Legal Briefing

Courtwell Properties Ltd v Greencore PF (UK) Ltd

[2014] EWHC 1844 (TCC), Mr Justice Akenhead

The Facts

Courtwell Properties Ltd ('Courtwell') was the sub-lessee of industrial premises in Salford. Its sub-sub-lessee was Greencore PF (UK) Ltd ('Greencore') who in turn had sub-let the premises for use as a bakery. Greencore's sub-sub-leases expired and in April 2010 Courtwell prepared schedules of dilapidations showing total remedial work costs of £1,774,000.

As the bakers apparently had no intention of leaving the premises, Greencore's building surveyor suggested that Courtwell had suffered no loss and requested that Courtwell confirm its intentions for the premises.

By September 2011, meetings had commenced between the parties' expert building surveyors but throughout the dispute, relations between the expert surveyors and the expert valuers retained by each side were fractious and unproductive.

On 26 June 2012, Courtwell issued a letter of claim under the Dilapidations Pre-Action Protocol ('the Protocol') seeking £700,000 based on capital diminution rather than remedial costs. Greencore was unable to respond within the 56-day period required by the Protocol and in September 2012 asked for access to the site and suggested that the valuers should meet to narrow issues. Courtwell replied that a meeting would not achieve much because of Greencore's reliance upon a no loss argument. Courtwell said that in the absence of a response from Greencore under the Protocol, it would press forward and in November 2012 Courtwell issued proceedings in the TCC.

At the same time Courtwell proposed mediation. Despite further exchanges between the parties' solicitors, no mediation took place.

Greencore denied that any loss flowed from any established breach of the sub-leases and in due course the court made directions and fixed a trial date for November 2013. In May 2013 the court approved Courtwell's cost budget of £411,171.

The case settled on 25 October 2013 after Greencore accepted Courtwell's Part 36 Offer for £800,000, inclusive of interest. Courtwell's offer had not been served until 15 October 2013 and as this was less than 21 days before the start of the trial, CPR 36.10(4) applied meaning that the court was not bound to assess costs on the standard basis.

On 1 November 2013, Courtwell issued an application for indemnity costs and for an order that it could depart from its costs budget. Courtwell argued that it was entitled to indemnity costs on four grounds:

(i) Greencore's failure to comply with the Protocol;

(ii) Greencore's failure to mediate;

(iii) Greencore's pleading of a no loss defence; and,

(iv) the conduct of Greencore's experts.

The Issue

Was Courtwell entitled to an order for indemnity costs against Greencore on some or all of the grounds alleged?

The Decision

No. Courtwell had not demonstrated the high degree of unreasonableness required to justify indemnity costs. On the evidence, both sides were at fault for the non-compliance with the Protocol and the failure to mediate and it was unlikely that a mediation would have succeeded in any event. On the third point, the no loss defence was not so implausible or hopeless that no legal and professional team should have put it forward.

Finally, where Courtwell's allegations of misconduct by Greencore's experts were disputed and had not been tested through oral evidence, it was impossible to come to a sensible and fair conclusion as to whether or not Greencore's experts had behaved so unreasonably as to justify an order for indemnity costs.

Commentary

Where a Part 36 Offer is accepted, costs will usually be assessed on the standard basis if not agreed but under CPR 36.10(4) if the offer is made or accepted less than 21 days before the start of the trial, assessment of costs on the standard basis is not mandatory. It was therefore open to Courtwell to apply for indemnity costs if they could show that Greencore's behaviour and conduct in the dispute and proceedings had been unreasonable to a high degree.

The Judge had little hesitation in dismissing Courtwell's application, concluding that both parties had shared responsibility for the failure to mediate and for non-compliance with the Protocol. The Judge considered that the no loss defence was arguable on the facts and thought it unlikely that Greencore's experts and legal advisers could all have acted unprofessionally or dishonestly when advocating this defence. Courtwell's extensive allegations against Greencore's experts were disputed and had not been tested by cross-examination, so the Judge was not satisfied that there was any compelling evidence of sufficiently poor conduct on the part of Greencore's representatives so as to justify an indemnity costs order.

Whilst the exchanges between experts, including at experts' meetings, are usually without prejudice, the Judge warned that this did not in itself excuse dishonesty, unprofessional conduct, or other unreasonable behaviour by the participants.

The Judge expressed doubts over the proportionality of Courtwell's application in circumstances where what should have been a simple dispute had required the involvement of Leading Counsel and generated 12 detailed witness statements. The aggregate costs of both parties on the indemnity costs application exceeded £100k and the Judge said that had the application succeeded he would have reduced Courtwell's £42k costs claim in order to reflect his serious concerns about the overall lack of proportionality.

The Judge also suggested that parties should think twice about making indemnity costs applications that rely heavily upon evidence that is materially challenged by the opposition and which has not been tested in court.

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