

# Indemnity Costs

White Paper Conference  
March 2022

Jamie Carpenter QC  
Hailsham Chambers

# The Framework

- CPR 44.3(1)
- Does the conduct of the case or its circumstances take it “out of the norm”?
- *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson* [2002] EWCA Civ 879

# Three Categories

- (1) Pursuit of a weak claim
- (2) Failure to accept an offer of settlement
- (3) Poor litigation conduct

# Pursuit of a Weak Claim

- *Lejonvarn v Burgess* [2020] 4 WLR 43
- “speculative, weak, opportunistic or thin” (*Three Rivers District Council v Governor & Company of the Bank of England* [2006] EWHC 816 (Comm))

# Pursuit of a Weak Claim

Coulson LJ:

*“the central element of this debate is whether or not, prior to trial, the respondents (or their advisors) should have realised that these were speculative/weak claims which were most unlikely to succeed and that, in pursuing them to trial, their conduct was out of the norm...”* (at [46])

# Pursuit of a Weak Claim

*“the judge should ... have been asked to consider whether, at any time following the commencement of the proceedings, a reasonable claimant would have concluded that the claims were so speculative or weak or thin that they should no longer be pursued” (at [54])*

*“lacked credibility and conviction”*

# How Weak is Weak Enough?

- *Bailey v GlaxoSmithKline UK Ltd* [2020] EWHC 1766 (QB) – Lambert J
- *Lejonvarn* not in tension with *Kiam v MGN Ltd (No 2)* [2002] 1 WLR 2810
- Pursuing a weak, but arguable claim would not per se justify indemnity costs

# How Weak is Weak Enough?

- *De Sena v Notaro* [2020] EWHC 1366 (Ch) – HHJ Paul Matthews
- *“This really was a weak case with very little substance to it. At least once the defence was served, and even more so when disclosure was given, it should have been obvious that the claim would fail, both on the facts, but also on the law”* (at [22])

# Other Relevant Factors

- Pursuit of a dishonest claim
  - *Beattie Passive Norse Ltd v Canham Consulting Ltd* [2021] EWHC 1414 (TCC)
  - *Bishopsgate Contracting Solutions Ltd v O’Sullivan* [2021] EWHC 2628 (QB)
- Litigation as punishment
  - *Lejonvarn*
  - *Bishopsgate*

# Avoid Hindsight

- “Cases involving very large sums which founder on sharp judicial rocks are not automatically outwith the norms of this court”
  - *Excalibur Ventures v Texas Keystone Inc* [2013] EWHC 4278 (Comm) – Christopher Clarke LJ at [7]
- *Hyde v Nygate* [2021] EWHC 1150 (Ch)
  - Indemnity costs on one issue

# Defendant Prophylaxis

- *“In my judgment the court should not encourage prophylactic applications for summary judgment or to strike out for fear of a later application for indemnity costs being refused”*
  - *De Sena v Notaro* [2020] EWHC 1366 (Ch) – HHJ Paul Matthews at [19]

# Failed Allegations of Dishonesty

- *Clutterbuck v HSBC* [2015] EWHC 3233 (Ch)
- Not an automatic entitlement but may be relevant: *Bishopsgate Contracting Solutions Ltd v O'Sullivan* [2021] EWHC 2628 (QB)
- Also allegations of commercial sharp practice: *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 2387 (TCC)

# Weak Defences

- More lenient?
- *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 2387 (TCC)
  - *Weak/opportunistic counterclaim justified indemnity costs for whole proceedings*

# Failing to Accept an Offer

- *Kiam v MGN Ltd (No 2)* [2002] 1 WLR 2810: “It will be a rare case indeed where the refusal of a settlement offer will attract under Part 44 not merely an adverse order for costs, but an order on an indemnity rather than standard basis” (Simon Brown LJ at [13])

# Failing to Accept an Offer

- *Hislop v Perde* [2019] 1 WLR 201
  - “Indemnity costs are appropriate only where the conduct of a paying party is unreasonable ‘to a high degree’”
  - “Unreasonable in this context does not mean wrong or misguided in hindsight”  
(Coulson LJ at [36])

# Failing to Accept an Offer

- *Lejonvarn v Burgess* [2020] 4 WLR 43
  - “At any stage from the date of the offer to the date of the outcome, was there a point when the reasonable claimant would have concluded that the offer presented a better outcome than the likely outcome at trial?”

(Coulson LJ at [80])

# *Lejonvarn* in Practice

- *Blackpool Borough Council v Volkerfitzpatrick* [2020] Costs LR 1295
  - “not unreasonable to a high degree ... for the claimant to decide that it had a reasonable prospect of obtaining more by pushing on”  
(HHJ Stephen Davies at [59])
- *Philip Warren & Son Ltd v Lidl Great Britain Ltd* [2021] EWHC 2372
  - Reasonable to expect a higher offer

# A Rare Example

- *Optical Express Ltd v Associated Newspapers Ltd* [2017] EWHC 2707 (QB)
- Continued pursuit was “*wholly disproportionate to the value of the claim*”  
  
(Warby J at [52])

# Litigation Conduct

- Three caveats:
  - Time-consuming
  - Limited/disproportionate consequences
  - People in glass houses...
- Experts may be more promising:
  - *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 2387 (TCC)
  - *Hyde v Nygate* [2021] EWHC 1150 (Ch)

# Indemnity Costs and CMOs

**3.18** In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –

(a) have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings;

(b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so; and

(c) take into account any comments made pursuant to rule 3.17(3) and recorded on the face of the order.

# No application of CPR 3.18

- *Cf Elvanite Full Circle Ltd v AMEX Earth & Environmental (UK) Ltd* [2013] EWHC 1643 (TCC) – Coulson J
- *Lejonvarn v Burgess* [2020] 4 WLR 43 – Coulson LJ – see para 96

# But the Budget is Relevant

- CPR 44.4(3)(h)
- *Lejonvarn* at [89]: “in many cases, the approved costs budget will be the appropriate starting point for the final costs assessment”

# Claiming More than the Budget

- Consider why the budget was exceeded?
- Focus on eliminating proportionality?
- Did proportionality feature in the costs management process?
- Are the costs claimed proportionate?
- Was there a failure to update the budget?

# Assessing Below the Budget

- *Mauge v Curtis* (HHJ Dight, CLCC, 10.01.22)
  - Master wrong to hold budget irrelevant
  - Relevant that both parties had very similar hourly rates in their budgets

# The Law of Unintended Consequences

- Because of the approach to standard basis assessment following *Harrison*, might you be worse off with indemnity costs?
- Can you ask for only incurred costs on the indemnity basis?
- Can a claimant who beats their own Part 36 argue against indemnity costs?

# Indemnity Costs

White Paper Conference  
March 2022

Jamie Carpenter QC  
Hailsham Chambers