Case No: CL-2023-000282

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27/01/25

Before :

HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

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Between :

(1) MACDONALD HOTELS LIMITED
(2) MACDONALD BOTLEY PARK LIMITED — **Claimants**
- and -
BANK OF SCOTLAND PLC — **Defendant**

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Tim Lord KC, Fred Hobson KC and Vanshaj Jain (instructed by **Enyo Law LLP**) for the **Claimants**
Andrew Mitchell KC, Elizabeth Fitzgerald And **Rupert Allen** (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

Hearing dates: 24 January 2025

Costs Ruling

HH Judge Pelling KC:

Introduction

1. Following the hand down of the main judgment in these proceedings on 24 January 2025, I directed that (a) the claimant ("MHL") should pay the defendant's costs of and occasioned by these proceedings; (b) that MHL should pay interest at 1% above base rate on the costs paid by the defendant ("BOS") from date of payment down to date of judgment and (c) dismissed MHL's application for permission to appeal. I need say no more about those rulings, for which I gave *ex tempore* reasons at the hand down hearing ("hearing").

2. Most of the time of the hearing was taken up with an application by BOS for an order that its costs should be assessed on the indemnity as opposed to the standard basis, which was opposed by MHL. Each party also made submissions as to the percentage of BOS's total costs that should be made the subject of a payment on account. Given the sums involved and the nature of the submissions made by each party, I decided to give my Ruling on these issues in writing.

Applicable Principles – Indemnity Assessment

3. The principles are not in dispute and are those identified by the Court of Appeal in Excelsior Commercial & Industrial Holdings Ltd v Sainsbury Hammer Aspden & Johnson [2002] EWCA Civ 879, as augmented by Tomlinson J as he then was in Three Rivers DC v The Governor of the Bank of England [2006] EWHC 816 (Comm). In summary, before a court directs that a receiving party's costs (or any part of its costs) be assessed on an indemnity basis, the court concerned must be satisfied that the litigation or part in respect of which an indemnity assessment is being directed was conducted or otherwise the circumstances were such as to take the case or part concerned out of the "*norm*", by which is meant the ordinary and reasonable conduct of proceedings, although to justify a direction that costs be assessed on the indemnity basis, generally the conduct of the paying party must have been unreasonable to a high degree.

4. Whilst various categories of circumstances that can make it appropriate to direct that costs or some part of the costs of the receiving party be assessed on the indemnity basis are set out in Three Rivers (ibid.), the list is not comprehensive or intended to be and not all cases that might arguably fall within those categories will justify a direction that costs be assessed on the indemnity as opposed to the standard basis. In each case the court has a wide discretion as to how to approach issues of this sort and should do so in a fact specific manner. This point is particularly important where a successful party argues that indemnity costs should be awarded because the claim it has faced is "… *speculative, weak, opportunistic or thin*…" Many claims will at least arguably satisfy this description without it being appropriate to direct that costs be assessed on the indemnity basis as a result. Just because a claim is weak and fails does not justify ordering the costs of the successful party to be assessed on an indemnity basis. That said, it is more likely to be appropriate to direct that the costs or some part of the costs of the receiving party be assessed in the indemnity basis:

> "…

i. Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time;

ii. where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;

iii. where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;

iv. where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;

v. where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat."

\- see Three Rivers (ibid.) at [25)d)]. BOS maintains that this claim satisfies each of these criteria.

BOS's Submissions Concerning Basis of Assessment

5. Mr Mitchell KC submits on behalf of BOS that the whole of its costs (said to total £19,359,713.80) should be assessed on the indemnity basis for six reasons. It will be necessary to set them out in more detail below. However I should record two points at this stage – the first is that it was submitted on behalf of MHL by Mr Lord KC that these costs are in the aggregate "*eye wateringly*" high and that the effect of directing that BOS's costs be assessed on the indemnity basis will deprive the costs judge of the opportunity to consider whether these costs or any part of them are disproportionate. In my judgment this submission is misplaced for at least three reasons – firstly, whilst the total sum claimed is high, in excess of £3m is in respect of VAT that BOS is said to be obliged to pay on its costs; secondly, whilst the total sum claimed by BOS other than VAT (£16.34m) is substantial it is to be viewed in the context of MHL's costs, which it estimates at over £10m but thirdly and most importantly, this submissions is circular – indemnity costs will be ordered only in respect of a claim which it was unreasonable to a high degree to have commenced or continued. If it was and an indemnity assessment is ordered as a result , then the fact that that the costs claimed are very high and that proportionality will not be relevant is not to the point. Finally and in any event, even on an indemnity assessment, only costs that have been reasonably incurred and are reasonable in amount will be recoverable.

6. Returning to BOS's submissions, it maintains that I should direct that all its costs of the claim should be assessed on the indemnity basis for the following reasons:

i) It was unreasonable to a high degree for MHL to have commenced and then maintained the claim over a period of 8 years as it maintains is illustrated by the late abandonment of the major part of the claim (known in these proceedings as the Botley Park claim), which represented about 50% of the total value of the claim and had been quantified by MHL at £73.6m as well as its duress defence to BOS's reliance on a Deed of Waiver;

ii) The claims were each formulated on the basis of alleged bad faith on the part of BOS acting by its various officials, which necessarily involved MHL alleging that the Bank had acted in a commercially unacceptable manner for which it had no proper evidential foundation;

iii) The litigation had been pursued by MHL for improper purposes including (a) for the purpose of enabling Mr Macdonald "*to ventilate his alleged grievances with BOS in a public forum*" and (b) to obtain an illegitimate advantage in re-finance negotiations commenced after the proceedings had been commenced;

iv) The claimant advanced a constantly changing factual case including seeking to advance allegations at trial that had not been pleaded and so had not been the subject of investigation, disclosure or relevant witness evidence, which it was submitted was all the more unreasonable because of the serious reputational damage that could be caused to the bank and its officials by the making of such allegations in a manner that the Bank was unable adequately to defend;

v) The claimant relied on lengthy witness statements from Mr Macdonald and Mr Fraser that failed to comply with CPR PD 57AC, because they contained substantial amount of argument, inadmissible evidence and evidence about facts that had not been pleaded; and

vi) The claimant conducted itself reasonably to a high degree in relation to settlement of the dispute and in particular should have but failed to accept two proposals made by the Bank to MHL to settlement the dispute on a without prejudice save as to costs basis.

Inevitably, some of these factors assuming they are made good will have greater effect in relation to the issue I am now concerned with than others but Mr Mitchell made clear in the course of his submissions that whilst he relied on each of these factors as justifying directing BOS's costs to be assessed on the indemnity basis, he also relied on them collectively as in any event leading to that result. In my judgment, the witness statement point is one that carries very little weight in the circumstances, because it was open to BOS to apply to strike out some or all of the statements. The main force of the point made is as part of (iv) to the extent the statements sought to advance allegations that had not been pleaded. Likewise I consider using the existence of the litigation as a commercial pressure point is of limited weight of itself in an overall assessment of whether a posing party should be required to pay costs assessed on an indemnity basis. The remaining points particularly when taken together are however more serious.

MHL's Submissions Concerning Basis of Assessment

7. First, Mr Lord submits that conduct which is merely wrong or misguided in hindsight does not justify ordering costs to be assessed on the indemnity basis. To my mind this requires some unpacking. I agree that merely because a weak claim was started and continued does not lead inevitably to the conclusion that the losing party should be ordered to pay costs assessed on the indemnity basis. However maintaining a claim

that it was unreasonable to a high degree to commence or continue may justify such a conclusion. Mr Lord further submits that there is nothing about the conduct of MHL that can be described as it having acted unreasonably to a high degree at least when viewed in light of the matters as they stood at the time when the claim was commenced. He maintains that from first to last the claim was one "… *where different tribunals could reasonably be expected to draw the line differently as to the boundary marking e.g. commercially unacceptable conduct*." The claim was not one that therefore could properly be characterised as hopeless or speculative. I return to that point below.

8. Mr Lord submits that the claim did not involve allegations of fraud or dishonesty that failed at trial, which in any event would not justify costs being directed to be assessed on the indemnity basis in every case where such allegations had been made and failed but on the contrary the claim "… *was a vanilla claim for breach of contract.*". The claim was not one that was brought for improper commercial purposes. I agree there is no evidence that the claim was brought for an improper purpose and that MHL did not allege fraud or dishonesty against BOS. However BOS does not allege otherwise. It has only alleged that the litigations was relied on during its life as a commercial pressure point and as I have said that to be of limited weight particularly as between two very substantial commercial operators as BOS and MHL.

9. Mr Lord submits that the decisions to discontinue the Botley Park claim and not to pursue the duress argument were immaterial. I return to these points in detail later but it is worth noting at this stage that in relation to the decision to discontinue the Botley Park claim, Mr Lord submitted that the "… *Court will rightly expect parties to keep their cases under review throughout trial with a view to streamlining the issues which require determination…*" Whilst that is correct as far as it goes, it is also fair to say that a Court will expect parties acting reasonably to go further and to regularly review their claims and defences for these purposes, at least at key stages in the course of litigation and in particular when settlement questions arise. I should also make clear that I do not accept that the abandonment of the Botley Park claim was decided upon by MHL for the purpose of "… *streamlining the issues which require determination…"* It abandoned the claim because it had no prospect of success. BOS's submission is that on the basis of the documentary material available to MHL it ought reasonably to have known that such was the case at the time when it commenced that part of its claim.

Discussion

10. As will be apparent from the summary set out above, there are at least four possible approaches that could be adopted – (a) a direction that all of BOS's costs be assessed on the indemnity basis; (b) a direction that all BOS's costs of and occasioned by the Botley Park claim should be assessed on the indemnity basis; (c) a direction that all BOS's costs after its first proposal to settle the claim should be assessed on the indemnity basis or (d) a direction that all BOS's costs be assessed on the standard basis. Neither party suggested that (b) ought to be adopted even as a fallback position and whilst both parties were (unwillingly) prepared to countenance (c) as a fall back possibility, both did so without any enthusiasm only in the course of oral submissions and in answer to questions from me.

11. I address the various points in turn. So far as Botley Park is concerned, I accept BOS's submission that on any view that claim ought not to have been started or continued with

to trial. As I have said the claim (which was a claim that BOS had in bad faith forced MHL to sell Botley Park against its will so as to inflict on it losses quantified by MHL at about £73m) was abandoned following completion of Mr Macdonald's cross examination. In my judgment, it is to be inferred that the claim was abandoned for the reasons relied on by BOS – the claim was one that could not be reconciled with MHL's own documentation and because Mr Macdonald's answers in the course of his cross examination were inconsistent with the claim being advanced. Had this issue been tested and reviewed prior to the commencement of proceedings that outcome would or ought to have been apparent. That notwithstanding, BOS incurred substantial costs at all phases during the life of the litigation including in particular disclosure and expert evidence which could have been avoided entirely. It was abandoned only after Mr Macdonald had been cross examined and without any explanation. Viewed in isolation I have no hesitation in concluding that the Botley Park claim costs merit an order requiring the costs of that exercise to be paid on the indemnity basis. I do not accept that MHL is entitled to any credit for this episode either for the reasons identified by MHL or otherwise. This claim represented 50% by alleged value of MHL's total claim that it took to trial and generated a significant amount of costly expert evidence. This is classically the sort of claim where it will be very difficult to obtain a summary disposal but which nonetheless should not have been commenced or continued. To have done so was conduct that was unreasonable to a high degree.

12. Although Mr Lord submitted that even if this was so it represented only part of the total cost incurred by BOS, that does not assist since it was not submitted by either party that I should make an issue based order and in any event it would be extremely difficult costly and time consuming to attempt to assess the costs attributable to the Botley Park claim as opposed to others. For the reasons set below I consider such an approach would be unrealistic in the circumstances.

13. In my judgment similar considerations apply to the Randolph Hotel claim for at least the following reasons. Firstly, on the conclusions I have reached any claim that was otherwise available to MHL was waived by the Deed of Waiver. As I pointed out in the judgment, both parties entered into the DoW because they both asserted a wish to "*draw a line in the sand…*" in relation to all claims threatened by MHL prior to March 2014 – see Judgment at [117] to [120]. Those claims had included an allegation that MHL had been forced to sell the Randolph Hotel by MOS in alleged breach of its good faith obligation contained in the SHA – see [129]. In those circumstances, it is difficult to see how, even ignoring the effect of hindsight, any reasonable person with the knowledge of the parties could have considered that the parties intended to exclude claims that were connected with one or other of the Finance Documents as defined other than such a claim when formulated as a claim for damages for breach of the SHA – see [131]. The duress defence was abandoned at the end of the trial without explanation. Mr Lord maintained that defence had taken up very little time but that misses the point. By abandoning it as and when it did MHL recognised that it had no legal or factual merit. However it was a very serious allegation to make against a major commercial bank with very serious potential regulatory and reputation implications for both BOS and the officials involved who are all career bank officials. Similarly, an in depth analysis would have revealed that the alleged misrepresentation defence could not succeed and was bound to fail for at least the reasons I set out in the judgment at [135] to [137]. Given these considerations, the Randolph Hotel claim should never have been brought because it had been waived.

14. In any event the claim was one that was bound to fail on the facts on the basis it had been pleaded because it had been premised on the Bank having failed to accept a proposal from Starwood when in fact there was never any such proposal that was capable of acceptance in any of the various iterations considered by MHL and that was clearly understood by MHL to be so at the time – see the Judgment at [101]. There was never any proposal that was capable of acceptance and that was apparent on the face of MHL's own documents (see by way of example the Judgment at [88]) and was acknowledged to be so by its witnesses including Mr Macdonald. Mr Lord submitted that BOS had been fortunate to succeed in relation to this part of the claim. I am not able to agree. In my judgment this part of the claim was properly characterised as "*speculative, weak, opportunistic or thin*" not when viewed in hindsight but by reference to what was known to both Mr Macdonald and Mr Fraser at the time when the claim was initiated. Although Mr Lord submitted that the claim was not one of fraud (and I agree, it was not) this ignores the point that it was an allegation of bad faith by a regulated entity and its officials. Such an allegation carries with it the risk of regulatory and reputational harm to both the bank and more particularly its career officials.

15. Similar considerations apply to the Marine and Old England claims. Firstly, whilst it was submitted that this was not a claim involving an allegation of bad faith I reject that submission., The claim was one that was advanced on the basis that BOS in breach of an alleged implied term requiring it to act in good faith towards MHL. That allegations carries with it the risks for the bank and its officials referred to above.

16. Secondly, the Marine claim was not one that could properly have been brought by MHL applying the reflective loss principle. That part of the claim was bound to fail from the moment it was commended, which is why MHL sought to avoid that consequence by taking an assignment of the cause of action, amending to withdraw the claim on the basis it had been advanced originally and seeking to advance the claim by reference to that assignment. Even if, contrary to my conclusion, such an assignment was contractually permissible, the claim was still statute barred for the reasons addressed in the judgment at [234] and following. Had s.1(2) of the Law of Property (Miscellaneous Provisions) Act 1989 been considered and the 2014 facility Agreement considered in light of that provision then in my judgment it was plain that claim was barred and should not have been resurrected.

17. Aside from that, the claim failed and was bound to fail on its facts (a) because of the narrowness of the term that could properly be implied in the circumstances but in any event (b) because MHL's case depended on an assertion that there was no rational basis on which BOS could have refused to consent to the Barclays re-finance of the Manchester Hotel and that by so doing it acted in bad faith. Mr Fraser and Mr Macdonald acknowledged in the course of their evidence that the Bank was not willing to lose control of the Manchester Hotel as part of its security other than on terms that were satisfactory to it in its commercial judgment – see the judgment at [189] to [197] and [206]. It was fully entitled to do so. That being so, the claim could only reasonably have been thought to be a proper claim to bring if this point could be overcome. As Mr Mitchell put in his skeleton argument for the consequentials hearing, "… *MHL never faced up to the obvious fact that a commercial lender that was owed hundreds of millions of pounds by its borrower could never be said to be acting in bad faith in refusing to release its first charge security over one of its borrower's most valuable properties in return for a relatively small reduction in its own lending that did not de-*

risk the borrower's balance sheet at all (since the repaid borrowing was simply replaced with debt owed to another lender who wished to take a first charge)."

18. Collectively, in my judgment the claims made by MHL are properly ones that are capable of attracting an indemnity costs order by reason of them having been from the outset "*speculative, weak, opportunistic or thin*" to such an extent that it was unreasonable to a high degree to have commenced and continued with them to the end of a very lengthy trial. In my judgment that was aggravated as a factor by the changes in case and by the attempts to advance different cases to those pleaded. Now is not the time to set out each and very way this was so but it will be apparent from the judgment that this was a significant factor because of the need to anchor many of the allegations considered firmly to the manner in which they had been pleaded. It is unreasonable to a high degree to seek to advance allegations that a regulated financial entity had acted in bad faith in manners that had not been pleaded for the reasons identified above – including in particular that it exposes a defendant to such claims to the risk of adverse findings where it had not had a full and proper opportunity to defendant itself.

19. The other factor which in my judgment lifts this case out of the norm concerns MHL's approach to settlement. Mr Lord submitted that this really only became relevant (if it was relevant at all) in 2024 and thus did not justify the order being sought by BOS. Had the issue I am abound to consider been the only factor that constituted conduct outside the norm, I would have been attracted to that analysis. However, in my judgment it was not the only factor as I have explained. In any event I am not attracted to the notion that settlement only became a relevant consideration when discussions were initiated in 2024. As I have said, the claim should have been kept under constant review and particularly so once disclosure had been completed and witness statements exchanged. Before the events in 2024, there had been some contact between the parties about resolution of the dispute. At that stage no attempt was made by MHL to grapple with the detail.

20. Neither party made a Part 36 offer. However, on 24 July 2024, BOS's solicitors wrote to MHL's solicitors offering to "*… pay to MHL, within 14 days of MHL accepting this offer, the sum of £1,080,000 … inclusive of costs, interest and any VAT…*" The offer was open for acceptance until 17.00 on 14 August 2024 but by a letter of 6 August 2024, that proposal was rejected by MHL. Critically, BOS warned MHL that if this offer was not accepted then if it was successful at trial it would seek indemnity costs. At that stage, as MHL had been told, BOS's costs were over £10m.

21. On 15 August 2024, BOS's solicitors wrote to MHL's solicitors stating amongst other things that *"… (as) previously advised, these costs (in the main net of VAT) are now in excess of £10 million (and could total up to £14 million by the conclusion of the trial). In view of the speculative and thin nature of your clients' claim, which is inconsistent with the contemporaneous documents, and unsupported by the evidence, as well as the seriousness of the allegations that they make against BOS, we consider that an order for indemnity costs may well be appropriate."* No counter offer was ever put forward by MHL prior to the start of the trial. In relation to this point, MHL's solicitors responded on 4 September 2024 that "*… (o)ur clients are not going to negotiate against themselves by providing a counteroffer in circumstances where BOS's initial offer was not realistically intended to be accepted*." At the end of week 1 of the trial, MHL offered

to settle its claim for £25m plus costs. On 13 October 2024, BOS counter offered to settle by MHL paying £5m towards its costs. That counter offer was rejected.

22. In my judgment BOS's initial offer should have been accepted and it was unreasonable to a high degree for MHL not to have done so given what I have said above. To continue the brinkmanship after the start of the trial and in particular at two stages – first following the openings being completed and then following the completion of Mr Macdonald's evidence was equally so. Whilst the savings from such a settlement for each side would be progressively less they would nonetheless have been substantial.

23. In those circumstances – (i) the weakness of the claims, (ii) the withdrawal of the Botley Park claim, (iii) the failure to grapple at all with the effect on the Randolph Hotel claim of the DoW, (iv) the reliance on a duress defence in relation to the DoW that was abandoned without explanation (in my judgment because it was recognised to be unarguable both in law and fact) and a misrepresentation defence in respect of the DoW which was unarguable on anything other than a contrived construction of the email relied on, (v) the fatal absence in respect of the Randolph Hotel claim on MHL's own material of any offer from Starwood capable of acceptance, (vi) the impact of limitation in relation to the Marine Hotel claim (or of the reflective loss principle when the claim was started), (vii) the failure to grapple with the points summarised above concerning the Barclays re-finance proposal, all coupled with (viii) the failure to review the claim as it progressed or to take account of these factors in deciding how to proceed, (ix) the making of allegations that were in significant respects not pleaded and (x) the outright rejection of BOS's offer to settle at the end of July 2024 - all point to indemnity costs being an appropriate response. I accept BOS's point that the claims had no more than a fanciful foundation in or was irreconcilable with the documentary evidence available to MHL from the outset. The claim was nonetheless maintained to the end. As Popplewell J observed in <u>Essex County Council v UBB Waste (Essex) Ltd</u> [2020] EWHC 2387, since "*… questions of good faith are likely to be fact sensitive, it is difficult for a court to weed out hopeless allegations before trial…*". Whilst the question is ultimately always a fact sensitive one, when claims are brought based on allegations of bad faith, which ultimately are shown to have no proper evidential foundation, they are likely to attract indemnity costs. This claim is one where an indemnity costs order is appropriate having regard to all the circumstances set out above when viewed as a whole.

Payment On Account

24. BOS submitted that if it succeeded in its submissions that it should recover its costs on the indemnity basis then the interim payment should be 70% of the total sum it claims being £19,359,713.80. MHL submitted that if costs were to be assessed on the indemnity basis then the interim payment should be confined to 60%.

25. In support of that contention, Mr Lord submitted that particular caution was required in the circumstances of this case because of what he characterised as the "*eye watering*" amount claimed in total by BOS. He submitted that I could not safely proceed on the basis that VAT would not be recoverable by BOS, which again justified some caution. Mr Mitchell submitted that the rate BOS sought was conventional. He submitted that whilst the headline grand total claimed by BOS was high, it was to be contrasted with the claimant's total costs of about £10m, that the costs incurred by BOS were inflated

by VAT of in excess of £3m and disclosure costs of in excess of £4.7m. In relation to this last factor, Mr Mitchell repeated that of BOS's complaints about the manner in which the litigation has been conducted is that it was exposed to entirely unreasonable disclosure demands from MHL that greatly inflated BOS's costs. Mr Mitchell maintained that one account was taken of the VAT issue and BOS greater disclosure costs, its total costs claim was not significantly out of steps with the costs incurred by MHL.

26. The test that I must apply is that identified by Christopher Clarke LJ in Excalibur Ventures LLC v Texas Keystone Inc [2015] EWHC 566 (Comm) and involves estimating the likely level of recovery subject to an appropriate margin to allow for error in the estimation. MHL does not suggest that it will face any difficulty in recovering an over payment from BOS. I can safely leave that out of account. I have dismissed the application for permission to appeal as having no real prospect of success so again I can safely leave that out of account. I can do nothing other than take at face value BOS's submission that it is unable to recover the VAT it claims otherwise than from MHL. Although Mr Lord suggested that was something that was not necessarily accepted, he offered no detailed submissions as to why that might be so. Again I leave that out of account. It remains the case however that the total sum claimed is very high and in my view it is likely that even following assessment on the indemnity basis, BOS will end up recovering significantly less than it claims. This causes me to conclude that I should adopt a percentage at the lowest end of the range contended for by the parties and for that reason I direct that the payment on account should be 60% of the total sum claimed by BOS. I calculate that sum (rounded downwards in MHL's favour) to be £11.6m, which is the payment on account that I direct MHL to pay.

Disposal

27. I direct the parties to submit an order giving effect to the conclusions set out above by no later than 1630 on 28 January 2025.