



Neutral Citation Number: [2022] EWHC 3055 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION

No. BL-2019-001698

Rolls Building
Fetter Lane
London, EC4A 1NL

2 December 2022

Before:

MR IAN KARET

(Sitting as a Deputy High Court Judge)

B E T W E E N :

(1) BOSTON TRUST COMPANY LIMITED
(2) BOSTON FIDUCIARY MANAGEMENT LTD

Claimants

- and -

(1) SZERELMEY LIMITED
(2) SZERELMEY (GB) LIMITED
(3) SZERELMEY RESTORATION LIMITED
(4) TELLISFORD LIMITED
(5) GORDON VERHOEF
(6) SZERELMEY (UK) LIMITED
(7) LONDON STONE LIMITED
(8) HERITAGE HOUSE (YORK) LIMITED
(9) TUSK HOLDINGS LIMITED
(10) HARE AND RANSOME JOINERY LTD

Defendants

J U D G M E N T

Introduction

- 1 On 14 October 2022 I delivered a judgment (i) dismissing the Application Defendants' application to reconstitute the claim and (ii) continuing until trial the costs indemnity in this action. The parties have been unable to agree the form of order following the judgment. I have written submissions from Mr Matthew Parfitt for the Claimants, Mr Daniel Lightman KC for the Operating Companies and Mr Adrian Pay for the Application Defendants. I will use the same defined terms as before.
- 2 There are three issues for decision. The first is the length of the extension of the costs indemnity. The second is the effect on the costs indemnity of work done on the Partnership Claim. The third is whether there should be liberty to apply.

Extension of the costs indemnity

- 3 The first issue is whether the costs indemnity should be extended so as to include consequential matters arising from the judgment or should be for a shorter period ending with the judgment. The draft order forming part of the Claimants' application sought the longer period for which they now contend. There was no argument before me on this point on 14 October 2022. The issue is addressed in the submissions.
- 4 The Claimants say that it is now common practice for judgments to be handed down without attendance by the parties by release to the National Archives. Unless an order is agreed, there may be a hearing to deal with consequential matters including the form of relief, costs and permission to appeal. Those matters are a natural part of the litigation and it is thus appropriate for the indemnity to run until the order is made.
- 5 The Application Defendants object to this. They submit that following judgment the outcome of the case will be clear. If the Application Defendants have been successful then the claim will, at best, have been ill-founded and no further indemnity should be granted. If the Claimants succeed then they will be able to ask for a continuation of the indemnity to cover any form of order hearing.
- 6 The Application Defendants further object to the Claimants' proposed form of wording "consequential matters arising from the judgment" as too broad and capable of covering further hearings such as the quantification of damages and enforcement of the order.
- 7 Mr Pay also submits that the argument before me was about the costs of the trial and not about consequential matters.
- 8 The Operating Companies object for the following reasons. The discussion at the hearing was about extending the indemnity to the trial and not beyond. In *Bhullar v Bhullar* [2015] EWHC 1943 (Ch) Morgan J held that the court should take considerable care in deciding whether to order a pre-emptive indemnity. The Operating Companies say that care should extend to the scope of the indemnity as well as to whether an indemnity should be ordered at all, and consequential matters should not be within its scope.

- 9 In my view the indemnity should extend to cover any consequential matters that remain to be determined directly following the handing down of the judgment. In *Wallersteiner v Moir (No.2)* [1975] QB 373, at 403-404 Buckley LJ explained the basis on which the court might order an indemnity. He held that it would be “a proper exercise of judicial discretion to order the company to pay the plaintiff’s costs. This would extend to the plaintiff’s costs down to judgment...”. I understand him to mean in this context that the indemnity covers the entire claim rather than only some part of it.
- 10 It is the order following the judgment determines the outcome of the case and against which any appeal would be made. The form of a judgment to be handed down may be affected by submissions made by the parties following a trial or on receipt of a draft of the judgment. Recent decisions have confirmed that consequential matters should usually be dealt with at a short oral hearing following shortly after the handing down of judgment and the submissions for them should be proportionate to the submissions for the trial. Matters raised before or after hand down, including a proportionate application for leave to appeal should, in my view, fall within the scope of the indemnity.
- 11 The Operating Companies did not rely on any authority that suggested there should be some re-assessment of the costs indemnity at the conclusion of the trial. Given the time the indemnity has been in place in this case, it should continue up to the making of the order on judgment.
- 12 The indemnity is not a free pass for Claimants to engage in unnecessary or speculative work following receipt of the draft judgment, and the defendants will be able to challenge a claim for costs which they do not agree. The indemnity would not, for example, automatically cover an inquiry into damages.

Work done on the Partnership Claim

- 13 The second issue is whether the costs indemnity should apply to work carried out by the Claimants for the “primary” or “sole” purpose of these proceedings. It has arisen now as a result of the recent filing of the Partnership Claim by Mr Krause. The Operating Companies suggested that the preparation of the Partnership Claim may have taken benefit from the disclosure carried out by the Claimants for this claim so giving Mr Krause a free ride in the Partnership Claim.
- 14 At the hearing on 14 October I said that the order should address the correct use of costs and that the indemnity should not fund the Partnership Claim. The parties have not been able to agree what that entails.
- 15 The Operating Companies say that Mr Krause should not be permitted to save costs in the Partnership Claim by reason of the indemnity. The order should thus provide that the indemnity applies only to work done for the “sole” purpose of these proceedings and this should apply to both past and future costs. The order should thus provide for repayment of costs that have been paid under any other basis. This, Mr Lightman submits, would ensure that the indemnity does not breach the “general principle of company law that the company’s money should not be expended on disputes between shareholders” (*Re Crossmore Electrical and Civil Engineering Ltd* [1989] BCLC, 137, 138 per Hoffmann J (as he then was)).

- 16 The Operating Companies say that the disclosure exercise involved review of a substantial number of documents and that there is likely overlap between this claim and the Partnership Claim, as the pleadings in the latter suggest.
- 17 The Claimants say that this argument was first made on the morning of the hearing before me and that it would represent a dramatic change to the position that has held for the last two years. The Operating Companies have not challenged the amounts claimed so far under the indemnity but now seek to re-open that.
- 18 The Claimants also say that the approach would be impractical as it is not clear what costs might be saved in due course as the Partnership Claim is at an early stage. If there is to be an element of “cab sharing” in which Mr Krause obtains a benefit then that should be allowed. The logic of the costs indemnity is that the Claimants should not have to pay for the for work done for the benefit of the Operating Companies. There has been no suggestion so far that anything has been claimed that should not have been. Further, any benefits for Mr Krause are theoretical and likely to be minimal. They say that “primary” would protect the Operating Companies against any abuse.
- 19 The Application Defendants are neutral on this; if pressed they would side with the Operating Companies.
- 20 I prefer the Claimants’ view. The correct test for whether costs should be covered by the indemnity is whether they have been properly incurred in this action. It is not a negative test that the work should not have any application in any other case. Work done for the “primary” purpose of these proceedings should thus be covered. The use of “primary” satisfies Hoffmann J’s principle, as set out above. In contrast, applying a test of “sole” purpose to costs may significantly reduce the protection that the indemnity is intended to provide. The order will provide that the costs indemnity shall only apply to work which has been or will be carried out for the primary purpose of pursuing, or seeking to resolve, these proceedings in this claim.
- 21 It follows that I decline the Operating Companies’ invitation to order a review of the operation of the indemnity to date and repayments under it on their proposed “sole” basis.
- 22 The Operating Companies also seek an order confirming that for the avoidance of doubt the costs indemnity should not cover any costs which the Claimants have incurred in relation to the ambit or operation of the costs indemnity. This includes communications with the Operating Companies about the indemnity. I decline to make this order because it is not needed in the light of the test that the costs be primarily incurred in the action. The Operating Companies are able to challenge any costs which they think should not be covered on that basis.

Liberty to apply

- 23 The Claimants seek liberty to apply for such further extensions of the Costs Indemnity as may be appropriate, for example in relation to the costs of enforcement if the Claimants are successful at trial.

24 The Operating Companies are neutral on this. The Application Defendants object on the basis that the order was not sought. While it was not raised before me, it did form part of the draft order in the Claimants application and I will make an order in those terms.