive of the issues on lending, and I am sure they came as a shock to the Bank's lawyers. This was a case won at trial; it was not a foregone conclusion."

47. Having set out the submissions on the law, I will turn now to Mr Fenwick's four factors in relation to the conduct and circumstances of the case justifying assessment on an indemnity basis. They are:

(a) The evidence of Mr Clarke, the JL's valuation expert.

(b) The claim advanced was speculative, weak, opportunistic and thin right from the outset.

(c) The claim involved wide-ranging changes and serious allegations.

(d) The JLs' failure to accept three without prejudice save as to costs offers.

48. These factors represent a repackaging and a re-ordering of the points made by Mr Oulton in his 12th witness statement dated 24 March 2021, which was responded to by Mr Starr in his fourth witness statement dated 31 March 2021. I have read both witness and taken them into account.

(a) Mr Clarke

49. Mr Fenwick relies on the comments I made about Mr Clarke's evidence in paragraphs 460 and 462 of my judgment, in which I said that I accepted the FAs' submission that the evidence as to how he carried out his pricing exercise was confused, contradictory and unreliable. In paragraph 462 of the judgment, I held that Mr Clarke was unable to give a satisfactory explanation for a whole series of major changes to the input values for his evaluation of the permitted scheme compared to his earlier

valuations, and the combined effect of these changes was to produce the same end result, i.e. a value of £120 million, which was simply not credible.

50. Mr Starr in his witness statement accepts that certain aspects of Mr Clarke's evidence were indeed, "extraordinary" and "certainly out of the norm". Mr Starr is right to make that concession. It is certainly not part of the normal run of litigation for an expert to have to be recalled on the last day of trial, represented by his own legal counsel, and for the party who called him to be forced into abandoning reliance on significant parts of his evidence. That is a very long way from one party's expert evidence being simply preferred to another.

51. The problem with Mr Clarke's evidence, which was exposed in cross-examination, was both serious and fundamental. He claimed to have based his opinions as to the value of the Site on various dates by reference to what he referred to as a "pricing exercise". This pricing exercise was referred to throughout his evidence, including: his first report dated 8 April 2021 (including in appendix 8), his second report at paragraph 4.2 as well as in answer to questions put by the FAs to him before the trial. There was no supporting documentary evidence for the pricing exercise itself, save the tables of figures that were provided which set out the results.

52. When it was pointed out to Mr Clarke in cross-examination that the values in the crucial column in his tables could be mathematically derived using a simple discounting formula from the actual sale prices of the flats as developed by St George, he initially claimed that this was merely a coincidence. When pressed, he said that this mathematical consistency showed how well he had carried out his pricing exercise. He also said in evidence that it would be "entirely wrong" and "completely inaccurate and completely irrelevant" to use the subsequent sale prices of the flats as developed by St George in order to calculate the value of the Site in 2011.

53. On the second day of his cross-examination, Mr Clarke's position changed radically. He accepted that he had indeed carried out a discounting exercise in which he had mathematically derived values

from the prices of the flats as developed, as set out in appendix 8 to his report. However, he claimed that the inclusion of these figures had been a mistake and that his secretary had hidden the original columns of a spreadsheet when producing appendix 8. This led the FAs to request further disclosure, which was provided. Mr Clarke was recalled to answer questions on the last day of the trial. Among the disclosure was an electronic document referred to as the "Workbook".

54. On examination, the Workbook appeared to show that the original pricing exercise column also contained a formula to produce a figure which was 92.5% of the actual sale prices of each flat (as developed). In other words, on its face, the Workbook appeared to show that a mathematical discounting formula, which Mr Clarke said in his evidence had been an entirely wrong and completely inaccurate and completely irrelevant exercise, was the exercise which he had in fact carried out from the outset.

55. However, Mr Clarke's provided a third explanation as to how his valuation figures were produced. This was as follows. He said that he had adjusted the individual apartment valuations produced in his pricing exercise: in other words, that he *had* performed the pricing exercise flat by flat, but had then adjusted the result to ensure that the apartment categories each totalled 92.5% of the sale prices for those categories. He claimed that this did not impact on the overall valuation and the exercise had been carried out because it was "neater".

56. In my judgement, that summary of how Mr Clarke's evidence developed is sufficient to demonstrate that it was unsatisfactory to a serious degree. It was quite extraordinary, given the length of his involvement in the case and the sums involved, that prior to giving evidence, Mr Clarke had not checked his valuation figures so that he was fully aware of the assumption he had made, the methodology he had employed and the source of the data for his opinions. In the end, he gave no less than three different accounts for how his figures were produced. The end result was so

unreliable that not only was the court unable to rely on it, but also the JLs felt unable to rely on a significant part of it.

57. I have no doubt that Mr Clarke's evidence and his conduct was so unreasonable to a sufficiently serious degree to justify an indemnity costs order. It caused extra costs to be incurred, not least the further cross-examination on the last day of trial. The FAs and their valuation expert thought they were meeting a case built upon a detailed price comparison exercise which had been carried out at some point, whereas in reality, at least on one version of Mr Clarke's evidence, what had happened was that he had performed a series of discounted calculations from later sale prices. On the latest version of his evidence, this was done as a cross-check and in order to make the result "neater". In neither case was this methodology revealed in Mr Clarke's reports. This meant that the court and the FAs' expert proceeded ignorance as to what Mr Clarke had done.

58. Nevertheless, it seems to me quite clear that the position in relation to Mr Clarke's evidence came as much of a shock to Mr Davenport and his team as it did to everyone else. No doubt with the benefit of hindsight the JLs' legal team wish that they had probed Mr Clarke more thoroughly about the basis of his evidence and his methodology and, in particular, what he had actually done as part of the "pricing exercise".

59. It is also fair to point out, as Mr Davenport emphasised, that the crucial line of cross-examination by Mr Fenwick which revealed the serious problems with Mr Clarke's evidence, as Mr Fenwick readily admitted, had come to him very late in the day during the trial itself.

60. While it is true that Mr Clarke's evidence underpinned many parts of the JL's case, I am not persuaded it is appropriate to order indemnity costs for the entirety of the action for the following reasons.

a. First, the reason why the claim failed was because the JLs failed to prove any breach of duty, and that turned principally on the factual evidence and the expert evidence of the insolvency practitioners and the sales and marketing experts, rather than the valuation evidence.

b. Secondly, Mr Clarke's evidence related predominantly, though not exclusively, to a head of loss, namely the loss of chance of a rescue of the company as a going concern.

c. Thirdly, to order indemnity costs for the entirety of the case because of the problems Mr Clarke's evidence would be excessive.

61. In my judgment, the appropriate and proportionate order to make in respect of Mr Clarke's evidence is that the FAs should have the costs of their own valuation evidence assessed on the indemnity basis, as well as the costs of and associated with dealing with Mr Clarke's evidence at trial, for essentially for the same reasons as given by Coulson J in Bank of Ireland v Watts at [10] and [11]. I note that this approach was approved recently by Pepperall J in Essex County Council v UBB Waste (Essex) Limited [2020] Costs LR 1259 at [76].

(b) Speculative, weak, opportunistic and thin

62. The second basis advanced by Mr Fenwick for a wider order for indemnity costs is that the claim advanced by the JLs was speculative, weak, opportunistic or thin.

63. Despite Mr Fenwick's efforts to persuade me that the JLs' claim was so speculative, weak, opportunistic and thin that it should never have been brought, I remained unpersuaded. In my judgement, this was a case somewhat like the Bank of Ireland v Watts case, which was lost very much at trial. The decisive witnesses were Mrs Rayment, Mr Laughton, Mr Sykes, Mr Sharman, Mr Clarke and Mr Gillington. The cross-examination of Mr Laughton (the JLs' IP expert) was decisive in many ways in proving that there had been no breach of duty as was the performance of Mrs Rayment and Mr Sykes, Mr Gillington and Mr Sharman.

64. To have lost resoundingly on all issues of breach of duty, as the JLs did, is not in my judgement sufficient to justify an indemnity costs order, as is clear from the authorities I have cited above, and indeed from the commentary in the White Book 2021 at page 1483.

65. I also accept Mr Davenport's two submissions, first, that his clients, as insolvency practitioners themselves, were entitled to form a view of whether the case was arguable or not, and they did so. Secondly, the court assessed the arguability of the claim when it gave permission for the claim to proceed.

66. It is not the sort of claim, it seems to me, which was commenced in the hope that something might turn up. The JLs' case was supported at the outset by their own assessment and independent expert evidence, albeit, as it turned out, expert evidence which at least in respect of valuation was unreliable.

67. Finally, I take account of the fact that when the JLs amended their claim to add the loss of chance case for which Mr Clarke's evidence was crucial, that amendment was resisted on a number of bases, but it was not resisted, as I noted in the judgment allowing the amendment, on the basis that it had no reasonable prospects of success.

68. Of course, Mr Fenwick is entitled to point to the letter of response to the JLs' letter of claim in support of a submission that the FA were vindicated in their view that there had been no breach of any of their duties. Indeed, as he points out, there were striking resemblances between the findings made in the judgment and the points made in that letter of response. But, in my judgement, that falls very far short of showing that the claim from the outset was speculative, weak, opportunistic or thin.

69. In summary, then, in relation to the second ground relied upon by Mr Fenwick, I do not find that it justifies a wider or further order for assessment on an indemnity basis.

(c) <u>Wide-ranging, changing and serious</u>

70. I turn then to the third allegation or factor relied upon by Mr Fenwick, namely that the claim involved allegations which were wide-ranging, constantly changing and serious. It is certainly true that the attack on the FAs' ' handling of the administration was wide-ranging and the allegations were indeed serious. It is noted in the judgment that, for parts of the case, there was an unhappy tendency for there to be a significant divergence between the JLs' pleaded case, on the one hand, and the submissions (both opening and closing), and some of the cross-examination, on the other.
71. Mr Fenwick points out in paragraph 28 of his skeleton argument that there were many changes between the draft particulars of claim approved by Mr Trower and the final version of the pleading. There were attempts made to clarify the case by means of requests for further information, many of which were resisted, and then not properly responded to.
72. There was also, it is said, a failure to engage properly in the revised list of issues which caused problems. Finally, Mr Fenwick submitted, the JLs sought to pursue several new and unpleaded points, including (a) failure to keep proper records, (b) CBRE's alleged conflicts as the Syndicate's strategic adviser (c) the conflict due to a relationship with Essential Land and he quotes from the judgment at paragraphs 255 and 256.
73. Although there was a degree of divergence between the pleaded case and the submissions made by the JLs, I am not ultimately persuaded that the way in which the case was generally run was so unreasonable to such a serious degree as to justify a wide order for indemnity costs. However, there was one exception to that, and that relates to the case that was advanced by the JLs in relation to sales and marketing.
74. For the reasons I set out in paragraphs 395 to 399 of my judgment, there were serious problems with the pleading on the sales and marketing aspect of the case from the outset. I am not going to summarise the points made in the judgment at paragraph 395, but the FAs were, in my judgement, justified in complaining that the JLs' case on this was "embarrassing for lack of particularity". An

attempt was made to pin the case down and to extract further particulars by way of a request for further information. This was met by the response, "This is a matter for expert evidence", and I have held in my judgment that that was not an appropriate answer. I found at paragraph 396:

> "The requested particulars ought to have been pleaded in the first place or at the very latest by way of voluntary further particulars when the relevant expert input had been obtained."

75. But matters did not improve, and by the time we reached trial the pleaded case was, to a very large extent, not even supported by the JLs' own sales and marketing expert, Mr Sharman. This in part led the JLs to advance a raft of new allegations, as described in paragraph 405 of my judgment, including that the FAs ought to have engaged in "roadshows" to improve the marketing of the site, which was not supported by expert evidence or put to anyone in cross-examination.

76. I accept that for the purposes of pleading the case at the outset, the JLs were entitled to rely on their own view of what appeared to have gone wrong in the marketing and sale of the Site. It also appears that Mr Clarke may have given some advice on marketing which is reflected in the pleading. So it is not a case that can be said to have been pleaded without any proper basis from the outset. However, following disclosure both of, first of all, the FAs' own documents, and then, as I am told, in April 2019, by the disclosure of CBRE's files, it should have been clear to the JLs what had actually been done in relation to the sale and marketing of the Site by CBRE. This included what advice had been given to the FAs about both marketing and the organisation, structure and implementation of the bidding process. At that stage, it ought to have been clear that re-appraisal of the pleaded case with the assistance of a specialist sales and marketing expert was necessary. The case should have been focused and re-pleaded but that did not occur. Instead, the originally pleaded case simply limped on and was either in part abandoned or replaced by entirely new unpleaded allegations.

77. In my judgement, from no later than three months from the disclosure of CBRE files in April 2019, the JLs had had sufficient time to analyse the information in that disclosure, take stock and replead

their case but they failed to do so. Instead, they pursed not only changing ever changing serious allegations about inadequate marketing, but the allegations themselves were also thin, weak or opportunistic. In particular, that applies to the unpleaded allegations that I described in paragraph 405 of my judgment.

78. In light of the foregoing, I consider that it is appropriate to order that the FAs' costs of their own sales and marketing evidence and the costs of dealing with the sales and marketing part of the case since 1 August 2019 should be assessed on the indemnity basis. That, in my judgment, is a proportionate response to the improper way in which the sales and marketing allegations were advanced since that date.

(d) Admissible offers

79. There were three admissible offers which the FAs rely on. The first was an offer to accept £330,000 towards their costs. That was made on 11 July 2018. The second was to accept payment of 80% of their costs assessed or agreed. That was an offer made on 1 October 2019. The third was to pay costs limited to £5 million, and that offer was made on 29 May 2020.

80. The legal principles in relation to the unreasonable refusal of offers is set out on page 1487 of the White Book 2021, and it has been said that:

> "It would be a rare case indeed where a refusal of a settlement offer will attract under Rule 44.2 not merely an adverse order for costs, but an order for assessment on indemnity rather than a standard basis."

81. The White Book goes on to say that although conduct in the form of a claimant's refusal of a defendant's Part 36 offer being an offer which the claimant subsequently fails to better may, subject to the court's discretion, be determinative of his liability to pay indemnity costs, it should not be thought it is genuinely appropriate to condemn in indemnity costs those who decline reasonable

settlement offers. See Coulson J in Barr v Biffa Waste Services Limited (No 4) [2011] EWHC 1107 (TCC).

82. Mr Davenport referred me in that context to the case of Epsom College v Pierse Contracting Southern Limited [2012] 3 Costs LR 451. In that case Rix LJ noted that the general requirements for indemnity costs to be imposed, namely that the case in question falls outside the norm, and that relevant conduct must be unreasonable to a high degree, might be met where there has been an unreasonable failure to accept settlement offers and/or a party had unreasonably resisted a sensible solution to proceedings. Mr Davenport submitted that neither applied in this case.

83. So, the starting point is that, ordinarily, any unreasonable refusal to accept an offer does not usually attract indemnity costs but a failure to accept an offer may in some circumstances be so unreasonable as to warrant an indemnity costs order.

84. I am not persuaded that the failure to accept these three particular offers was unreasonable or unreasonable to a sufficiently high degree to justify indemnity costs. As Mr Davenport points out, it would only be if the JLs at the time the offers were made should have been virtually certain that their claim would fail, that it would have been reasonable to abandon the claim and accept nothing more than a discount on costs. As he put it in the submissions, the premise on which the offers were made was that all that was reasonably open to the JLs was to raise the white flag. I do not accept that was the position at the time the offers were made.

Overall conclusion on basis of assessment

85. Standing back and looking at the various factors together that have been relied upon in light of the legal principles set out above, I consider it is appropriate to order indemnity costs on the two limited bases that I have set out but not more generally.

Issue 3: the quantum of the interim payment on costs.

86. There is no dispute as to the applicable principles for the exercise of the power under CPR 44.2(8) to order a "reasonable sum" to be paid on account. The JLs accept that the sum ought to be more than "the irreducible minimum" of what may be ordered to be paid on assessment. That was held to be so in United Airlines Inc v United Airways Limited [2011] EWHC 2411 (Ch) by Vos J, as he then was, although the White Book 2021 cites a later decision by Warren J in Gollop v Pryke, Chancery Division, unreported 29 November 2011, in which Vos J's decision was followed.

87. The relevant authorities were reviewed by Christopher Clarke LJ sitting as a High Court judge in Excalibur Ventures LLC v Texas Keystone Inc & Ors [2015] EWHC 566. It is common ground between the parties that this was the most relevant authority and that four propositions can be derived from that case, in particular from paragraphs 22 to 24 thereof:

    a. First, as I have already mentioned, the irreducible minimum of the amount that would be awarded, a detailed assessment is not the test.
    b. Secondly, reasonable amount will depend on the circumstances, chief of which is that there will have been no detailed assessment. So, there is an element of uncertainty and any sum is necessarily an estimate.
    c. Thirdly, the reasonable sum will often be an estimate of the likely costs subject to an appropriate margin of error. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.
    d. Fourthly, the relevant factors include the likelihood, if it can be assessed, of the claimants being awarded the costs they seek, or a lesser and, if so, what proportion of them; the

difficulty, if any, that may be faced when recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay; and whether the paying party will have any difficulty in recovering the costs of an overpayment.

88. On the facts of that case, Christopher Clarke LJ, sitting as a High Court judge, ordered that 80% of the costs claimed be paid by way of an interim payment. He remarked that the litigation had been conducted on a gargantuan scale and which had justifiably required a lot of work. He also ordered that the costs of the successful party be assessed on the indemnity basis.

89. In this case, the FAs have put before me a schedule of costs, which describes the constituent elements of a claim for costs in the total sum of £9,008,612. The schedule was exhibited by Mr Oulton to his 12th witness statement.

90. The sum sought by the FAs, by way of an interim payment assuming costs are awarded on the standard basis, was £6.3 million, and £7.2 million assuming costs, as they had submitted, ought to be awarded on an indemnity basis. Those figures are based on taking 70% and 80% respectively of the costs to which the application relates.

91. The JLs say that the appropriate figure to order is £3.15 million, which happens to be 50% of their own equivalent costs figure of £6.3 million, adjusted in a number of different ways so that it is comparable to the same basis on which the FAs advance their costs claim.

92. Mr Starr in his fourth witness statement made a number of criticisms of the FAs' costs:

    a. First, he says that the figure of £9 million was first intimated only on 29 May 2020. It came he says at that time as something of a surprise because, until that point, the FAs' estimate of their likely costs of the proceedings had been in the range of £6 million to £7 million.

    b. Secondly, the parties' costs had followed until he says around March 2020 a similar trajectory, and it was only thereafter that there was a wide divergence in terms of spending.

c. Thirdly, that the FAs comprehensively outspent the JLs in relation to experts in particular. To illustrate this, Mr Starr produced a very helpful table in paragraph 20 of his witness statement.

d. Fourthly, the document hosting costs incurred by the FAs were five times higher than those of the JLs: £273,000 compared with £45,000.

e. Fifthly, that he complained that Mayer Brown had sent an unusually large number of long letters and aggressively set short deadlines for responding to correspondence.

f. Finally, and in summary, he accused the FAs of following a general pattern of "unrestrained win-at-all-costs spending".

93. In response, Mr Fenwick made five points:

a. He submitted that the JLs rates at a notional 100% are only marginally lower than those of Mayer Brown's rates and there is no evidence to suggest that those solicitor hourly rates are excessive. Indeed, he points out that Mayer Brown's rates are comparable to the 2010 guideline hourly rates and lower than those proposed by the working group, as exhibited to Mr Oulton's 12th witness statement.

b. Secondly, in respect of all the expert fields, the scope of the case that the FAs were required to meet and adduce expert evidence in respect of was often unfocussed or unclear. That necessitated the FAs addressing all possible allegations made by the JLs. Had the case been more clearly defined and more narrowly confined, the FAs' expert evidence could have been tailored accordingly.

c. Thirdly, the largest discrepancy by far related to the cost of expert evidence and, in particular, the valuation and development feasibility costs. Mr Fenwick noted that Mr Clarke was originally put forward by the JLs as an expert for both of these areas, and he is not a

model or a guide for the appropriate figure given the findings in the judgment about his evidence.

d. Fourthly, that Mr Fourt's evidence, by contrast with Mr Clarke's, was described in the judgment as measured, detailed, precise and transparent - see judgment paragraph 463. Mr Fenwick makes the point that producing evidence of that quality in respect of a claim involving numerous inputs and date ranges is time-consuming and necessarily reasonably costly. To make that point more concrete, Mr Fenwick points out correctly that Mr Fourt was required to address valuations for no less than seven different dates, those being November 2010, January 2011, May 2011, October 2011, March 2013, July 2013 and mid-2017.

e. Fifthly, Mr Fenwick submits that in respect of a claim valued at £250 million, the FAs' costs are plainly proportionate.

94. Having case managed this case since November 2018 and having dealt with a number of interlocutory applications, including an application to amend, I have seen a reasonable proportion of the correspondence passing between the parties and observed the steps taken by them in response to case management orders.

95. Whilst the litigation has been hard fought at all times and the parties have from time to time engaged in what might be described as prolonged spats via correspondence, I do not accept the submission that Mayer Brown have sent an unusually high number of letters or otherwise acted oppressively in setting short deadlines for responses or threatening applications. Nor, and more importantly, do I accept that there has been any pattern of an approach by the FAs, as Mr Starr alleged, of "unrestrained win-at-all-costs spending".

96. As to the significant difference in document handling costs, that is a bad point. It self-evidently arises from the fact that the FAs had many, many more documents to deal with than the JLs.

97. It follows that I would not apply any discount to the sum claimed in costs on the basis of any of those three points made by Mr Starr.

98. What is in my judgement of more significance is Mr Starr's own evidence that the parties' cost trajectories followed a similar path until some time in early 2020, possibly March 2020. What seems to have caused the main divergence, in the final cost figures was the spending in relation to experts in the immediate run-up to trial.

99. In my judgement, while there may be some room for debate in the process of detailed assessment about whether particular steps taken by the experts instructed by the FAs were reasonable, broadly speaking, I am not surprised that the FAs outspent the JLs. The FAs had to deal quickly with a new and much expanded case based on loss of chance following the amendment to the JLs' case permitted in 2019. This was, by its nature, based on multiple alternative valuation and financing scenarios each of which rested on contested valuations of a complex and large scheme on, as I pointed out, seven different dates. The FAs, not unreasonably, in my judgment, wanted to respond to each scenario fully. Their aim through their expert evidence was to show that the claim advanced under each scenario was unsustainable. That was always going to be an expensive exercise. To have the claim dismissed, the FAs had to win on each scenario whereas the JLs had to win on only one to make a substantial recovery.

100. Both parties were engaged in arguing a complex counterfactual case in relation to the loss of a chance. The FAs were in a position of needing to prove a negative, i.e. the development being alleged was implausible given the various valuation inputs. It seems to me that this was inevitably an extremely expensive exercise for the FAs. I well recall Mr Fenwick's warnings to that effect at the case management conference when the application for amendment to add the loss of chance case was first floated.

101. I therefore accept the broad thrust of, in particular, Mr Fenwick's second and fourth point, namely the FAs were required to meet and adduce expert evidence on a broad, complex case which was not always very precisely focussed, and secondly that producing evidence to cover all of the different scenarios was inevitably a time-consuming and costly endeavour.

102. I also accept Mr Fenwick's first submission in relation to the hourly rates of Mayer Brown.

103. I accept that, given the sums involved, there is no basis on which I could apply a significant provisional discount based on the chance that, on a detailed assessment, the sum claimed would be held to be disproportionate overall.

Conclusion on quantum of interim payment

104. Taking into account the two areas of the case which I have held should be assessed on an indemnity basis, and taking account of all the matters set out above, including the lower comparable costs of the JLs in the sum of £6.3 million, I consider that the correct approach to take in this case is to apply a discount from the claimed total. I order that £6.5 million of the £9 million be paid by way of an interim payment. That equates to 72% of the total sum, and I order that that sum be paid within 28 days. That falls between the sums that were sought by the FAs but closer to the lower of the two figures.

Direction on source of payment

105. As to the source of the payment, in the draft order that was originally produced by the FAs, Mr Davenport and Mr Poole suggested that there be added to paragraph 2 of the draft order the following words, namely, "such sum to be drawn from the security provided by the applicants". Mr Fenwick submitted that he had never seen such a direction before and submitted it was not necessary. I confess that I have not seen such a provision either.

106. Mr Davenport was not able to explain satisfactorily why any such provision should be inserted. It seemed to me the onus was on him to explain why it was necessary to do so. I was not referred to

any authorities on the point or any guidance from the White Book or any other source. As a matter of principle, it seems to me that the role of the court is limited to deciding the sum to be paid and the day of payment. How the paying party discharges the debt is a matter for it, and what enforcement steps may be taken by the receiving party if the debt is not paid on the date set for payment seems to me to be a matter for it. I therefore decline to add any such words as suggested by the JLs.

Issue 4: Liberty to apply under s. 51 of the SCA 1981

107. In paragraph 5 of their draft order, the FAs sought a provision in the following terms:

> "The respondent shall have liberty to apply for an order that non-parties be joined to these proceedings for the purposes of enforcing a costs award pursuant to section 51 of the Senior Courts Act 1981."

108. That was opposed by Mr Davenport.

109. I am not persuaded that it is appropriate to include such a liberty to apply provision in respect of section 51 for two reasons:

a. I have no evidence and no reason to believe that the JLs will not satisfy the costs order that I have made in relation to the interim payment.

b. The proposed words add nothing in any event. It is open to the FAs at any stage, it seems to me -- they did not take me to any authority to suggest otherwise -- to make the necessary application should the need arise without the words "liberty to apply" being included in this order.

110. In the event that the JLs do not pay the costs that have been ordered to be paid and it is thought that there may be third parties who are liable for maintaining the action, then at that stage an application can be made, and it cannot be said in any way that it would be out of time.

111. So, I do not propose to make any provision for liberty to apply in this order.

Issue 5 is the appropriate rate for interest on costs.

112. The JLs submitted that the appropriate rate was Bank of England base rate plus 1%. They referred me to two cases: ABCI v Banque Franco-Tunisienne [2003] EWCA Civ 205, per Mance LJ, as he then was, at 88 to 91, and J Murphy & Sons Limited v Johnston Precast Limited [2009] 5 Costs LR 745, per Coulson J, as he then was, at paragraphs 35 to 36.

113. The FAs sought interest on costs at the rate of 2% above base, as they submitted was an appropriate measure as a commercial rate of interest in current conditions where the base rate is at an historic low. It is not in dispute that the base rate has been 0.1% since March 2020, which is a reduction from the 0.25% rate in place at the time of the authorities that they rely on. The JLs rely on two authorities in particular: Marathon Asset v Seddon [2017] 2 Costs LR 255, and Hosking v Apax Partners LLP [2019] 1 WLR 3347 [120].

114. In Hosking v Apax Partners LLP Hildyard J dealt with the question of interest on costs at paragraphs 120 to 123 of the judgment. In that case the receiving party was seeking a rate of 2% above base rate, which is what the FAs here are seeking in this case, and the liquidators in that case were also arguing that it was too high; they were arguing for 1.5%. Hildyard J considered that the rate sought, 2%, was appropriate and reflected the rate that had been awarded in Marathon Asset Management LLP v Seddon. I consider it is appropriate to follow Marathon Asset Management Limited v Seddon and Hosking v Apax Partners LLP by awarding interest on costs at 2% above base.

115. I note in the recent decision by Pepperall J in Essex County Council v UBB Waste (Essex) [2020] Cost LR 1259, at paragraphs 5 and 6, the paying party in that case was arguing for precisely the 1% over Bank of England base rate as the joint liquidators in this case argue for, and referred back to the older authorities relied upon by Mr Davenport. In that case, Pepperall J noted the original wording of the Commercial Court Guide in J14.1 which said that:

> "Historically the Commercial Court generally awarded interest at base rate plus one percent unless that was shown to be unfair to one party or the other or to be otherwise inappropriate. In the light of recent interest rate developments there is no presumption that base rate plus one percent is the appropriate measure of a commercial rate of interest."

116. In that case, Pepperall J in fact ordered interest to be paid at 2.4% because he had received evidence as to the approximate cost of borrowing for a local authority such as Essex during the relevant period.

117. In this case I have not received any specific evidence as to the cost of borrowing which is applicable to firms such as BDO, but I am more than satisfied, in the absence of such evidence, that I should follow the Marathon Assets and Hosking decisions and award interest on costs at the rate of 2%, given the historically low base rates that we currently have.

Issue 6: date on which Judgment Act interest should start to run

118. The relevant provision is CPR 40.8(1). This provides:

> "(1) Where interest is payable on a judgment pursuant to section 17 of the Judgments Act 1838 ... interest shall begin to run from the date that judgment is given unless ...
>
> "(b) the court orders otherwise."

119. So, in the absence of any order from me, the position is that the judgment rate would apply from the date of this judgment. But the JLs submit that I should follow and apply the decision of Leggatt

J as he then was in Involnert Management Inc [2015] EWHC 2834 (Comm). In that case it was held that it was not reasonable to expect the party liable for costs to pay the balance of the debt until it knows exactly what sums are being claimed by the party awarded its costs and has had a fair opportunity to decide whether he accepts that they are properly payable.

120. At paragraph 23, Leggatt J, as then was, said this:

> "It is this principle which seems to me to have informed the approach of Roth J in the London Tara Hotel case, when he could see no reason why the judgment rate should apply 'before the amount which has to be paid is known'. It also reflects the unfairness which Andrew Smith J in the Fiona Trust case recognised as potentially arising where it is predictable that there will be an amount of costs outstanding for a period after the costs order has been made which the party liable for costs cannot reasonably be expected to avoid. I do not, however, see this unfairness as confined to cases where a particularly large amount of costs is likely to be outstanding for a particularly long period, albeit that it is clearly more acute in such cases."

121. Mr Davenport submitted that in translating the above principle into practice, it was desirable to set a date from which the Judgment Act interest will run. Generally speaking, this should be three months after the date of the costs order, which is the period prescribed under CPR 47.7 for commencing detailed assessment proceedings. He submitted that justice requires the Judgments Act interest not to start running until three months after the order for costs.

122. In response, Mr Fenwick submitted simply that the approach taken by Leggatt J is not justified here because the JLs have had ample time to consider costs.

123. I am satisfied that it is appropriate to follow the Involnert Management Inc case and to order that the judgment rate interest should only start running from three months from the date of this judgment, that is to say 1 August 2021. Until that point, the FAs are protected and compensated, it

seems to me, adequately by the order that I have made that interest on costs accrues at base rate plus 2%. That has the benefit in this case of giving the FAs an opportunity to put together their full schedule on costs and to present it to the JLs , and for the JLs to take a view as to whether they are going to take cost all the way to an assessment and, if they do, to make an informed offer in the assessment proceedings which is without prejudice save as to costs in those proceedings.

124. That concludes my judgment on the six costs and interest issues.