

Indemnity Costs – you’ll be lucky! Interim Payment of Costs – definitely maybe

Written by Victoria Tyson

Even if a claimant has achieved complete success in litigation, it remains exceptionally difficult to recover legal costs on an indemnity basis, as this case demonstrates. Costs will most likely be recovered on the standard basis – at least in the absence of bad conduct during the litigation itself. This case also indicates that the court will generally limit an interim payment of costs to two-thirds of an approved costs budget.

In the recent case of *Obrascon Huarte Lain SA v Her Majesty’s Attorney General for Gibraltar* [2014] EWHC 1028 (TCC)¹ Corbett & Co acted for the Government of Gibraltar (GoG). In April 2014, the Technology and Construction Court of England & Wales found that GoG had successfully terminated its £30 million FIDIC Yellow Book contract with Obrascon Huarte Lain SA (‘OHL’) for design and construction work to Gibraltar Airport, which principally involved the creation of a tunnel beneath the airport runway. As the successful party, GoG returned to Court in June 2014 to claim its legal and other costs of the proceedings. In particular, GoG sought the recovery of indemnity costs and an interim payment of those costs. As a general rule costs are not awarded on an indemnity basis. However, the Court’s discretion to award indemnity costs under Part 44.3 of the Civil Procedure Rules is wide.

The basis of costs

GoG requested costs on an indemnity basis due to OHL’s conduct. OHL accepted that it must pay GoG’s costs but asserted that it should do so on a standard basis only.

GoG referred to the cases of *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson* [2002] EWCA Civ 879² and *Three Rivers District Council v Bank of England* [2006] EWHC 816 (Comm)³ as authority that a party

seeking indemnity costs must establish some conduct or circumstance to take a case ‘out of the norm’. GoG asserted that OHL’s conduct indeed took the Gibraltar case out of the norm, in particular by OHL’s reliance on a report by a consultant whom it had engaged. That report was put forward to support OHL’s suspension of the works and redesign of the tunnel and also to put commercial pressure on GoG. In his judgment of April 2014 the judge had said this report was ‘palpably and obviously inept, was clearly worked on by OHL and cannot have been considered by OHL to be independent or competent’.

GoG also identified similarities in OHL’s conduct to that of the defendant in the case of *Amoco (UK) Exploration Company v British American Offshore* [2001] EWHC 485 (Comm)⁴. In *Amoco* the defendant’s conduct had involved a deliberate policy calculated to exert unfair commercial pressure on the other party, the prioritisation of commercial interests over the rights and wrongs of the situation and a constantly changing case. It ultimately led to a resounding defeat at trial and the rejection of evidence put forward in support. The court had awarded indemnity costs in those circumstances.

OHL denied that its conduct bore any similarity to that of the defendant in the *Amoco* case. It instead asked the Court to consider the case of *Courtwell Properties Ltd v Greencore PF (UK) Ltd* [2014] EWHC 184 (TCC)⁵ (a case heard by the same judge) where, although the defendant had been unsuccessful at trial, its position was nevertheless arguable and its conduct in the litigation had not been unreasonable.

Decision: costs on standard basis

The judge observed that the Gibraltar case was ‘many layered’ although primarily concerned whether the termination was lawful. He pointed out that there were other substantive and important

issues such as ground/soil and water contamination, design processes, rock, suspension and re-design which had all been properly raised by OHL. He distinguished the *Amoco* case, and said that the primary question in present circumstances was whether a particular case was *fought* on a basis that took it out of the norm. Although highly sceptical of OHL's tactics in the commissioning and drafting of the much criticised consultant's report, the judge said that primarily the costs here were concerned with the costs of the litigation itself. OHL had run a large number of issues at trial and the fact that it had lost resolutely did not mean that GoG would automatically receive indemnity costs. OHL had not thereby taken the case out of the norm. This was not a case for indemnity costs, although the judge considered it was certainly not unreasonable for GoG to have requested them in present circumstances. OHL was ordered to pay the costs of the issues tried to date on the standard basis, to be the subject of a detailed assessment if not agreed.

Interim payment of costs: how much?

Early in the proceedings, at the case management conference, both parties had agreed cost budgets each in excess of £6 million and these had also been approved by the Court in a costs management order. Following judgment in April 2014, the parties had agreed that GoG was entitled to an interim payment of its costs, but disputed the size of that payment. GoG requested an interim payment of £5.5 million (approximately 80% of the budget previously approved by the Court) and OHL offered it only £4 million (approximately 58% of the approved budget).

GoG argued that its approved costs budget was 'reasonable and proportionate' and that its recoverable costs (after a detailed assessment) were unlikely to be much less. It relied on the case of *The Board of Trustees of National Museums and Galleries on Merseyside v AEW Architects and Designers Limited -and- PIHL UK Limited and Galliford Try Construction Limited (in joint venture)* [2013] EWHC 2403 (TCC)⁶. There an interim payment of 70% had been made.

OHL argued that the fact that a costs management order had been made for the full agreed costs budget should not lead the Court to award more than would normally be paid on account. OHL referred to the cases of *Henry v News Group Newspapers Ltd* [2013] EWCA Civ 197 and *Troy Foods v Manton* [2013] EWCA Civ 615⁸ and claimed that the approved costs budget 'does not act as a rubber stamp for claims up to that amount'. OHL said that GoG would still need to demonstrate in a detailed assessment that the costs it had incurred were proportionate and reasonable. It suggested that questions might arise in such a detailed assessment over the reasonableness of the approved costs budget. For example, OHL suggested there might have been some duplication in the involvement of two QCs and two law firms on the part of GoG (despite this point never having been raised before).

The judge remarked that the case was a relatively complex piece of litigation involving international parties, five disciplines of experts, and had been conducted in a short period of time, all of which meant that preparation for the trial had to be more focused. Although the costs budgets had been approved at the case management conference, the judge had not been asked to cast a critical eye over them at the time. They had not been criticised by the opposing parties nor did they seem out of the ordinary for a case of this nature.

The judge said that the purpose of an interim payment is to reflect the fact that there is a winning party entitled to substantial costs and to ensure that that party is not kept out of those costs. Whilst the agreed costs budget set a likely upper limit at this stage on what GoG is likely to recover in costs, it does not set out figures on a standard or detailed assessment. The judge confirmed that unless GoG's costs could be agreed between the parties, there would have to be a detailed costs assessment process.

Decision: Interim payment of two-thirds of the approved costs budget

The judge considered that a costs assessment on a standard basis commonly, but not always, reduces the claimed sum to two-thirds (higher on an indemnity basis). Therefore, an interim payment should not represent more than could be recovered on a standard assessment. OHL was ordered to pay two-thirds of the approved costs budget i.e. £4.5 million on account of GoG's costs. A time for payment was agreed between the parties.

Conclusion

Unless a losing party has behaved particularly badly during the litigation process itself, the winning party is unlikely to recover legal and other costs on an indemnity basis. The winning party can expect only to recover those costs on the standard basis even after an outright victory.

The size of an interim payment is also likely to be capped at two-thirds of an approved costs budget. However, there is no absolute rule in this. In an even more recent case – (1) *Peter Kellie and (2) Kelly Kellie -v- Wheatley & Lloyd Architects Limited [2014] EWHC 2886 (TCC)*⁹ – the court took a more generous approach. There almost all of the approved costs budget was ordered to be paid on account of costs. The facts of a particular case always have the potential to influence the outcome of an application for an interim payment.

¹ *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028 (TCC)*

<http://www.bailii.org/ew/cases/EWHC/TCC/2014/1028.html>

² *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson [2002] EWCA Civ*

879 [http://www.bailii.org/cgi-](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2002/879.html&query=title+(+Excelsior+)&method=boolean)

[bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2002/879.html&query=title+\(+Excelsior+\)&method=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2002/879.html&query=title+(+Excelsior+)&method=boolean)

³ *Three Rivers District Council v Bank of England [2006] EWHC 816 (Comm)*

<http://www.bailii.org/ew/cases/EWHC/Comm/2006/816.html>

⁴ *Amoco (UK) Exploration Company v British American Offshore [2001] EWHC 485 (Comm)*

<http://www.bailii.org/ew/cases/EWHC/Comm/2001/485.html>

⁵ *Courtwell Properties Ltd v Greencore PF (UK) Ltd [2014] EWHC 184 (TCC)* [http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/TCC/2014/184.html&query=title+\(+Courtwell+\)+and+title+\(+Properties+\)&method=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/TCC/2014/184.html&query=title+(+Courtwell+)+and+title+(+Properties+)&method=boolean)

⁶ *The Board of Trustees of National Museums and Galleries on Merseyside v AEW Architects and Designers Limited -and- PIHL UK Limited and Galliford Try Construction Limited (in joint venture) [2013] EWHC 2403 (TCC)* <http://www.bailii.org/ew/cases/EWHC/TCC/2013/2403.html>

⁷ *Henry v News Group Newspapers Ltd [2013] EWCA Civ 19*
<http://www.bailii.org/ew/cases/EWCA/Civ/2013/19.html>

⁸ *Troy Foods v Manton [2013] EWCA Civ 615*
<http://www.bailii.org/ew/cases/EWCA/Civ/2013/615.html>

⁹ (1) *Peter Kellie and (2) Kelly Kellie -v- Wheatley & Lloyd Architects Limited [2014] EWHC 2886 (TCC)*
<http://www.bailii.org/ew/cases/EWHC/TCC/2014/2886.html>



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