IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
[2020] EWHC 3041 (Comm)

No. CL-2018-000824

Rolls Building
Fetter Lane
London EC4A 1NL

Tuesday, 27 October 2020

Before:

MRS JUSTICE COCKERILL

B E T W E E N :

(1) MAROIL TRADING INC
(2) SEA PIONEER SHIPPING CORPORATION — Claimants

- and -

(1) CALLY SHIPHOLDINGS INC
(2) VITAL SHIPPING CORPORATION
(3) DAINFORD NAVIGATION INC
(4) TAMARA SHIPHOLDINGS S.A.
(5) TUSCANY MARITIME S.A.
(6) NOVOSHIP (UK) LIMITED

Defendants

- and -

(1) BURFORD CAPITAL (UK) LIMITED
(2) DANIEL JAMES HALL

First and Second Named Third Parties

J U D G M E N T

A P P E A R A N C E S

MR T. GRANT QC and MR T. FLETCHER (instructed by Grosvenor Law) appeared on behalf of the Claimants.

MR D. ALLEN QC and MR K. HOWIE (instructed by Reed Smith LLP) appeared on behalf of the Defendants.

MS S. TOLANEY QC and MR J. RUDDELL (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Third Parties.

_____

(Transcript prepared from Skype conference recording)

MRS JUSTICE COCKERILL:

1 The issues arising for decision in this fairly lengthy hearing today are, firstly, how much security should the claimants provide in respect of the Part 7 proceedings; secondly, the question in relation to the security in relation to the third party costs, and then, moving on from that, the amount of third party costs.

2 I will deal first with the question that was dealt with first, which is how much security the claimant should provide in respect of the Part 7 proceedings. In relation to that, the parties have respectively contended for seventy per cent and sixty per cent, being the percentage range usually awarded on assessment, though the claimants then go on to say that because of the high starting point a considerable discount from sixty per cent ought to be effectively applied one way or the other. My own understanding is that the way that this would proceed on taxation is what is recovered is a factor of exactly how reasonable individual costs are and so individual line items in the documents before me can give a flavour of the appropriate percentage, whether it should be seventy per cent, sixty per cent or other.

3 So far as the approach which was urged on me by Mr Grant for the claimants, which has been slightly unfairly or cruelly called the "double discounting" approach, in my view, that is not a particularly helpful way to proceed because, in general, an assessment would not proceed on that basis.

4 I note, of course, that some categories would be assessed more harshly than the overall figure that we have been talking about and some would be assessed less harshly. So, for example, here, as with the third party costs, there is no challenge at all in relation to a number of the categories. I would also note that what I am trying to do here is arrive at an overall figure.

5 Mr Grant directed my attention to the *Tugushev* case as indicating that this double layered approach is appropriate. It seems to me that that was a particular approach taken in a particular case, where there was a very large estimate based on some very inadequate materials and there, looking at particular line items and the inadequacy of the material which the Deputy Judge had, he decided to follow that approach. There is no other authority for that approach. I prefer, in this case, to pursue something which is rather more like looking at the likely outcome on a detailed assessment as a single percentage and applying that.

6 So in looking at where we get in relation to that, I have been taken to a number of different categories of areas within the schedules where issue was taken, and I bear well in mind that there were some areas where issue was not taken. So there was "preparing documents for counsel". It seemed to me that the discount which was proposed by the claimants was plainly too low, though there remains a serious point as to what discount would be applied on a detailed assessment for a change of counsel involving a need for new counsel to read into a case. So it seems to me that that was an area where one would probably expect to find a discount perhaps somewhat above thirty per cent but not a huge amount above thirty per cent.

7 In relation to pre-CMC disclosure costs, I was struck, as I noted to Mr Allen in submissions, with 120 either partner or very senior assistant level hours for this initial exercise, which equates to three weeks of senior fee earner time. While the point he makes about the significant partner or senior fee earner involvement in setting up disclosure is a good one, it

seems to me that there are limits and three weeks is a very significant figure which is indicative that a discount above seventy per cent may well be appropriate.

8 In relation to the amended reply, again, while it is obviously reasonable to have fees of leading counsel looking at a substantial amendment in a significant document and to allow time for leading counsel and junior counsel to do that, the figure claimed is high. This is where we get to what one might term the "Rolls-Royce submission", which is made equally in relation to Mr Gaisman, Mr Allen and the hourly rates for the third parties' solicitors. That is an area where the authorities, in particular the *Dana Gas PJSC v. Dana Gas Sukuk Ltd [2018]* EWHC 332 (Comm), per Leggatt LJ , indicates that what will be recoverable on assessment is not necessarily the full Rolls-Royce but more the reasonable amount somewhere considerably below the Rolls-Royce level. So, again, I would expect to see on an assessment a discount which is probably going to take it below the seventy per cent.

9 Similarly, in relation to the rejoinder, which is a short document and you have got two counsel charging a fairly significant amount of money, I would expect that to indicate a reduction somewhat below seventy per cent.

10 The CMC, although there was a full day hearing and there were a large number of points in issue, there are two stand-out points. The first is Mr Allen's brief fee. Yes, there is reading in but, again, the extent to which one can expect that to be recoverable on taxation. And in any event, it is a very, very significant brief fee and, even in the absence of evidence about the claimants' fees, one can see it is a very significant brief fee which one would expect to see scythed to some extent on taxation. Similarly, 200 hours of solicitors' time. Yes, CMCs take a long time to prepare for; but that is effectively one month's solid work by somebody or two weeks' solid work for two people. That is, again, the level one expects a cut – I am not saying a scythe – but a significant cut to be made on assessment.

11 Disclosure; in relation to that, I entirely take on board the points which Mr Allen has made in detail and which Mr Kirkpatrick has made in his witness statement in relation to the archives which have turned out to contain rather more documents than was anticipated, in fact, 63,000 rather than 10,000, and where it has proved impossible to do automatic or electronic de-duplication so that manual de-duplication is going to have to be done. These are not completely speculative costs. They are slightly uncertain at the moment and it may be possible for the parties to liaise as to some other search which can be done which could cut it down further. But, on the basis of what there is at the moment, the actual review process seems reasonable. Thirty to forty documents an hour is not at all unreasonable. So there is it seems to me, on the basis of the evidence which there is, a need to do this but it is a major amount which is likely inevitably to be the target of a costs judge at some point. There are significant counsel fees. There is a considerable amount of counsel time, both leading and junior, an area which is likely to be heavily trimmed on taxation. Again, what I am seeing is something which suggests probably above the thirty per cent reduction which one would normally see but not massively above.

12 Witness statements is an area where I would expect a significant reduction on a detailed assessment. We have got what appears to be about 7.5 days per witness statement, excluding the significant amounts of counsel time, and eight and a half days, I think it is roughly, of Mr Kirkpatrick's time. There are £150,000 of counsel fees for witness statements. That accounts for, I think, nearly half of the amount which is sought and that is against a background where there are issues as to just how substantial the witness statements will have to be, given the nature of the litigation, and the fact that a considerable amount of the factual issue is at one end or the other of the chain. So this is an area where I would expect a discount to take the amount down well below sixty per cent.

13 At the end of the day, I then look at what we take out of those indications. I bear in mind that the exercise which I am doing is a very different exercise to doing a summary assessment or a costs budget, where one is effectively looking to err on the side of caution. Similarly, when one is looking at payment on account. Here I am looking effectively to have a sense of what will be ordered on a detailed assessment but to err, where there is doubt, on the side of the recipient. Bearing that point in mind, the place to which I come is that the hourly rates are entirely sensible and reasonable. In fact, they are positively moderate. There are some areas where I would expect it to come down below seventy per cent but, bearing in mind the requirement to err slightly on the side of the recipient, I am going to order sixty-five per cent of the Part 7 costs.

14 That then takes me to the main point in relation to security in respect of costs of the Part 20 proceedings. The issue here is about whether this is a case where security should be given. It is not in dispute that in certain cases it is appropriate for a claimant to provide security for the costs of a Part 20 claim brought by a defendant against a third party, including the defendant's potential cost exposure to the third party. This acknowledges that at the end of the trial if a defendant succeeds in defending the primary claim but loses the third party claim, the court may order the claimant to pay to the defendant the costs it has incurred in the third party claim (see, for example, *Johnson v Ribbins* [1977] 1 WLR 1458).

15 The claimants' submission before me has been that the making of an order for security in this regard is pegged to whether "*it is likely that a defendant will have to pay a third party's costs if the claim fails*", that being a quote from the judgment of Sales LJ in *Sarpd Oil Limited v Addax Energy* [2016] EWCA Civ 120, [2016] 1 CLC 336 [27]. The claimant also prays in aid the judgment of Roth J in the *Phones 4U* case where he refused to adopt a possibility test in the context of arguments about securing for indemnity costs.

16 The claimants say that this is not the kind of case where such an order should be made, being much more a case where, quoting Andrew Smith J in *Sarpd* at first instance:

> "… in a part 20 claim against a third party a defendant goes beyond seeking to protect himself from the consequences of the claim against me succeeding, then he could not have security for the further costs of the wider part 20 claim, any more than he could have security for a counterclaim against the claimant in so far as it goes beyond a mere defence of the claim."

17 The focus of the submission was effectively three-fold. Firstly, there was the fact that the defendants allege independent duty of confidence down the line against the third party. Secondly, the claimants pray in aid the fact that the defendants' remedies are not limited to an indemnity but also seek an account of profits and point to the fact that in emphasising the independence of the Additional Claim, the defendants have amended paragraph20 of their particulars by deleting the words "*is advanced on the assumption that the primary claim succeeds*".

18 Finally, reliance is placed on the fact that the defendants argue that the 2017 Intrigue/Burford settlement agreement was, or should be, rescinded because it was procured by fraud on the part of the third parties. That allegation takes up a large part of the defendants' Particulars of Additional Claim. It is said by the claimants to be "*a wholly separate claim for a remedy which is unconnected with any remedy sought by the claimants in the Part 7 claim, based on allegations of fraud which are unrelated to the claimants in respect of a settlement agreement as between a principal and its agent to which the*

claimants were obviously not party and which they did not even know existed". So the claimants say that this claim is wholly divorced from them, they did not provoke it and they were not consulted about it. They submit it is unforeseeable that the defendants would bring this claim and that that is relevant to whether the claimants would ever be ordered to pay the costs.

19 There is a certain amount of this analysis which I do not find persuasive. *Sarpd* is a decision on its facts. I accept Mr Allen's submission that it is not purporting to lay down a prescriptive rule for when Part 20 costs will be ordered to be covered. I accept Mr Allen's submission that the particular passage relied upon is no more than a reflection of deciding the case because that was a case where there were no actual issues as to the appropriate test. That is not, of course, to say that what Sales LJ had to say there is an inaccurate summary. Whatever the test is, it seems that it must be by reference to the outcome at the end of the day; because the point of providing security for costs is against the contingency that the costs will land with the claimants at the end of the day.

20 Mr Allen said the question is: if you can be ordered to pay it in the end, you can be ordered to secure it and the question is whether that is right or whether one should be saying that one can only be ordered to secure it if it is likely, or something akin to likely, that you would be ordered to pay it, in line with what was said in *Sarpd* - albeit that was not in issue in that case.

21 Certainly, it is far from unusual for third party costs to be ordered against claimants. It might even be said to be more usual than not (see for example *Blackpool Borough Council v. Volkerfitzpatrick Ltd* [2020] EWHC 2128 (TCC), per HHJ Stephen Davies (sitting as a High Court Judge) at [18]; White Book (2020) (vol.1) at 44.2.13 (p.1387)), and a rigid likelihood test might be said to run contrary to the authorities, which suggest that the court in this kind of application should not be conducting a mini-trial or getting too involved in the merits (see, for example, the authorities on securing by reference to possible future indemnity costs such as *Phones4U Ltd v. EE Ltd* [2020] EWHC 1943 (Ch), per Roth J at [24], *Danilina v. Chernukhin* [2019] 1 WLR 758, per Hamblen LJ at [69]-[70], and the Commercial Court Guide, Appendix 10, paragraph 4).

22 I also accept the submission that questions of foreseeability, as such, are not relevant. I accept that it was reasonably to be expected by the claimants when they sued the defendants that the defendants would probably seek any available recourse against any relevant third parties. The fact that they could not have predicted exactly how that would stack up in terms of how the recourse action would be constituted cannot, it seems to me, be relevant. That does not affect the costs order that is made at the end of the day. However, the way that the action is constituted may ultimately affect the costs order that is made at the end of the day and that is a point to which I shall return.

23 Overall, there must be a sliding scale between cases where a claim is purely and simply passed down the line on the same basis, like *Sarpd* (so where you have a back to back basis and, as night follows day, the claim follows down the chain), and cases where, for example, a small simple claim is passed down and a separate and entirely distinct claim is then also pursued for a much greater amount and involving much greater dispute.

24 This case, it seems to me, falls in the ground somewhere between the two extremities. There are effectively two ways of looking at it. The first is to say, well, looked at overall, although the Part 20 claim has notable differences, those are not notable differences produced by an extraneous or independent claim but produced by the vicissitudes of passing on a claim against a different contractual and duty background. So on that basis you might say the

claimant pursues the defendant on the basis of litigation confidentiality but the defendant cannot pursue the Part 20 defendant on that basis and can only do so on the basis of the relationship with the Part 20 defendant, which was contractual. The rescission claim, on that basis, is not actually an independent claim but a defensive assertion. The defendants say to the third party, "*You cannot say that it is barred by the settlement agreement because we have rescinded the settlement agreement*". So, on one level, the vast majority of the claim is passing on the claim *mutatis mutandis*. It is also not a claim one would expect to see being raised independently absent this litigation. It is effectively caused by the claimants' move in suing the defendants and, as Mr Allen submitted, it might well be seen as, in broad terms, being reasonable to sue the third party. So on a surface level one might think that it would follow, as night follows day, that costs would be passed.

25 However, when one then asks in which circumstances the claimants would be liable to pay the costs of the third party, the analysis of the circumstances suggest that matters are rather more complicated than that and that the claimants would likely not pay the costs or at best that the chances of them doing so is some considerable distance from being a likelihood. That is because one assumes, as a starting point for these purposes, that the claim in relation to confidentiality fails, so the claimant fails against the defendant. That is step one on both *hypotheses*. Then there is a possibility that the defendants themselves fail in their allegations of fraud against the third parties. The claimants say it would be fanciful that the claimants should bear the costs of the decision to pursue a claim in fraud against the third parties and that the defendants should, and would, bear the risk of any adverse costs.

26 While I would not necessarily say it would be fanciful that the claimants should bear the costs of the defendants' decision to pursue the claim in fraud, given the distinct challenges of pass on, it seems to me that it by no means follows, even if the defendants fail in their allegations of fraud, that all of the costs would pass back up the line. There may well be vibrant arguments about whether that was a reasonable thing to do, which the judge looking at this at the end of the day would view in the light of the evidence as it comes out and what the merits are of the fraud case. So it cannot be said to be likely that if the claimants' claim fails and the defendants fail in their allegations of fraud, that the claimants would bear the costs of that.

27 The second real possibility is that the claimants fail against the defendants and the defendants succeed in their allegations of fraud. In that eventuality, the claimants say, how could it be the case that the claimants would be at risk of a costs order other than in relation to the defendants' costs of defending the claim? It certainly seems to me to be highly questionable whether the claimants would be ordered to pay the costs in those circumstances, where there was a successful allegation of fraud made against the third parties.

28 It therefore follows that, broadly, the arguments raised by the claimants in relation to ultimate outcome are good ones. While they were addressed in writing by the defendants, they were not addressed orally by Mr Allen. In writing a third possibility was floated by the defendants, which appeared to have been put together to deal with the difficulties of the first two points, and that is the possibility that the court would find that there was no breach of confidence and the Part 20 claim was going to fail and the court would, therefore, think it unnecessary to make what they say would be legally irrelevant findings of fraud against the third parties and, in those circumstances, the claimants would pay the Part 20 costs.

29 As I say, it seems to me that that is a hypothesis which is really designed to attract one clear route through to the claimants being liable to pay the Part 20 costs in circumstances where the other routes are certainly difficult. I conclude that it is very unlikely that the fraud

allegation would be ignored, now that there is no bifurcation going to happen,. What is more, given the costs involved in the different elements of the case which is now going to proceed together, it must be hugely unlikely that the parties would be happy for the judge to simply "park" an issue on which there had been full evidence. So, in those circumstances, an analysis of the various contingent possibilities as to the outcome suggest that the argument is far from a likelihood.

30 A suggestion was raised by Mr Grant as a backstop, that one might say that one could simply order security in relation to the elements of the Part 20 claim that did not include the fraud element. The problem with that is that that effectively divorces the elements of the case from the likely outcome and, given that we are proceeding on the basis that security is ordered because of the likely outcome or an outcome which is going to happen at the end of the day on costs, it seems hugely unlikely that costs would be done on an issue basis at the end of the day. The authorities are very negative about issue-based costs orders and so it is certainly unlikely that there would be a separate costs order.

31 In the end, although this is obviously not an entirely straightforward point, I have come to the view that, as a matter of jurisdiction, the test may well be one of likelihood, as appears to be indicated, albeit in passing, by *Sarpd*, or it might be said to be something rather lower. Though, given the seriousness of having to provide security, it is unlikely to be very low, as in a mere possibility, and it is likely to be not unadjacent to a likelihood. Alternatively, if the test is somewhat lower, it would seem to me right that the lesser degree of likelihood goes to the exercise of the discretion, given that the authorities seem to be quite clear that there are circumstances in which, in Part 20 claims, costs should be recoverable and there are circumstances in which they should not. So there must be a sliding scale.

32 Whichever way one looks at it in this case, having looked at the possibilities for the outcome on costs as thoroughly as it seems possible to do at this stage, I conclude that I should not make this order. I consider that the jurisdictional hurdle, as indicated in the authorities and as I have outlined it above, is not met. If there is a jurisdiction, contrary to that initial view, I consider that a court in my position should be hesitant to exercise a discretion when the likelihood of the costs order being made against the claimant is not high. It is in this case, it seems to me, a fairly distant possibility, and the more so perhaps when the vast majority of the costs would seem actually to relate to the dispute between the defendants and the third parties. So I am not going to make the order for the claimants to give security for the costs of the third party claim.

33 That takes out of the equation the question of the defendants' costs of the third party claim and just leaves the question of how much security should the defendants provide to the third parties. The sum sought is just over one million, which is said to be far too high given their role. I was urged by Ms Tolaney to look at this as a matter where a like for like comparison with the defendants' overall costs is about right. In the end I have no difficulty concluding that like for like comparison with the defendants' costs is too generous. I also have no difficulty in concluding that the other extreme, that of looking at the Part 20 claim in isolation will be far too ungenerous.

34 On the former point, there is to some extent, yes, a limited role. There is to some extent no involvement with some of the very detailed factual submissions which are simply adopted by the third party and some submissions in relation to quantum. On the other hand, the case has proceeded on the basis that the third party is vital to the determination of the case – the "Hamlet without the prince" argument – and so it cannot be said that the third party is by any means marginal. I accept that the Part 20 defendant has had to come up to speed, perhaps more so than the defendant with its earlier involvement, and that they will have a

certain amount of wasted costs monitoring those parts of the case they do not need in order to take the action on, in deciding what to adopt and what not, as well as in dealing with and actively engaging with the not inconsiderable areas where they do need to take action and that these are areas where the third party will need to incur costs off their own bat.

35 It follows that one expects the sum awarded to be substantial but probably somewhere below the figure that the defendants will be incurring and probably below the figure that the claimants would be incurring if one had that figure. I obviously take on board that this is a complex and high-value case – that is a given – but the authorities suggest that this is of relatively limited assistance. There is also something, but not a huge amount, to be taken into account in relation to fraud allegations generally, though one can see that there are certain elements of the costs where that becomes more important, for example, in relation to witness statements.

36 I will deal first with the question of whether the Part 20 defendant would recover more than standard costs, as that makes a difference to what I might call the "guiding percentage". While there may be cases where one would anticipate an award of indemnity costs because of behaviour outside the norm and while it is the case that fraud often gives rise to an award of costs on the basis of "behaviour outside the norm" when a fraud case has been run unsuccessfully I do not see this as a case where this comes into play. The cases where this has been anticipated on a security for costs application are relatively few and far between and do involve some element of anticipation of the merits of the case. This is certainly not one where I would be minded to say that the fact that there is a fraud element is enough to anticipate an award of indemnity costs.

37 More to the point though, and particularly as between the defendants and the Part 20 defendant, there is the question of the contractual indemnity. This is something which was not dealt with in any great detail but it seems to be not in issue that there is such a contractual indemnity and the authorities cited by the third parties suggest that on that basis indemnity costs are very much a real prospect. Ms Tolaney says in the light of that, the fact that she is only seeking seventy per cent makes what she is after positively reasonable.

38 I then turn, in the light of that, to what broad percentage I should apply and I note the point made by Mr Allen that the indemnity principle is about the burden of proof, and it does not mean that you get away with things which are entirely unreasonable. However, the burden of proof does, in the real world, make a difference as to what you recover. It makes a difference probably of about something between five and ten per cent. Mr Allen might well be right that very abnormal facts mean that it would not make such a difference but, on the basis of erring in favour of the secured party, I will take into account, as Ms Tolaney urged me at the end of the day, the question of the indemnity recovery and give a little extra on top of the basic and a little more than I would otherwise.

39 We then look to see roughly what the figure would be if one were doing an assessment on the standard basis. Just stepping back, the overall figure on its face looks very high when compared to the defendants' costs, even when you look at the costs of the Part 7 claim. As I have said, my broad brush assessment is that there ought to be some difference. The prior involvement of Reed Smith seems to me to be neither here nor there.

40 There is a genuine point here about the very high hourly rates of the solicitors. If one were to say that, for example, in relation to the defendants' costs schedule, if one were to do recovery on the basis of seventy per cent on that, in order to get to an equivalent figure for the third parties' solicitors' rates it would require more than halving the hourly rate to get to an equivalent figure and nearly halving the rate for more junior solicitors. So that is a very

high rate. That will permeate the statement throughout. In the light of what has been said by Leggatt LJ in *Dana Gas PJSC v. Dana Gas Sukuk Ltd* [2018] EWHC 332 (Comm), per Leggatt LJ at [12, 19] and what one knows is done in relation to detailed assessment, one must expect a very considerable cut in those rates throughout on assessment.

41 Then the pleadings section, there is very high solicitor time, about 750 hours, which is around 100 days or three months. About a third of this is put down as "miscellaneous", which appears to be reading in. While they are very serious allegations which require an appropriately serious investigation, we are still looking at an enormous amount of time and, while there may be factual investigations within the "miscellaneous" category, the overall figures remain the same and they are enormous.

42 In relation to bifurcation, while it was a very considerable issue and perhaps most important to the third parties, these costs are nonetheless, even viewed fairly charitably and even in the light of the submissions that Ms Tolaney could make, way too high.

43 In relation to disclosure, an objection was made that this has more than doubled since the DRD with no suggestion that that had been incompetently prepared. But it is very apparent from what I have said in relation to the defendants' own costs of disclosure, that since that date all parties have moved on in relation to disclosure. There is a clear explanation. It is still a high figure. It is still, it seems to me, likely to be considerably reduced on assessment but not necessarily by such an amount.

44 On witness statements, this is another really, really big figure. A 725 hour equivalent for two witnesses. On a broad brush basis, that would suggest something like fifty days per statement. Even if you split it down a bit and said that there are eleven further statements for the solicitors to review, if they spent ten hours each on the eleven statements, that knocks 110 hours off the total and you are still looking at a huge number of days, something like forty days, in relation to those two witness statements. I entirely take on board Ms Tolaney's submissions that Mr Hall is a key witness and that he covers issues from 2015 onwards, that those will be detailed meetings, the allegations are incredibly serious, being fraud, so it is not directly comparable to the other party's statements. I appreciate that the other witness is an in-house solicitor and there are issues of privilege and those take time. Even bearing all of these points in mind, I cannot come to a conclusion which suggests other than that this is an enormously high figure which one would expect to come down a very considerable distance.

45 So bearing all of those points in mind, the figure which I am going to award in relation to the third party costs, making an allowance for that potential for the indemnity or quasi-indemnity basis because of the contractual indemnity, is sixty per cent.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge.