

Part 36 Civil Procedure Rules and Indemnity Costs

Introduction

What happens about the costs of a party who have been successful at the end of a legal case?

The Court has a very wide discretion in this area. However there is a general rule: this is that “costs follow the event”.

This means that the winning party may legitimately expect to be awarded a costs contribution from the losing party.

It is generally a contribution only towards costs. There are sound policy reasons for imposing this restriction. Its main aim is to prohibit or deter wealthy litigants from deploying threats of heavy costs consequences either to derail a party with a genuine claim or to bludgeon them into submission.

There are however rare occasions when a Court will be persuaded to do more than order a costs contribution.

A Judge may decide to make an award upon the **indemnity basis**. If this occurs, the party with the benefit of the Order will look to receive most of its outlay from their unsuccessful opponent.

The area is complex. There are no hard and fast rules which can be drawn. Much depends upon the individual facts.

However, it may be helpful to examine a recently reported case on the question of indemnity costs.

1. *Beattie*

The case of *Beattie Passive Norse Limited* [Beattie] and *NPS Property Consultants Limited* [NPS] v. *Canham Consulting Limited* [Canham] [2021] EWHC 1414 is a case in point on indemnity costs.

In summary Claimants Beattie and NPS sued Canham for damages. The claims totalled approximately £3.7million.

The brief facts were these:

Beattie had constructed two blocks of flats. They had employed a specialist sub-contractor: *Foxdown* [F]. The work had been done so poorly that ultimately – whatever the arguments between the parties – it was necessary to demolish both blocks.

Beattie alleged that this had all been due to Canham's negligent design. In point of fact, it emerged that Canham's design had never been used to construct the blocks.

Rather, Canham had utilised drawings issued by F, which had related to an earlier (and superseded)

design. Canham, it seems had been misled : those drawings had been stamped "*Issued for Construction*".

2. *Damages:*

The claims for damages brought by NPS were dismissed.

The Court awarded Beattie £2,000 in relation to its claim of £3.7m. However, this relatively modest amount related to the cost of works to remedy the negligent omission by Canham of dowel connections from the design drawings actually used by F.

3. *Canham and Part 36 Offers:*

Before trial Canham made two offers under what is known as the "*Part 36*" Civil Procedure Rules (CPR). The CPR came into force in 1999. They govern the way in which legal proceedings are conducted in England and Wales.

The CPR is divided into various Parts. Part 36 is a rigid code for enabling a party to make a financial proposal to settle all (or a specific part of) a dispute. It attracts costs consequences if for instance a Part 36 Offer is rejected and not effectively *beaten* by the financial outcome at trial.

Canham's first Part 36 offer was to pay both Beattie and NPS £50,000 plus costs. This was open for acceptance until 11 January 2021 : "*the First Offer*".

Canham made a second Part 36 offer. On this occasion it increased its proposal to £110,000 : "*the Second Offer*".

4. *Award of Damages: £2,000*

As the Court award of damages had only been £2,000 Canham were content – for Part 36 purposes - to rely upon the First Offer when it came to the costs consequences of non-acceptance.

Canham had *beaten* the amount of the First Offer.

Under Part 36 and as a consequence, Canham were entitled to be paid a contribution towards their costs from the last date available for acceptance (11 January 2021) with each Claimant [Beattie and NSP] being entitled to their costs up to that date. That would have been the conventional outcome of the strict application of the provisions of Part 36.

However, this was not a conventional case. Canham did not seek a conventional Costs Order. Instead Canham sought payment of all of its costs and on the indemnity basis. Canham supported their request with reasons.

5. *Canham's reasons*

Canham put forward the following arguments:-

- (1) The foundations constructed by F were not of its design. This primary defence had been wholly ignored by both Beattie and NPS during the currency of the litigation and the consequent trial.
- (2) In comparison with the legal costs generated by the dispute, an award of £2,000 was negligible and well below the Small Claims limit.
- (3) There were criticisms of the Claimants' expert evidence such as might justify an award of indemnity costs.
- (4) The claims had been brought by Beattie without the express authority of its Board of Directors.
- (5) Last but not least, both Beattie and NPS had refused opportunities to narrow the various items in dispute and had wholly ignored a Notice To Admit Facts served by Canham which – had it been answered – would have served to highlight the fact that Canham had not been responsible for the design of the defective foundations (and accordingly corroborate Canham's case that the claims against them were devoid of merit).

6. *Caveat*

This paper does not seek to explore in detail the arguments between the parties and the Court's subsequent reasoning.

A summary of essentials only is given.

With reference to earlier reported legal cases, the Court stated that in order to justify an award of indemnity costs: -

"It is crystal clear that there must be something that takes the case out of the norm". This is the critical requirement.

7. *Three Rivers*

The Court paid due regard to earlier reported authorities on this question.

One of these was *"Three Rivers [2006] EWHC 816 (Comm)*. In this case the Court pointed out that if a Claimant chose to pursue speculative, weak or opportunistic claims they necessarily assume a high risk and might well expect to be saddled with an indemnity costs Order in the event of failure.

The Court helpfully listed examples of circumstances which would bring a case out of the norm. This might be where a Claimant: -

- (a) advances and aggressively pursues serious and wide-ranging allegations of dishonesty or impropriety over an extended period of time.
- (b) pursues the conduct in (a) despite lack of any evidential foundation and maintains its allegations without apology to the bitter end.

- (c) actively seeks to court publicity for such allegations both prior to and during trial.
- (d) turns a case into an unprecedented factual enquiry by the pursuit of unjustified claims.
- (e) pursues a claim which is most charitably thin and in some respects far-fetched.
- (f) pursues a claim irreconcilable with contemporaneous documents.
- (g) commences and pursues large scale and expensive litigation calculated to exert commercial pressure on an opponent (and during the course of trial advances a constantly changing case to justify the allegations earlier made) only then to suffer a resounding defeat.

8. *European Strategic Fund Limited v. Skandinaviska Enskilda Banken [2012] EWHC 749 (Comm)*

This was a case where indemnity costs were awarded having regard to certain of the factors listed in paragraph 7.

However the Court entered a "caveat": the fact that a Claimant may lose a massive claim (and does so badly) is *not of itself a reason* to justify an Order for indemnity costs. Cases may involve very large sums which founder on sharp juridical rocks, a not uncommon consequence of litigation in the commercial courts. Much will depend upon the circumstances of the individual case.

9. *Beattie : particular features*

There were aspects of Beattie's conduct of the litigation which were telling:-

- (1) They had pursued an unjustified case because they knew from the beginning that the foundations had not been constructed to Canham's latest design.
- (2) The claims had been extraordinarily exaggerated: put at £3.7million but resulting in a quite modest award of £2,000 when all was said and done.
- (3) The failure by Beattie to respond candidly and openly to Canham's separate Request for Information relating to the basis upon which the Claimants were putting their case.

Request 22 referred to the Claimants' case that there had been "*significant deficiencies in the design and therefore the construction of the foundations*".

In Request 22 Canham asked "*is it the Claimants' case that the foundations (including the ground beams and any connecting features) were constructed in accordance with the Defendant's [Canham's] design?*"

The Claimants answered thus:-

"*Yes, as far as the details in the design could be discerned*".

The Court held that the evidence given on behalf of the Claimants was such as to show that the Claimants knew that the foundations had not been so constructed.

Accordingly the Court found that the answer which had been given to Request 22 was "*completely factually inaccurate.*" and "*This is a more polite way of saying directly untrue.*"

10. *Judgment in Beattie*

The Court concluded the justice of the case required:-

- (1) No Order for costs at all to the date of Canham's Request for Further Information and
- (2) Thereafter Canham was entitled to recover all of its costs from 13 March 2020 onwards (the date of service of its Request for Further Information). This encompassed the period up to the making of the First Offer; the period when that offer was open for acceptance and the period after. Such costs were to be assessed on the *indemnity basis*.

The Court made this Order on the basis that "*the Claimants were conducting the litigation on a wholly false factual basis, something which must have been known to the Directors of both the Claimant companies*". The Claimants' pleading (their Answer to Request 22) was "*positively untrue*".

This case serves as a salutary example of the need to look closely at the terms of any Part 36 Offers put and to engage openly, promptly and without fear or favour in connection with all aspects of a legal dispute whether or not proceedings have begun.

In the respectful view of the author, this duty continues throughout the currency of dispute unless and until resolved whether by agreement or Judgment following trial.

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