Neutral Citation No. [2013] NIQB 61 | *Ref:* **WEA8816**

Judgment: approved by the Court for handing down | *Delivered:* **15/03/2013**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

JAMES ANTHONY CRAVEN and CAROLINE CRAVEN
& OTHERS

Plaintiffs;

-v-

GABRIELE GIAMBRONE
p/a GIAMBRONE & LAW, SOLICITORS and EUROPEAN LAWYERS

Defendant

WEATHERUP J

[1] This is the plaintiffs' application that the defendant be ordered to pay the plaintiffs' costs of the action on an indemnity basis. Mr O'Donoghue and Mr Girvan appeared for the plaintiffs and Mr Good QC and Mr Gibson appeared on behalf of the defendant.

[2] Order 62 of the Rules of the Court of Judicature provides for costs.

Rule 3(2) provides that no party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the Court.

Rule 3(3) provides that if the Court, in the exercise of its discretion, sees fit to make an order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

Rule 3(4) provides that the amount of costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis, unless it appears to the Court to be appropriate to order costs to be taxed on the indemnity basis.

Rule 12 deals with basis of taxation and provides that on a taxation of costs on the standard basis there should be allowed a reasonable amount in respect of all costs reasonably incurred. On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred.

[3] There is a different scheme in England under the Civil Procedure Rules. Part 44 includes a provision that in deciding what Order, if any, to make about costs the Court must have regard to all the circumstances including (a) the conduct of the parties (b) whether a party has succeeded on part of his case, even if he has not been wholly successful and (c) any payment into Court or admissible offer to settle made by a party which is drawn to the court's attention whether or not made in accordance with Part 36 (containing further provisions on the Court's discretion where a payment into Court or an offer to settle is made under that part). In the House of Lords in Fourie v Le Roux [2007] UKHL 1 at page 335 Lord Scott stated –

> "However, CPR 43 and 44 are a product of Lord Woolf's civil justice reforms, one object of which was to produce greater flexibility in awards of costs. It was, I believe, contemplated that greater use would be made of the discretion to award costs on an indemnity basis than had previously been the practice."

[4] In London Borough of Southwark v IBM UK Ltd [2011] EWHC 653 (TCC) Aikenhead J stated what he described as unexceptionable propositions:

> (a) An award of costs on an indemnity basis is not intended to be penal and regard must be had to what in the circumstances is fair and reasonable: Reid Minty v Taylor [2002] 1 WLR 2800, Paragraph 20.
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> (b) Indemnity costs are not limited to cases in which the court wishes to express disapproval of the way in which litigation has been conducted. An order for indemnity costs can be made even when the conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation: Reid Minty, Paragraph 28.
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> (c) The court's discretion is wide and generous but there must be some conduct or some circumstance which takes the case out of the norm: Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (A Firm) [2002] C.P. Rep. 67, Paragraphs 12, 19 & 32

(d) The conduct must be unreasonable to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight: Kiam v MGN Ltd (No2) [2002] 1 WLR 2810, Paragraph 12.

(e) The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, 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: "[T]o maintain a claim that you know, or ought to know, is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs": Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd [2006] BLR 45, Paragraph 27 and Noorani v Calver [2009] EWHC 592 (QB), Paragraph 9.

(f) There is no injustice to a claimant in denying it the benefit of an assessment on a proportionate basis when the claimant showed no interest in proportionality in casting its claim disproportionately widely and requiring the defendant to meet such a claim: Digicel (St Lucia) Ltd v Cable & Wireless plc [2010] 5 Costs L.R. 709, Paragraph 68.

(g) If one party has made a real effort to find a reasonable solution to the proceedings and the other party has resisted that sensible approach, then the latter puts himself at risk that the order for costs may be on an indemnity basis: Reid Minty, Paragraph 37.

(h) Rejection of a reasonable offer to settle will not of itself automatically result in an order for indemnity costs but where the successful party has behaved reasonably and the losing party has behaved unreasonably the rejection of an offer may result in such an order: Noorani, Paragraph 12.

(i) Rejection of 2 reasonable offers can of itself justify an order for indemnity costs: Franks v Sinclair (Costs) [2006] EWHC 3656

[5] The plaintiffs referred to Excelsior Commercial and Industrial Holdings v Salsbury [2002] EWCA Civ. 879 where the defendants made a joint payment into Court of £100,000 and the claimant recovered nominal damages of £2 against the fifth defendant and failed entirely against the other defendant. An Order was made for indemnity costs. At first instance the conclusion was that having regard to the background circumstances of the case the payment into Court should have been accepted and the fact that it had not been accepted meant that it was appropriate to make an indemnity order for costs. The Court of Appeal stated that the Judge was entitled to come to the conclusion that he did and added –

> [31] "….the need to be something more than merely non acceptance of a payment into court, or an offer of a payment, by a defendant before it is appropriate to make an indemnity order

> for costs. …. the circumstances with which the courts may be concerned where there is a payment into court may vary considerably. An indemnity order may be justified not only because of the conduct of the parties but also because of other particular circumstances of the litigation. ….there may be situations where the nature of litigation means that the parties could not be expected to conduct the litigation in a proportionate manner. Again the conduct would not be unreasonable and it seems to me that the court would be entitled to take into account that sort of situation in deciding that an indemnity order was appropriate."

[5] Cook on Costs (2012 ed.) at page 183 under the hearing "Culpability and Abuse of Process" states that traditionally costs on the indemnity basis have been awarded only where there has been some culpability or abuse of process such as deceit or underhandedness, abuse of the court's procedures, not coming to court with open hands, tenuous claims, unjustified defences, voluminous and unnecessary evidence or extraneous motives for the litigation. The author comments that if indemnity costs are sought the Court must decide whether there is something in the conduct of the action or the circumstances which takes it out of the norm in a way which justifies an Order for indemnity costs. Under a further heading "No Culpability or Abuse of Process" and by reference to CPR 44 the author comments that, if costs are to be awarded on an indemnity basis, in many cases there would be some implicit expression of disapproval of the way in which the litigation has been conducted, but that would not necessarily be so in every case. Litigation could be conducted in a way which was unreasonable, which justified an award of costs on an indemnity basis but could not properly be regarded as lacking moral probity or deserving moral condemnation.

[7] In the present case the plaintiffs' claimed damages for negligence and breach of contract against the defendant as solicitor acting on behalf of the plaintiffs in respect of the purchase of 13 properties in Italy in a development known as El Caribe. The case came on for hearing on a Monday. On the previous Friday the defendant gave notice of intention to admit liability. After the resolution of certain issues Judgment was entered for the plaintiffs against the defendant for a sum of damages and for costs. It is now the plaintiffs' application that those costs be awarded on an indemnity basis.

[8] The plaintiffs' grounding affidavit filed by Simon Chambers, the solicitor for the plaintiffs, relied on six grounds which he stated take the case out of the norm and warrant the award of costs on an indemnity basis. The six grounds are addressed by a replying affidavit from the defendant's solicitor, William Sefton.

[9] The first ground relates to previous proceedings against the defendant by other purchasers at El Caribe, which proceedings were settled by the defendant. The plaintiffs' complaint is that they were required to issue these further

proceedings and obtain independent legal experts to assess each of the 13 cases when the earlier case had been settled and ultimately when liability in the 13 cases was not disputed.

[10] The defendant's replying affidavit indicates that the earlier case was dealt with by different insurers who instructed different solicitors and that the present insurer and solicitors were not involved. It is stated that the decision to settle the earlier case was taken by the previous insurer without consulting with the defendant and was a commercial decision in relation to the incurring of costs.

[11] I do not fault the defendant or his solicitors or insurer for not adopting the approach of the previous insurers and solicitors in the earlier case and not making an early admission of liability. The new insurers were concerned with a different period and new solicitors were engaged. They were each entitled to reassess the position and take their own approach to the new litigation, involving as it did 13 Northern Ireland claims in respect of El Caribe and many other claims in another development known as Jewel of the Sea. The defendant may not have been consulted on the earlier settlement but in any event the decision on the conduct of all the claims would have been taken by the insurer on advice from solicitors and Counsel and no doubt taking account of the views of the defendant if they so wished.

[12] The second ground relied on by the plaintiff concerned an earlier adjournment of the present case. The case was first listed for trial in November 2012 and Mr Good QC for the defendant applied to have the case taken out because he was not ready to conduct the case as he had only recently been instructed. The case was taken out for that reason. The defendant's position in relation to the adjournment is that at that time the Court dealt with the adjournment by making a wasted costs order against the defendant. Thus the defendant will be paying the costs thrown away by the adjournment in November 2012.

[13] The fact of the adjournment is an issue to be taken into account to the extent that it might prove to be part of a course of unreasonable conduct by the defendant. I look to see whether there has been such unreasonable conduct.

[14] The third ground concerns the late admission of liability by the defendant. The plaintiffs' contend that the defendant admitted liability formally on the first day of the trial having made the offer to admit liability on the previous Friday. The defendant's response is that the defendant's case was not without merit; the plaintiffs had not made an application for summary judgment as they had done in the other class action for the other development; the defendant had the support of expert evidence but had taken a strategic decision to admit liability. The plaintiff disputed the independence of an expert who reported for the defendant.

[15] There was an extended process of negotiation between the parties. The Commercial Court would encourage early negotiations. It is recognised that there

has been a culture in Northern Ireland of the late settlement of personal injury claims, perhaps less so today than in former days. However that is not a practice to be encouraged in the Commercial Court where the emphasis from the first review in recent times has certainly been on early dispute resolution if possible. However I do not believe we have reached the stage in this jurisdiction of penalising a defendant by indemnity costs for a late settlement. I conclude that the late admission is a matter to take into account in the wider consideration of unreasonable conduct by the defendant.

[16] The fourth ground concerns the pre-trial conduct of the defendant. This is at the heart of the matter. Was the pre-trial conduct of the defendant so unreasonable as to warrant an order for indemnity costs? In assessing this conduct the above points are taken into account to the extent that they may be revealed as aspects of unreasonable behaviour not otherwise identified. The plaintiffs contend that the defendant and the legal representatives have sought to raise issues about the limits of the defendant's insurance cover on the claims without sufficient proof of the insurance position and have engaged in inappropriate use of without prejudice correspondence between the parties. The defendant's response is to refer to Heads of Terms which have been agreed between the insurance company and the defendant which the defendant states is clear evidence that an agreement on aggregation has been reached between the insured and the insurer and asserts that the plaintiffs have known this for some time. Offers have been made from time to time in respect of both El Caribe and the Jewel of the Sea on the basis that there is a limit on the amount of insurance monies available. The defendant's solicitor states that while he appreciates that the plaintiffs would not choose the insurance position to be as it is, it was not unreasonable to try and settle with as many claimants as possible so that the available funds could be distributed in an effective manner.

[17] I refer to some of the correspondence. A letter of offer dated 14 December 2011 was sent by CMS Cameron McKenna, former solicitors for the defendant, to Mr Chambers of Russell and Co, who was then representing 25 plaintiffs at the El Caribe development. A number of those plaintiffs were based in England and the Republic of Ireland. Since that letter this Court has determined that it did not have jurisdiction to deal with plaintiffs domiciled outside the jurisdiction (Craven v Bellanca & Others [2012] NIQB 58). As a result the plaintiffs who were not domiciled in Northern Ireland were removed from the proceedings. The letter of 14 December 2011 was stated to be "Confidential and without prejudice save as to costs" and was stated to be a Calderbank letter. The letter discussed liability and the defendant's insurance and the limits on the insurance pot. The plaintiffs say that what was not made clear was that there were other pots of insurance money for other developments. The letter contained an offer of settlement to the 25 clients at €1.1M for damages and interest and costs in full and final settlement.

[18] A further letter on 7 February 2013 from the defendant's present solicitors RPC to Mr Chambers, now representing 13 plaintiffs, was again stated to be confidential and without prejudice save as to costs and again expressly referred to

Calderbank. The letter discussed liability and the insurance position and the Heads of Terms signed by the former partners and the defendant and the insurer AIG. Pursuant to that agreement there was stated to be a £3M limit on liability for all claims where 'Italian Connection' was the promoter of the development, that is the El Caribe development. The letter contained an offer in respect of the 13 plaintiffs.

[19] The binding heads of agreement was attached, dated 6 February 2013 between AIG and the defendant, and stated to be pursuant to a policy of indemnity dated 1 October 2008, with the limit of AIG's liability under the policy being £3M for any one claim. The agreement stated that AIG had made indemnity payments in respect of claims of a certain amount and stated that AIG had indemnified the aggregated claims on a promoter basis and for the promoter Italian Connection the amount was some £1.8M. That therefore left in the £3M pot some £1.2M for the remaining El Caribe claims.

[20] A further letter of 13 February 2013, this time from Giambrone Law to Mr Chambers at Russell and Co, again stated to be without prejudice save as to costs and referring to Calderbank, made an improved offer. The offer was now £600,000 for damages, £130,000 for costs. However the offer also included £610,000 in full and final settlements of the legal costs relating to the Jewel of the Sea action. This sum was to include solicitors costs, counsels' fees and the fees of experts and the offer of costs in the Jewel of the Sea action was stated to have been made on the understanding that the El Caribe cases would be settled in full under a confidentiality agreement and the Jewel of the Sea claims would proceed on a contested basis and if the defendant were to be successful the plaintiff would be liable to pay the defendant's costs. The defendant further stated that the extent of the offer was such that it had exhausted the insurance pot and the defendant was personally including £16,000 of his own funds to make up the offer.

[21] The plaintiffs expressed concerns about two particular aspects of the defendant's approach. First of all the offer of costs for the Jewel of the Sea was categorised by the plaintiffs as a bribe. Secondly, the plaintiff did not accept that there was such a shortfall of £16,000.

[22] I am not satisfied that there was impropriety in either respect on the part of the defendant. There has obviously been a process of negotiation with what appears to be a limited insurance pot for the development. The plaintiffs may not be convinced about the existence of the various pots or the size of the El Caribe pot as they suspect that the arrangements have been contrived. However an explanation of the insurance position does appear from the correspondence and while the plaintiffs may be sceptical I do not have a basis for concluding that the account that is given of the insurance position is inaccurate. The defendant and the insurers and the solicitors seek, of course, to pay the least possible amount and to manage the claims as best they can with the funds available. This is clearly a difficult situation for all the plaintiffs and for the defendant and the insurers to manage these claims within the confines of the available funds.

[23] The related offer of costs in respect of the claims for the Jewel of the Sea development is unusual, but it does appear to represent a cap on the costs incurred in the Jewel of the Sea action while settling the El Caribe claims and contesting the Jewel of the Sea claims. I do recognise that the cap on costs may be but a step on the way to addressing the damages in the Jewel of the Sea action. On the information available I would not categorise the costs proposals as a bribe or an improper offer.

[24] In relation to the shortfall issue, the £16,000 is said by the defendant to arise from what are described as the Pennington actions, these being the actions of the English plaintiffs who were removed from the Northern Ireland proceedings who then instructed English solicitors known as Penningtons to commence proceedings in England. The defendant contends that when the position of the Pennington claimants is taken into account the El Caribe insurance pot will be short and the defendant will have to raise an additional £16,000 personally. The plaintiffs dispute this. I do not propose to undertake an investigation into how the pot is to be distributed between the Northern Ireland plaintiffs and the English plaintiffs. On the information available it has not been established that the defendant's account is inaccurate.

[25] In relation to the pre-trial conduct of the defendant, which as I say is at the heart of the matter, I do not find such unreasonable conduct by the defendant as has been alleged by the plaintiffs.

[26] The fifth ground concerns an independent expert engaged by the defendant. The plaintiffs challenge the independence of the expert witness. The expert reported in relation to the Jewel of the Sea development. The expert does not bear on the position in relation to El Caribe.

[27] The sixth ground concerns the costs that might be visited on the plaintiffs. The plaintiffs contend that it would not be appropriate that they should be required to bear any of the costs of the proceedings, this being on the basis that the absence of recovery of costs on an indemnity basis may lead to a charge on the plaintiffs for part of the costs. This factor does not alter the essential approach in relation to this issue which is to determine whether there has been such unreasonable behaviour on the part of the defendant in the conduct of the litigation or in the circumstances of the case as would warrant the award of costs on an indemnity basis. I have not been satisfied that there has been such unreasonableness and therefore I do not propose to make an order for costs on an indemnity basis.

[28] The plaintiffs have their judgment for damages and costs and those costs are in a specified interim amount to be paid together with the balance of the plaintiffs' costs to be determined by the Taxing Master as taxed on the standard basis.