Case No: 2005 FOLIO 130

Neutral Citation Number: [2006] EWHC 2531 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday 17th October 2006

Before:

MR JUSTICE CHRISTOPHER CLARKE

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Between:

BALMORAL GROUP LIMITED	**Claimant**
- and -	
(1) BOREALIS (UK) LIMITED	**Defendants**
(2) BOREALIS AS	
(3) BOREALIS A/S	

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Mr Richard Mawrey QC & Mr Ross Fentem (instructed by **Moon Beever**) for the **Claimant**
Mr David Allen & Mr Charles Holroyd (instructed by **Kennedys**) for the **Defendants**

Hearing dates: 6th October 2006

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Approved Judgment

MR JUSTICE CHRISTOPHER CLARKE:

1. Balmoral lost the action. They will have to pay the costs. The question I have to decide is whether they should pay the costs, or some of them, on the standard or the indemnity basis. The basic rule is that a successful party is entitled to his costs on the standard basis. The factors to be taken into account in deciding whether to order costs on the latter basis have been helpfully summarised by Tomlinson, J., in *Three Rivers District Council v The Governor and Company of the Bank of England* [2006] EWGC 816 (Comm). The discretion is a wide one to be determined in the light of all the circumstances of the case. To award costs against an unsuccessful party on an indemnity scale is a departure from the norm. There must, therefore, be something – whether it be the conduct of the claimant or the circumstances of the case – which takes the case outside the norm. It is not necessary that the claimant should be guilty of dishonesty or moral blame. Unreasonableness in the conduct of the proceedings and the raising of particular allegations, or in the manner of raising them may suffice. So may the pursuit of a speculative claim involving a high risk of failure or the making of allegations of dishonesty that turn out to be misconceived, or the conduct of an extensive publicity campaign designed to drive the other party to settlement. The making of a grossly exaggerated claim may also be a ground for indemnity costs.

2. In this case Balmoral lost badly. On most of the issues I found against it. That does not necessarily mean that it must pay costs on an indemnity scale. But Borealis contends that there are a series of circumstances, which, looked at as a whole, amount to a pattern of unreasonable behaviour which make it just to order costs on that basis. Such an order is not a punishment. But it will mean that Borealis recovers a higher percentage of what it has had to pay in costs than would be the case on the standard basis. This is because the incidence of the burden of proof is different and because, in the case of costs on the indemnity scale, proportionality does not feature as an expressed criterion. It is only just, Borealis submits, that costs should be awarded on this basis in the light of Balmoral's behaviour and the costs to which Borealis has thereby been exposed.

3. In essence Borealis says that Balmoral adopted an unreasonably obdurate approach to the litigation from the start and unreasonably disregarded the interests of the Borealis defendants. This approach was manifested by Balmoral's pre-action publicity, by the presentation of a grossly exaggerated claim, by an unreasonable failure to make efforts to settle, and by the character of the technical evidence adduced.

4. As to *pre action publicity,* in 2003 Balmoral recalled a large number of its borecene made fuel tanks. In the course of so doing it stated that the materials used during the period when the tanks were manufactured created the problems, or that the raw material of the tanks was suspect, or similar expressions. No complaint is made of the product recall or the giving of publicity about tank failures. What is complained of is a public prejudgment of the issue which was to be determined in the action as to whether the tank failures were caused by the material or something else.

5. I do not regard the fact that Balmoral spoke publicly of their problems being due to suspect raw material (which the industry would know meant borecene) as unreasonable in the circumstances. Tanks were cracking in increasing numbers; members of the public were concerned; as was, increasingly, the Environment Agency. Balmoral believed that borecene was the cause of the problem. It had not had anything like this trouble with

previous materials; other manufacturers were having similar problems using it; and RAPRA's advice was that it was the material that was to blame. In those circumstances it was not unreasonable for Balmoral to say what it did. Indeed it seems to me somewhat unrealistic to expect Balmoral to recall large numbers of tanks without explanation as to why they were suspect.

6. On 13th January 2005, after proceedings had been begun in May 2004, Balmoral wrote to the chief executive of Borealis A/S in Denmark, with copies to Borealis' shareholders, referring to its claim in these proceedings. The gist of the letter was to point out that the tanks were a continuing threat to the environment because of the risk of leakage and that something had to be done in a shorter time frame than that of the litigation. The letter proposed a mediation in the penultimate week of January and said that if a mediation could not take place in the week beginning 24th January 2005:

> *"…the Directors of Balmoral will have no option but to go public with information on the defective Borealis raw material to the industry, its Regulators, and customers. This will include information on Borealis raw material problems incurred by other tank manufacturers ….including but not limited to* [4 named manufacturers]. *Given that Balmoral has sold oil tanks in other European countries Balmoral will have no option but to include those countries within the media campaign."*

7. This was a clear threat to contact Borealis' customers and the industry regulators and to mount a campaign in the media, the intended purpose of which must have been to put pressure on Borealis to settle. Borealis contends that this was an unjustified prejudgment of the issue - put forward in disregard of its legitimate rights not to have pre-trial by media.

8. I am not however persuaded that Balmoral so overstepped the mark that I should award indemnity costs on that ground. Firstly the fact that a claimant puts his case to, and in, the media is not of itself a ground for indemnity costs. Much depends on how he does so. A litigant must not put improper pressure on another litigant to abandon a defence; and, even if what he does falls short of contempt, he may find that his conduct leads, or contributes, to the making of an order for indemnity costs. But much depends on the circumstances. Secondly, I bear in mind that Balmoral was facing acute financial difficulties at this stage and was desperate to get some movement on what it viewed as a well founded claim for severe financial loss. Thirdly, I have no evidence that the threat – and it was only a threat - contained in the letter matured into an improper campaign. Borealis replied 6 days later rejecting what it described as Balmoral's presumption about responsibility for the tank failures, stating that the threat to go public would not persuade it to follow any course that it did not consider appropriate, and declining mediation until an appropriate time. Thereafter, so far as the evidence shows there was no campaign.

9. As to *exaggeration* of the claim, Balmoral's claim as finally put forward was valued at over £60 million, a figure which grew from an initial £10 million. That figure included two matters – environmental claims (unquantified) and overseas claims (about £11 million) – that were not dealt with at the trial. Shortly before the trial Borealis valued Balmoral's claim on the matters the subject of my judgment as being worth about £12 – 13 million. Borealis told Balmoral that it had done so when it made a payment in, and said that that the sum paid into court was therefore generous to Balmoral in terms of risk

assessment. Borealis' accountant has subsequently estimated that, on the findings as to quantum set out in my judgment (which assumed that all of Borealis' defences failed), the claim was about £16.6 million or about 1/3rd of the figure claimed for the items with which I dealt. So Borealis' estimate was not that far off. However you look at it, and even allowing for the fact that the £60 million includes overseas claims, the claim was grossly exaggerated. This, Borealis submits, was as a result of the unbending determination of Balmoral in the person of Mr Joyce, Balmoral's Managing Director, and Dr Milne, its Chairman, to stick to the line that figures of this kind were realistic. This included the ridiculous contention that a 30% year on year continuing increase in turnover would, but for the tank failures, have been achieved.

10. Against that Mr Richard Mawrey, Q.C., for Balmoral points out that, on the footing that I am wrong on liability, I have made an award under each of the headings of loss in respect of which Balmoral claimed. The amount that would have been awarded, had all of Borealis' defences failed, would have comfortably exceeded both the payment in and Borealis' calculation as to the claim's worth. Further a major part of the reason for the shortfall between the amount claimed and the amount awarded is that I have not accepted that Balmoral would, but for the tank failures, have achieved a year-on-year cumulative straight line increase in turnover[1] of 10 %, 20% or 30%, with consequent loss of profit. These claims, he submits, were in no way absurd, and, as important, they were relatively easy to deal with. They relied on a projection from an existing profit figure as the base line. A 10% increase could, on no view, be regarded as a fanciful estimate. A 20% figure, for which in the end Miss Hassell, his expert accountant, plumped, and a 30% figure, which she thought possible, were simply further extrapolations. The bulk of the evidence in this area related to Balmoral's view of the market and its prospects and expert evidence on what trends could be discerned. Further, even if the entire loss of profit was stripped out, Balmoral would still have beaten the payment in, had all of Borealis' defences failed.

11. So far as the *failure to settle* is concerned there is an issue between the parties as to whether a claimant's failure to accept a Part 36 payment which is greater than that which he later recovers, is a relevant factor in deciding whether costs should be on an indemnity scale. Balmoral submits that there is a distinction in the rules and practice between the position of an unsuccessful claimant and that of an unsuccessful defendant. A claimant who does not accept a Part 36 offer made by the defendant or a payment into court and who then fails to beat the payment in will usually have to pay the costs of the defendant from the latest date on which he could have accepted the payment in without permission, on the standard basis: *Rule 36.20*. The fact that that will usually be the order is the incentive to encourage the claimant to settle. If the claimant makes a Part 36 offer and the defendant refuses to accept it the Court may order indemnity costs against him: *Rule 36.21*. That is the incentive to encourage a defendant to settle. In each case the rule provides for a departure from the norm – that a successful claimant recovers his costs or that an unsuccessful defendant pays costs on the standard scale – in order to promote a settlement and to encourage the acceptance of offers that ought to be accepted.

[1] Inadequate proof reading of the sub-paragraphs of paragraph 509 of my judgment has left in an erroneous reference to a loss of profit as opposed to a loss of turnover, as well as infelicitous references to losing a loss. Happily the overall sense of the paragraph is clear.

12. The reference to indemnity costs in *Rule 36.21* and the absence of any such reference in *Rule 36.20* show that normally a claimant who does not beat the payment in does not have to pay indemnity costs. In *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer* [2002] EWCA Civ 879 the Court of Appeal so held. But, as that case makes plain, there can be surrounding circumstances that make continuance of the claim after the making of a payment into Court unjustified and such as ought to attract indemnity costs. In that case the claimant continued with a speculative claim upon which he recovered £2 from one defendant and nothing from another after failing to accept £100,000 paid in. Such conduct was held sufficient to attract indemnity costs. Similarly in *CAT Ltd v Abbott Biotechnology Ltd* [2005] EWHC 357, Laddie J awarded indemnity costs against a defendant who had run an "*extremely thin and high risk defence*" which was virtually impossible to reconcile with the contemporaneous documents.

13. The position is, therefore, that the mere fact that a defendant has made a Part 36.20 offer and the claimant recovers less is not sufficient to attract indemnity costs. But, when taken with other things, the refusal to accept the payment in may make it just to order costs on an indemnity scale.

14. Mr David Allen for Borealis invites me to look at the position in November 2005 when the £7 million was paid in. At that stage, he submits, Balmoral had put forward an inflated claim. It had grown from £10 million in 2003 to over £60 million. His clients had evaluated the claim at £12 - £13 million. Balmoral could have done the same. On the liability side Balmoral faced serious difficulties in the light of the evidence of Capcis, Borealis' technical experts; and, particularly, of Professor Crawford, whose rotomoulding expertise Balmoral recognised. In addition it faced serious difficulties so far as the incorporation of Balmoral's standard terms was concerned since, if they were incorporated, they would, unless the Unfair Contract Terms Act could be relied upon, be a bar to recovery of anything but the price of the goods. In those circumstances the offer made was a very reasonable offer. It was not accepted nor was any counter offer made. Balmoral simply continued with the claim which became incapable of settlement at a reasonable level.

15. Mr Mawrey submitted that there was nothing sufficiently out of the ordinary in this case that would justify indemnity costs. He further reminded me that this was not a case where there had been no attempt to settle. A mediation took place in November 2005 and, whilst the details of what happened then must be unknown, the fact that Balmoral participated in it cannot be ignored[2]. Balmoral believed, and still believes, that it had a very strong claim which it sought to prove. It should not be subjected to indemnity costs because it failed to accept a 50% discount on Borealis' estimate of the value of its claim, and an even greater discount on mine.

16. Borealis next rely on the deficiencies in Balmoral's *expert evidence*. This was a case in which expert evidence was always going to be either crucial or, at least, very important. The way in which Balmorals' expert Mr Clements' evidence was put forward, its deficiencies (always to the benefit of Balmoral) and my criticisms of it are set out in my judgment. Borealis points to the fact that, in the light of the way in which that evidence was put forward, it had to spend an inordinate amount of time trying to understand what

[2] In one sense this is unsatisfactory. I have no way of knowing whether one side or the other behaved with complete reasonableness or gross and unyielding irrationality or somewhere in between. But that is a necessary consequence of a mediation which for sound reasons is confidential.

the evidence meant and, when it had done so, to unravel it sufficiently to reveal its fallacies. Borealis discovered Mr Clements' contradictory evidence in the separate DESO proceedings only by chance. When RAPRA's report in those proceedings was discovered Borealis' counsel took the view that, until I ordered the production of RAPRA's report in the DESO action in these proceedings, they were not at liberty to show it to their expert and had therefore to work out its implications without his assistance *(see CPR 32.12(1)).*

17. Borealis also relies on the fact that Professor Pethrick's evidence was as they put it "*flawed in some areas and incomprehensible in others*" and on the fact that he produced new material including the **Mc** point which had been unheralded and then appeared to represent the cornerstone of his evidence. While I have expressed the view that the unheralded introduction of **Mc** was unhelpful, the observations that I made in the judgment about Mr Clements are of a different order of magnitude.

18. In my judgment the flaws in Mr Clements' evidence and approach take this case, in this respect, out of the norm. This was not just a dispute where the technical experts took a different opinion on facts fairly stated. Mr Clements' original report was far from transparent. It did not reveal that the data relied on for figure 5 (based on soaked data) was not contained in the report, nor that Appendix 3 contained unsoaked data which did not support figure 5, nor did it reveal what the data relied on was. When the soaked data was produced it was inadequate to support the report's conclusions. The data, when produced, accompanied a letter from Mr Clements claiming that tests carried out on unsoaked data were invalid, a contention not raised before. The table in RAPRA's supplementary report gave an inaccurately detrimental impression of the characteristics of borecene. Mr Clements did not reveal that he had given significantly different evidence in the DESO action where he had, albeit with some qualification, relied on unsoaked data. Had his reports not had these deficiencies the weaknesses in some of Balmoral's technical case would have become apparent much sooner.

19. Balmoral contend that they cannot, or at any rate should not, be required to shoulder any additional burden in costs because of the deficiencies of their independent expert, over whom they had no control, and who, under the new framework, is to be regarded more as an assistant to the Court than to them (*CAT Ltd at paragraph 33)*. Up to the beginning of the trial there was no reason to believe that his evidence, which entirely supported Balmoral's case, was flawed, or that his evidence would "blow up" in the witness box. Moreover Balmoral's case was not wholly dependent on expert evidence.

20. I do not accept that a litigant is able to distance himself from his expert in that way. The expert, whatever his duties, is still the witness of the party calling him. Serious failings by an expert may make it just to order indemnity costs, unless the expert and the party calling him can, for these purposes, be distinguished. In my view they cannot. As between the party calling the expert and the opposing party the risk should rest with the former.

21. Balmoral next relies on evidence of *witness intimidation*. During the course of the trial evidence was put before me by Mr Greenwood, a partner in Kennedys, Borealis' solicitors, to the effect that, when Mr Webster was in the middle of his evidence, Mr Joyce, Balmoral's managing director, approached him outside court during a break and accused him of telling a pack of lies. Similar remarks were said to have been made to Messrs Halvorsen and Wood by Balmoral witnesses, and to Mr Webster after he had given evidence. I also had a witness statement from Professor Crawford in which he

described being approached by Dr Milne on Thursday 2nd March whilst he was in the lavatory. Dr Milne gripped his arm and said "*You realise that by going against Balmoral you are going against all your friends in Ireland – think about that*", which Professor Crawford took to be a reference to Irish rotomoulders with whom he had a professional association.

22. When these incidents were drawn to my attention during the course of the trial I made it plain that I was not then going to conduct a mini trial as to what exactly occurred, but that anything amounting to witness intimidation would attract the severest of consequences and that the witnesses were not to speak to each other. No further trouble occurred.

23. I also have evidence of a bizarre episode that occurred when Dr Clemens and Dr Wright visited Balmoral in Aberdeen. On this occasion Dr Milne is said to have gestured with a claymore pointed close to Dr Clemens throat whilst telling Dr Clemens how he collected debts. The evidence of Mr Saunders of Moon Beever, Balmoral's solicitors is that the incident was "*as playful and good natured as it was unusual and disconcerting.*" I find it quite difficult to know what to make of this. In the absence of hearing evidence it would be wrong to reach any final conclusion as to the significance of what happened. My impression is that Mr Saunders' analysis is broadly correct. Dr Milne is obviously a man of steel (in this case too literally), whose actions may have an effect greater than was really intended.

24. It is accepted that, in relation to some of these matters there is a factual dispute as to what was said, what was intended, and what was understood. Thus Mr Joyce denies speaking to Mr Webster when he was giving evidence although he accepts that he spoke to him during a break in Mr Wood's evidence when he said that some of Mr Wood's evidence was the biggest load of rubbish he had ever heard. No one can recall saying anything controversial to Mr Halverson. Dr Milne admits speaking to Professor Crawford and there appears no dispute as to the substance of what he said. That incident should never have happened and was reprehensible. But Professor Crawford was not in the event intimidated, and I do not think that that incident, which was short lived in time and effect, should, of itself or taken with other matters, lead to an order for indemnity costs.

25. It is common ground that I cannot resolve what is in dispute on the written evidence alone and that it would be disproportionate to have a further hearing in order to do so. In these circumstances Borealis say that the evidence of what happened that is not disputed shows a mindset on the part of Balmoral that consists of an inability to accept that any case could be made inconsistent with its claim.

26. Taking all these things together Borealis submit that there is a pattern of unreasonable behaviour which justifies an award of indemnity costs for the periods specified in an open offer made by them prior to this hearing.

Conclusions

27. I do not regard the issue for determination as entirely straightforward. Now that I have decided the case comprehensively against Balmoral it is relatively easy for Borealis to contend that it was so unreasonable for Balmoral to continue to make the case that it did and that it would be just to make an order that gives Borealis as much of the costs that it has had to pay as the rules allow. But Balmoral's claim was not a frivolous one. It had a

solid basis. The fact that tanks made with borecene had failed in large quantities when tanks made with other material had not; and that other manufacturers had had similar problems with borecene, suggested a fault in the material. Expert evidence appeared to confirm that. The payment in was made at a 50% discount to what Borealis reckoned the claim was worth on the basis of full liability. The fact that the payment in of so large an amount was made at all carried with it a recognition that Balmoral might recover up to that sum or more.

28. Although each case must be decided on its own facts it is relevant to note that Balmoral's claim was, as it seems to me, in a different category to the "*speculative claim*" in *Excelsior* met by what must have been a nuisance value payment in, or the extremely thin and high risk defence, inconsistent with the contemporaneous documents in *CAT*. Nor does it come into the same category as the defence in *Amoco (UK) Exploration Co v British American Offshore Ltd* [2002] BLR 135. There a defence was put forward in order to extricate the defendant from a freely negotiated commercial contract for the supply of a drilling unit, not because it was believed that the unit was unsuitable for the job but because the job was not considered to be worth doing at the agreed prices; the defence was constantly changing and was very substantially different from that put forward at termination.

29. Balmoral's claim to damages for loss of profits was put very high and, as I said in my judgment, the suggestion that there would be a continuing 20% or 30% year on year increase of turnover, and especially the latter, rested more on wishful thinking than evidential support. But Balmoral had enjoyed a 10% year on year increase in turnover in respect of fuel tanks between 1996 and 2000 and the extent to which there were opportunities for considerable increases in turnover from the greater use of bunded tanks was debatable. 10% was arguable as a figure and I do not regard a claim of 20% as completely fanciful, although 30% seems to me to have been unrealistic. Further the costs attributable to dealing with a 20% or 30% as opposed to a 10% claim were very limited.

30. Further I regard it as significant that, if I had been in favour of Balmoral on breach and causation and had Borealis' defences been unsuccessful I would have awarded substantial amounts under each head of claim, totalling over £16,000,000.

31. There is force in Borealis' point that the problems in Balmoral's case both on quantum and on liability were such that a failure to accept the sum paid in or make a counter offer was unreasonable. The problems on liability consisted of the technical questions as to the suitability of Borecene, the applicability of Borecene's standard conditions and, if they were applicable, the non application of the Unfair Contract Terms Act, if the contracts in question were international supply contracts.

32. I am not, however, persuaded that the combination of difficulties was such that Balmoral's continuing with the claim was so unreasonable that they should pay costs on an indemnity scale. In essence this seems to me one of those cases where justice does not demand that a resounding defeat should also carry with it an award of indemnity costs.

33. The deficiencies of the RAPRA expert evidence do, however, seem to me to fall into a somewhat different category. It was not reasonable for the RAPRA report to be prepared and presented in the way in which it was, or for there to be no reference to what had happened in the Deso action, or for the data relied on not to be revealed until a late stage

(when it turned out not to support the conclusion sought to be drawn from it). It has led to unnecessary costs. The fact that the deficiencies were only revealed at a late stage no doubt contributed to Balmoral regarding their technical case as sounder than it was.

34. It seems to me that any costs order should take account of this fact. I suggested at the hearing that it might be appropriate to order that the costs of employing Capcis after a certain date should be paid on an indemnity basis, together with the costs of some of the days of hearing, or that Balmoral should bear, on that basis, the costs of all or some of the issues considered in the Capcis reports. As to the former Mr Mawrey submitted that this was either unnecessary, because Capcis' fees were likely to be recoverable on a standard basis taxation anyway, or inappropriate, since the difference between indemnity and standard costs on a few days of evidence was insignificant in the context of an action of this kind. As to the latter it would be extremely difficult for the costs judge to determine which of the legal costs were attributable to dealing with the Capcis reports, or aspects of the RAPRA reports, and then make an assessment on an indemnity basis in respect of those costs and not others.

35. There is considerable force in these observations and Mr Allen understandably did not express much enthusiasm for indemnity costs being awarded on this much reduced basis. Nevertheless it is not certain that there will be no dispute about Capcis' fees or that the difference between costs on a standard and an indemnity scale per day are very modest.

36. I propose to order that Balmoral should bear upon the indemnity basis:

    (a) the costs incurred by Borealis in respect of work carried out by Capcis subsequent to the receipt by them of RAPRA's first report dated 27th October 2005; and

    (b) the costs incurred by Borealis in respect of:

        (i) both of their counsel (Mr Allen and Mr Holroyd) and

        (ii) their solicitors' attendance in Court

    on 23rd, 27th, 28th February and 1st March 2006, those being the days upon which Mr Clements gave evidence.

37. If that has no practical effect because the two bases will produce the same result, so be it. If it does, it seems to me that to require, in effect, a Commercial Court week to be paid for on an indemnity scale is a just and proportionate way of dealing with the matter, particularly having regard to the fact that the deficiencies of the RAPRA report will have had an effect on costs beyond the confines of that week.

38. I also observe, for the assistance of the costs judge, that, in my view, he should not be astute to pare down any of the costs said to be attributable to dealing with the expert technical evidence of Mr Clements or Professor Pethrick, whether that was done by way of Capcis' supplementary reports, or Borealis' lawyers' consideration of the content of the evidence of Mr Clements and Professor Pethrick, or the cross examination of those two witnesses or the preparation therefor.

39 Borealis made a number of further points in its skeleton argument in relation to Balmoral's conduct. I have considered all of them. I do not intend to lengthen an already lengthy judgment save to say that none of them are such, whether taken by themselves or together, as to cause me to make any further order for indemnity costs.