Neutral Citation Number: [2022] EWHC 1802 (Ch)

BL-2020-002022

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

12 July 2022

Before:

MR JUSTICE LEECH

- -

B E T W E E N:

WILLIAM ANDREW TINKLER	**Claimant**
- and –	
ESKEN LIMITED (formerly STOBART GROUP LIMITED)	**Defendant**

- -

MR JOHN WARDELL QC and **MR JAMES McWILLIAMS** (instructed by **Clyde & Co LLP**) appeared on behalf of the Claimant.

MR RICHARD LEIPER QC and **MR DANIEL ISENBERG** (instructed by **Rosenblatt**) appeared on behalf of the Defendant.

Hearing date: 29 June 2022

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APPROVED JUDGMENT
(COSTS)

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Introduction

1. On 7 June 2022 I handed down judgment after the trial of this action dismissing the claim of Mr Andrew Tinkler to set aside the judgment of His Honour Judge Russen QC (sitting as a Judge of the High Court) dated 15 February 2019: see [2022] EWHC 1375 (Ch). In this judgment I deal with costs and other consequential matters. Where I refer to the "**Judgment**", I intend to refer to my principal judgment (rather than the judgment of His Honour Judge Russen QC). Otherwise, I adopt the defined terms and abbreviations which I used in the Judgment. Finally, where I refer to paragraphs in square brackets, I intend to cite paragraphs in the Judgment (unless I identify an alternative source).

2. On 29 June 2022 I heard the parties on consequential matters over a full day. Subject to one point, they were able to agree all consequential matters apart from four issues which were as follows:

   (1) Mr Tinkler's application for permission to appeal;

   (2) Whether Mr Tinkler should be ordered to pay the costs of the action on a standard or indemnity basis;

   (3) Whether I should order Mr Tinkler to pay interest on costs at the rate of 1% or 2% above base rates and, if so, from when; and

   (4) Whether I should dismiss a separate claim for conspiracy issued by Mr Tinkler against SGL, Mr Brady, Mr Ferguson and Mr Soanes issued under Claim No. BL 2020 002025 (the "**Conspiracy Claim**") and discharge certain related orders and undertakings.

3. In correspondence Mr Tinkler agreed to submit to an Order that he make an interim payment on account of costs of £1,689,490 by 14 July 2022. In his sixth witness statement dated 11 July 2022 ("**Tinkler 6**") he also applied for a stay of this Order over the objections of SGL. I deal with that application after dealing with the four matters which I have set out (above).

II. Permission to Appeal

4. Mr Wardell and Mr McWilliams submitted draft Grounds of Appeal (the "**Grounds of**

Appeal") in which they applied for permission to appeal on six grounds ("**Ground 1**" to "**Ground 6**"). Ground 6 consisted of 21 examples of where I was said to have made findings of fact which were "plainly wrong and unjust". However, in oral argument Mr Wardell focussed his submissions on Ground 1 and approached Ground 6 on the basis that I made the 21 errors of fact because I misdirected myself on the law. In considering the application for permission, therefore, I concentrate on Ground 1 and deal with Ground 6 only very briefly.

5. For the reasons which I now give I refuse to give permission to appeal. I am not satisfied that Mr Tinkler has a real prospect of success on any of the Grounds of Appeal and there is no other compelling reason why I should grant permission. Indeed, the need for finality in litigation is a compelling reason why I should refuse permission to appeal.

Ground 1

6. Mr Wardell submitted that I adopted an approach which was wrong in law and contrary to the judgment of Lord Sumption JSC in *Takhar v Gracefield Developments Ltd* [2020] AC 450 at [60] and [61]. He submitted that I treated Mr Tinkler's claim as a procedural application rather than as an independent cause of action in its own right. In my judgment, this submission has no real prospect of success. I tried Mr Tinkler's claim by reference to the allegations pleaded in the Particulars of Claim and (and only those allegations) and they failed in their entirety. Moreover, in trying those allegations I applied the law as set out in *Takhar*.

7. Mr Wardell also submitted that I misdirected myself in law by stating that my function was to hear and evaluate the new evidence and then decide whether the Judge's findings could stand in the light of it rather than to hear and decide the same issues again with the benefit of both the old and the new material and then ask myself in the round whether the witnesses must have deceived the Judge: see [34].

8. I accept that this was an issue of law (or an issue of mixed law and fact) but I am satisfied that Mr Tinkler has no real prospect of success. As Mr Leiper submitted, the *Highland* principles clearly support the approach which I adopted. In particular Aikens LJ stated that: "it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision". The only way in which I found it possible to apply this test was by evaluating the new evidence and then asking whether

in the light of that evidence, the Judge's findings can stand. Any other approach seemed to me to be unworkable.

9. But in any event, none of the new documents upon which Mr Tinkler relied, provided strong evidence of fraud. Instead, Mr Tinkler constructed a new narrative, namely, that Mr Brady had formed a plan to remove him from the Board in early 2018 and then tried to demonstrate that he and Mr Soanes must have covered this up and lied about it at the Trial. But most of the documents which Mr Wardell put to the witnesses to support Mr Tinkler's case theory were documents which had been disclosed in the 2018 Claim and put to the same witnesses at the Trial.

10. Indeed, Mr Ferguson's cross-examination about the notes of the meeting on 24 January 2018 and the minutes of the meeting on 25 January 2018 demonstrates why Mr Tinkler has no real prospect of success on Ground 1. Mr Wardell suggested to Mr Ferguson that he had produced a false record of those meetings by putting to him the same documents which were put to him by Mr John Taylor QC at the Trial: see the Judgment, at [81] to [88]. The Judge accepted Mr Ferguson's evidence: see the Judgment, [230]. Without new evidence to suggest that the Judge was wrong to do so, there was no proper basis or justification for me to go behind his findings. Mr Tinkler now argues that it was plainly wrong and unjust for me to accept the same evidence which the Judge accepted at trial: see the Grounds of Appeal, ¶13. In my judgment, this is fanciful.

Ground 2

11. Mr Wardell and McWilliams also submitted that I misdirected myself by following *Coghlan v Bailey* [2014] EWHC 924 (QB): see [25]. They argued that in doing so I failed to follow the *Highland* principles. I am satisfied that Mr Tinkler has no prospect of success on this point either. Contrary to Mr Wardell's submission, *Highland* supports the approach which I adopted. But in any event, I did not follow *Coghlan v Bailey* without qualification: see [26] and [459]. Moreover, neither of the findings which I made following *Coghlan v Bailey* was determinative of any of the issues in the action because I found that there was no evidence of fraud: see [432] and [437].

Ground 3

12. Mr Wardell and McWilliams also submitted that I was wrong to cite *Owens Bank Ltd v*

Bracco [1992] AC 443 at 483G-H at [24] because Lord Sumption had disapproved this passage in *Takhar* at [65]. Mr Tinkler has no real prospect of success on this issue for a number of reasons:

(1) I relied on this passage as a general statement about the importance of finality in litigation in deciding whether to follow *Highland* or *Hamilton* in relation to the test for materiality. Mr Wardell did not suggest that this was not a proper policy objective in this context. Moreover, I did not suggest that *Bracco* remained good law on the reasonable diligence test and, indeed, I made it clear that the decision pre-dated *Takhar.*

(2) But in any event, I did not have to choose between the two tests both because Mr Tinkler failed on every allegation of dishonesty and because I applied both the *Highland* test and the *Hamilton* test on each issue of materiality. Even if I was wrong to rely on *Bracco* as a matter of law, it had no effect on my decision.

(3) Finally, the point on which Lord Sumption declined to follow *Bracco* was a different one and was concerned with the reasonable diligence test and not the test for materiality or the importance of finality in litigation more generally. Moreover, he declined to follow the sentence which appears immediately before the passage which I cited.[1]

Ground 4

13. Mr Wardell and McWilliams also submitted that I adopted the wrong approach to the credibility of the witnesses by reference to my "impression of them and their demeanour". This ground has no prospect of success either. I set out my approach to credibility at [223] to [229] and Ground 4 is a very partial and inaccurate summary of those paragraphs.

Ground 5

14. Mr Wardell and Mr McWilliams criticise the judgment because I failed to resolve the many challenges which they put to SGL's witnesses. In my judgment, Ground 5

[1] "Here, it is said, there is no such fresh evidence. This is the rule to be applied in an action brought to set aside an English judgment on the ground that it was obtained by fraud."

demonstrates the fallacy in their approach throughout the trial. What they were trying to encourage me to do was to decide the same issues again on the basis of the same evidence but this time in their favour. In my judgment, this approach has no real prospect of success on appeal. Although I would not go so far as to say that it was an abuse of process, Mr Tinkler's claim was in my judgment close to limits of the *Takhar* jurisdiction to set aside a judgment for fraud.

Ground 6

15. Mr Wardell did not submit that I should consider Ground 6 separately from Ground 1 and he did not take me through any of the 21 errors of fact which he asserts that I made. But in any event, I do not accept that Mr Tinkler has any real prospect of persuading the Court of Appeal that my findings of fact were unjust or unfair. The threshold on an appeal on findings of fact from a trial judge is a high one and it is appropriate that Mr Tinkler should try and persuade the Court of Appeal that I made so many errors of fact.

III. Standard or Indemnity Costs

16. The parties agreed that Mr Tinkler would pay the costs of the action and that he would make an interim payment on account of costs of £1,689,490. The only outstanding issue on costs at the hearing, therefore, was whether Mr Tinkler should be ordered to pay costs on a standard or indemnity basis. Despite this, the parties spent almost a full day of Court time arguing this question. In my view, parties should be discouraged from spending so much Court time on a costs issue which is essentially a matter of discretion and I will attempt to deal with it as briefly as possible,

17. The Court has a discretion whether to order costs to be assessed on the standard or indemnity basis: see CPR Part 44.2 and 44.3. It is appropriate to order a party to pay indemnity costs where the conduct of the parties or other particular circumstances of the case (or both) is such as to take the situation "out of the norm" in a way which justifies an order for indemnity costs: see *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson* [2002] CP Rep 67 at [31] (Lord Woolf LCJ) and [39] (Waller LJ).

18. Conduct or circumstances will be "out of the norm" if it is something "outside the ordinary and reasonable conduct of proceedings": see *Esure Services Ltd v Quarcoo*

[2009] EWCA Civ 595 at [17] and [25] Waller LJ). Authorities on this issue usually turn on their own facts and circumstances and are usually no more than illustrations of the kind or type of case in which an indemnity costs order may or may not be appropriate: see *Bishopsgate Contracting Solutions Ltd v O'Sullivan* [2021] Costs LR 1357 at [16] Linden J).

19. The principal issue between the parties was whether there is a general practice that a party who makes an allegation of fraud and loses should pay costs on an indemnity basis. Mr Leiper and Mr Isenberg relied on the following authorities in support of this proposition: *Clutterbuck and Paton v HSBC plc* [2016] 1 Costs LR 13 (David Richards J (as he then was)) in *PJSC Aeroflot – Russian Airlines v Leeds* [2018] 4 Costs LR 775 Rose J ((as she then was)), *Stati v Republic of Kazakhstan* [2019] Costs LR 1051 (Jacobs J) and *Natixis SA v Marex Financial Ltd* [2019] EWHC 3163 (Comm) (Bryan J)

20. Mr Wardell and Mr McWilliams argued that *Clutterbuck and Paton v HSBC plc* was wrongly decided and that there was no general practice that a party who made allegations of fraud and lost was bound to pay indemnity costs. Mr Wardell pointed out that David Richards J cited no authority for this general principle and neither *Excelsior* nor *Quarcoo* was cited to him. Indeed, the only authority to which he referred was the decision of Lightman J in *Jarvis plc v PricewaterhouseCoopers* [2000] 2 ECLC 368. Mr Leiper provided me with a copy after the hearing and it is clear that it was concerned with the late withdrawal of serious but unjustified allegations (as was *Clutterbuck* itself).

21. I consider it unnecessary to decide whether *Clutterbuck* was wrongly decided or whether there is a general practice that a party who alleges fraud and loses should pay costs on an indemnity basis. Mr Leiper did not argue that this was an invariable rule or practice and the difference between the parties was really about my departure point. Mr Leiper argued that I should start my enquiry on the basis that Mr Tinkler should pay indemnity costs and ask myself whether there was anything to displace that view. Mr Wardell submitted that I should start my enquiry on the basis that he should pay standard costs and ask myself whether there was any reason to treat his conduct or the circumstances as "out of the norm".

22. Mr Tinkler fought the 2018 Claim and lost. The Trial was expedited, the Judge heard it over 11 days and gave a very detailed and fully reasoned judgment in which he made

findings both for and against Mr Tinkler. But overall Mr Tinkler lost. He applied for permission to appeal and lost again. In my judgment, that really should have been the end of the matter. However, Mr Tinkler tried again before me.

23. To set aside His Honour Judge Russen QC's judgment, Mr Tinkler was prepared to make allegations of perjury, deliberate non-disclosure and deliberate destruction of documents against Mr Brady, Mr Ferguson and Mr Soanes and Mr Coombs. As Mr Leiper submitted, they all stood to lose their reputations and face criminal prosecution if he succeeded. Mr Wardell submitted that this would have been an inevitable consequence if Mr Tinkler succeeded. But that did not justify Mr Tinkler making such serious allegations when he lost and he lost on every single one.

24. At the hearing on 29 June 2022 I went out of my way to make it clear that I was not critical of the conduct of Mr Tinkler's solicitors and counsel. Indeed, I paid tribute to the skill and probity with which Mr Wardell had presented his case. Moreover, Mr Leiper did not submit that the claim was unarguable and should have been struck out and I considered that there was a strong circumstantial case against Mr Brady in relation to the deletion of his WhatsApp messages: see [317]. If I had found against him on this issue, it might have had a profound effect on the outcome.

25. In my judgment, it was out of the norm to bring a second claim and to make allegations of perjury, non-disclosure and deliberate destruction which failed. Moreover, I have reached that conclusion whichever departure point I take. I have, however, considered whether the skill with which Mr Tinkler's solicitors and counsel conducted the case would justify me making an order for costs on a standard basis only. In my judgment, it remains appropriate to make an order for indemnity costs for the following reasons:

    (1) Mr Tinkler made very serious allegations and he lost comprehensively. Although I accept that there were one issue on which he was able to advance a strong circumstantial case and others which I had to consider carefully, there were many other allegations which were both weak and speculative. For instance, by trial Mr Tinkler had little or no basis for pursuing the allegation that Mr Ferguson deliberately deleted emails from his Wilton Park account and he should have withdrawn it: see [386].

    (2) Mr Tinkler withdrew the allegation of dishonesty against Mr Coombs at trial

without apology or explanation and this allegation should never have been made. He also withdrew the allegation that Mr Brady deliberately suppressed the Briefing Note at the start of the trial. It is clear that the original allegation was based on a misunderstanding about its date of creation and, again, this allegation should never have been made either.

(2) Most of the new documents upon which Mr Tinkler relied in this action were peripheral and had little probative value. As I have made clear in refusing permission to appeal, Mr Tinkler was in substance using them as an excuse to relitigate the same issues on the same evidence. It is also clear from the Grounds of Appeal that even now he is not prepared to accept the decision of His Honour Judge Russen QC or, indeed, my own decision in relation to any of these same issues.

(3) A principal difference between an order for indemnity costs and an order for standard costs is that CPR Part 44.3(2)(a) does not apply and the Court is not required to disallow costs which are not proportionate. In my judgment, these few examples show that Mr Tinkler's conduct in bringing a second claim to set aside His Honour Judge Russen QC's judgment was so lacking in proportionality that it justifies an order for indemnity costs however well it was presented at trial.

III. Interest on Costs

26. Under cover of a letter dated 23 June 2022 Rosenblatt sent a revised draft Order to Clyde & Co. The draft Order contained the following terms:

> "1. The Claim is dismissed.
>
> 2. The Claimant shall pay the Defendant's costs of the Claim, such costs to be subject to detailed assessment on the [indemnity] basis if not agreed.
>
> 3. The Claimant shall pay the Defendant the sum of £1,689,490 on account of its costs of the Claim by 14 July 2022.
>
> 4. The Claimant shall pay interest on all costs incurred by the Defendant at the rate of: a. 2% per annum above the Bank of England base rate prevailing from time to time from the dates of payment by the Claimant until 29 June 2022; b. 8% per annum from 29 June 2022 until the date of payment by the Defendant."

27. By letter dated 27 June 2022 Clyde & Co replied stating: "We agree the draft wording of

the Order attached to your letter dated 23 June 2022." It is clear from their Skeleton Argument that Mr Leiper and Mr Isenberg considered the issue of interest and costs to be agreed but in their Skeleton Argument Mr Wardell and Mr Isenberg sought to argue that the Court should award interest at 1% above the Bank of England base rate and that interest on costs should only be payable from 29 September 2022.

28. In my judgment, there was agreement between the parties about the rate of interest and the dates from which it should be payable and it is not open to Mr Tinkler to argue the contrary now. Mr Wardell suggested that Clyde & Co had made a mistake. But he did not seek to persuade me that the agreement between the parties was not binding. Moreover, he did not put any evidence before the Court to explain how the mistake was made or why the Court should not give effect to the agreement.

29. In my judgment, it is appropriate to give effect to the parties' agreement. I am satisfied that there was a binding agreement between the parties as to the terms of the Order with the exception of the basis of assessment (which explains why the word "indemnity" was in square brackets). But even if it did not take effect as a contract, I am satisfied that I should give effect to the agreement as a matter of case management. The Order which SGL sought and to which Mr Tinkler agreed was not unusual and CPR Part 1.3 provides that the parties owe a duty to help the Court to further the overriding objective. This requires parties to assist the Court by agreeing consequential matters wherever they can and not to be permitted to re-open issues without a good reason.

IV. The Conspiracy Claim

30. Mr Leiper submitted that I should strike the Conspiracy Claim and make a number of consequential orders including orders for costs. I decline to do so. On 26 November 2020 Chief Master Shuman made an Order that all further proceedings in the Conspiracy Claim shall be stayed until this action had been concluded in its entirety and all rights of appeal had been exhausted. That point in time has not been reached and the stay continues in force until the Court of Appeal finally determine any appeal against the Judgment.

V. The Stay Application

31. By email dated 6 July 2022 Mr McWilliams wrote to the Court stating that Mr Tinkler intended to make an application to stay the order for the payment of £1,689,490 on

account of its costs of the Claim by 14 July 2022 because of his concerns about SGL's ability to repay that sum. I invited SGL to respond and by email dated 6 July 2022 Mr Leiper wrote to the Court objecting to me hearing such an application. He copied this email to Mr Wardell and Mr McWilliams. On 11 July 2022 and despite those objections Clyde & Co filed Tinkler 6 in which Mr Tinkler applied to stay the order for payment.

32. I have read Tinkler 6 and its exhibit. I am not prepared to entertain Mr Tinkler's application for the following reasons:

(1) The primary basis upon which Mr Tinkler now seeks a stay is that SGL's annual report suggests that it will be unable to repay that sum if Mr Tinkler is successful on appeal. However, it was published on SGL's website on 13 June 2022. If he wished to make an application to stay the interim payment, he could and should have made that application at the hearing on 29 June 2022.

(2) It is Mr Tinkler's evidence that he did not appreciate how desperate SGL's position was until SGL itself applied for a stay of an interim payment in the related proceedings before His Honour Judge Cawson QC. I do not accept that evidence (or not without considerable qualification). The basis on which SGL made that application was not that it was unable to pay but that SCL would be unable to repay it if it (SGL was successful on appeal).

(3) But even if it was the case that Mr Tinkler only appreciated SGL's position on 24 June 2022, he had sufficient time to make an application before me at the hearing on 29 June 2022 or to ask for time to make that application. He does not explain why he did not give instructions to his solicitors and counsel to make that application or why he agreed to the draft Order (above) in the meantime.

(4) In their letter dated 27 June 2022, and after Mr Tinkler became aware of SGL's position (even on his own case), Clyde & Co unequivocally agreed to an order on Mr Tinkler's behalf that he should make an interim of £1,689,490 on account of its costs of the Claim by 14 July 2022. In my judgment Mr Tinkler should be held to that agreement for the reasons which I have given.

33. I add that Mr Tinkler asked me to delay handing down this judgment until after he had submitted his application for a stay on Monday 11 July 2022. By doing so, he took the

risk that I would hold him to his agreement order him to make the interim payment by Thursday 14 July 2022. Given the proximity of that date, I would be prepared to consider an application to extend time for a short period (e.g. 7 days) subject to any further objection by SGL. However, as things stand Mr Tinkler must make the payment on 14 July 2022.

V. Disposal

34. I will, therefore, make an Order in the terms of the draft Order which I have set out (above) subject to two additions. The square brackets around the word indemnity will be removed and the Order will record that I have dismissed Mr Tinkler's application for permission to appeal. I invite SGL's solicitors and counsel to submit an Order for approval and sealing as soon as possible.