

Construction Law Update

Indemnity Costs Orders – Guidance from the Court of Appeal

In the case of *Lejonvarn v Burgess & Anr* the Court of Appeal considered whether a claimant's conduct during litigation, including its "*haphazard and spray gun*" case, justified an award for indemnity costs to the defendant.

Background

The defendant, an American-qualified architect, had provided assistance to the claimants in relation to a major landscaping project, free of charge. A dispute arose in relation to the project budget and the defendant ceased her involvement. The claimants commenced proceedings against the defendant in the TCC for breach of contract and/or negligence. The defendant made an early Part 36 offer in the sum of £25,000, however, this was rejected.

A trial on the preliminary issues of the case found that the parties had no contract and that the defendant's duty of care to the claimants related only to the limited professional services she had provided, not to various alleged omissions. This was confirmed by the Court of Appeal on 7 April 2017 (the "**April Judgment**"). The outcome of the April Judgment was so damning to the claimants' case that they subsequently advanced "*a wholly new and inconsistent case*" described later as "*thoroughly unmeritorious*," "*wholly unsupported*" and lacking "*credibility and conviction*". Needless to say, the claim failed in its entirety.

By this point, the defendant had incurred around £724,265 of costs and, whilst she was initially awarded costs on a standard basis, she appealed this decision seeking costs on an indemnity basis.

Indemnity costs orders

A court may use its discretion under CPR 44.2 to grant a costs order on a standard or indemnity basis. Indemnity costs orders are considered penal and so to be granted "*there must be some conduct or circumstance which takes the case out of the norm*". Factors which may take a case 'out of the norm' include

the claimants conduct in pursuing claims which are weak and opportunistic and Part 36 offers being unreasonably rejected and not beaten.

Was the claimants' conduct 'out of the norm' such as to justify an order for indemnity costs?

The key question was whether, at any time following commencement of the proceedings, a reasonable claimant would have concluded that its claims were so speculative, weak or thin that they should no longer be pursued.

The Court of Appeal held that following the April Judgment, the claimants should have, and did, realise that their claims were weak and likely to fail. This was evidenced by the two Part 36 offers subsequently made by them (one of which was for one fifth of their original claim), which were "*eloquent testimony... that all that really mattered now was costs*".

It was held that from 7 May 2017 onwards (one month after the April Judgment, by which time the claimants ought to have digested the decision) the pursuit of the claims by the claimants was 'out of the norm' thereby justifying an indemnity costs award from this date.

The question then turned to whether the rejection of the defendants early Part 36 offer was enough to justify indemnity costs from an earlier date.

Was the claimant's failure to beat the Part 36 offer 'out of the norm' such as to justify an order for indemnity costs?

If a defendant's Part 36 offer is not beaten this does not *automatically* entitle them to indemnity costs. It is an important factor, however, when considered against the background of the case.

In this case, "*the answer [was] plain*". When proceedings were commenced against the defendant, confident she had done nothing wrong, she made a

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“sensible and proportionate” Part 36 offer. The reasons for this were to (a) avoid the stress of litigation, and (b) protect herself in relation to costs. The claimants unreasonably rejected this, choosing to pursue litigation (costing many hundreds of thousands of pounds) and won nothing. In these circumstances, the claimants’ failure to accept or beat the defendant’s Part 36 offer alone was enough to bring the case ‘out of the norm’ such as to justify an order for indemnity costs.

From what date should the indemnity costs run?

In relation to the Part 36 offer, the key question was - at which stage from the date of the offer to the outcome of proceedings, should the claimants have concluded that the Part 36 offer represented a better outcome than the likely outcome at trial? The Court of Appeal found that this occurred on 7 May 2017 meaning the defendant was, again, entitled to indemnity costs from that date forward.

Analysis

Indemnity costs orders are rare due to their penal nature. In this case, however, the Court of Appeal found such an order was justified on not one but two separate bases. The common theme was the continued pursuit of claims after it became blatantly apparent the same were bound to fail, possibly as a way of punishing the defendant. Such an abuse of process is not taken lightly by the courts, as is evidenced by this award. This judgment should stand as a stark reminder to parties and legal representatives of the importance of regularly assessing the merits of a case throughout litigation and making sure that claims are being pursued for the right reasons.

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