Claim No H10CL285

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building
Royal Courts of Justice
Strand
London WC2A 2LL

Date: 17 March 2022

Before :

HIS HONOUR JUDGE MONTY QC

- -

Between :

MRS THI HIEN NGUYEN

Claimant

- and -

MS ANNA HUONG NHAT NGUYEN

Defendant

- -

Mr Clarke (instructed by **EPLegal**) for the **Claimant**
Mr Katz (instructed by **gunnercooke LLP**) for the **Defendant**

Hearing date: 17 March 2022

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Approved Judgment

HHJ Monty QC:

1. This is my judgment on costs. The parties had settled all substantive issues save for costs. The trial (which was due to commence on 14 March 2022) was vacated. A Tomlin Order was made incorporating the agreed terms in a schedule, with costs to be decided at a hearing which took place today, 17 March 2022.

2. Where a claim is compromised, but the parties cannot agree costs, it is open to the court to refuse to sanction a Tomlin Order (on the basis that the claim has not in fact settled) and to require there to be a trial in order to determine the winner (the general rule on costs is that the loser pays): see *BCT Software Solutions Ltd v C Brewer & Sons Ltd* [2003] EWCA Civ 939.

3. It would have been disproportionately wasteful of time, money and resources to have done that in this case, and in a number of other reported cases the courts have determined costs without a trial following a compromise. The better course – which was the one suggested by the parties, and approved by the court as being consistent with the approach in those other reported cases – is to have a hearing at which the court determines liability for costs.

4. I will set out the principles which are to be applied later in this judgment. I first need to set out the background facts.

5. The Claimant is the tenant of commercial premises at 265 Chiswick High Street, London W4 4PU from which she ran a Nail Bar business.

6. In September 2019, the Claimant reached an agreement with the Defendant's mother (who is known as Jenny, and I shall refer to her as Jenny in this judgment) that the business would be sold to the Defendant for £120,000.

7. There were three relevant documents.

8. On 16 September 2019, the landlord, the Claimant and Jenny signed a document which stated:

> "This is to confirm that [Jenny] will be running the business at JK Nails of 265 Chiswick High Street, London W4 4PU on behalf of [the Claimant] until the legal documentation has all be signed giving a new lease to [Jenny].

9. On 17 September 2019, in a document signed by the Claimant as Seller, and the Defendant as Buyer, it was agreed that the business was being sold by the Claimant to the Defendant. This document stated:

> "Before cancel the old contract with Landlord, Buyer need to pay comprehensively the amount: £10,000.00 (ten thousand GBP) for Seller.
>
> From this day (17th of September, 2019), the Seller will withdraw all responsibilities and duties on behalf of JK Nails LTD business."

10. A second document was signed on 17 September 2019, by the Claimant as Seller but this time by Jenny as Buyer, confirming that the Claimant had received £100,000, and it further stated:

> "[The Claimant] agreed to sell her Nails shop named JK NAILS located at 265 Chiswick High Street, London W4 4PU to [Jenny] who is the representative of [the Defendant] ([Jenny's] daughter).
>
> [The Claimant] will hand all relevant documents and the Nails shop over to [Jenny] for her full right use since this day.
>
> After all sublease procedures are successfully fulfilled, [Jenny] must pay the rest amount [payments of £20,000 and £10,000]
>
> Both parties must pay all the relevant bills."

11. Thereafter, the Defendant went into possession of the premises.

12. The rent under the lease was £10,000 per quarter. The Defendant paid the Claimant £10,000 for the September 2019 quarter, which the Claimant paid to the landlord. The December 2019 quarter was paid to the landlord by the Defendant direct.

13. Negotiations ensued for the grant of a new lease to the Defendant, and draft leases were exchanged a number of times.

14. In March 2020, the shop closed because of the COVID pandemic. The Defendant stopped paying rent. The Claimant paid rent thereafter for a number of quarters to the landlord, apparently with financial help from a Government grant.

15. By October 2020, negotiations for the new lease had stalled, and on 9 October the landlord's solicitors terminated negotiations and "The temporary consent granted to the tenant on 16 September 2019 to allow [Jenny] to operate the business is withdrawn."

16. On 2 November 2020, the Claimant commenced possession proceedings against the Defendant.

17. The Particulars of Claim state:

> "3. Pursuant to the said agreements [of 16 and 17 September 2019] and pending an agreement for the surrender of the said lease by the Claimant and the grant of a new lease to the Defendant by the landlord, alternatively the assignment of the said lease to the Defendant, the Claimant permitted the Defendant to occupy the said premises on licence at a fee of £10,000 per quarter from 16th September 2019.
>
> 4. In breach of contract, the Defendant has failed to agree terms for a new lease and the landlord has terminated negotiations. Further or alternatively, the Defendant has declined to take an assignment of the lease from the Claimant.
>
> 5. Accordingly, the Claimant served Notice on 15th July 2020 determining the said licence and requiring the Defendant to vacate the said premises by 16th July 2020.

6. The Defendant has failed to vacate the said premises in accordance with the said Notice and remains in occupation thereof."

5. The prayer for relief sought possession, mesne profits at a rate of £10,000 per quarter, and costs.

6. Pausing there, it can be seen that the position on the Claimant's pleaded case was rather confused.

7. The agreements of 17 September 2019 refer to a sale of the business to Jenny, the Defendant's mother. It was the Defendant who went into possession. The licence from the landlord of 16 September 2019 refers to Jenny running the business and a new lease being granted to her, whereas the negotiations were for a new lease to the Defendant. The agreements do not refer to a licence payment. Payments had been made by the Defendant for rent (one via the Claimant, the second to the landlord direct) and the Defendant was in occupation.

8. In any event, the contention in the pleadings was that the Defendant was a trespasser and the Claimant was entitled to possession.

9. The Defence contended that there had been an implied surrender of the existing lease, and that the Defendant was either a tenant, or had the benefit of an equitable assignment of the existing lease.

10. The Claimant's Reply refers to the Defendant having "refused to pay the rent".

11. The claim was set down for a 4-day trial starting on 14 March 2020.

12. Shortly before the trial, the parties had a mediation, and in the period which followed, they were able to agree a settlement but not the costs of the claim.

13. The settlement they reached was embodied in a Schedule to a Tomlin Order. The relevant parts of the Schedule state:

"1. The terms below are in full and final settlement of:-

i. The Claimant's claim for possession of commercial property known as the ground floor and basement situated at 265 Chiswick High Road, London, W4 4PU ("The Premises"), on grounds of trespass.

ii. Any claim by the Defendant against the Claimant in respect of money paid to the Claimant for the purchase of the business, the assignment of the lease or otherwise.

iii. Any and all claims whether known or unknown arising as between the Claimant and the Defendant in connection with their occupation of the Premises.

2. Purchase of the business:-

i. The Defendant agreed to purchase the Claimant's business on 17 September 2019 for £120,000 ("the Agreement"). £100,000 was to be paid before the

Defendant went into occupation of the Premises and the remaining £20,000 upon the assignment of the existing lease of the Premises dated 2 December 2008 between Mr Panayi as landlord ("the Landlord") and the Claimant as tenant ("the Lease") or, otherwise, for the surrender of the Lease by the Claimant and the grant of a new lease to the Defendant.

ii. The Landlord was party to the negotiations and knew, at the time the Agreement was entered, the terms which were agreed between the Claimant and Defendant and signed a memorandum dated 16 September 2019 to this effect.

iii. The parties accept that the Defendant paid £100,000 to the Claimant on or before 17 September 2019 pursuant to the agreement set out in paragraph 2(i) above.

iv. The Defendant contended that in fact £110,000 was paid on or before 17 September 2019. The Claimant contended only £100,000 was paid. The parties have compromised this dispute whereby upon completion of the assignment, the Defendant will pay forthwith to the Claimant the sum of £15,000 and, thereafter, no further sums are due from the Defendant to the Claimant save as set out herein."

14. The Schedule went on to set out the operative terms of the parties' agreement, which was that the Claimant would take all reasonable steps to have the lease assigned to the Defendant, and the Defendant would pay any outstanding rent and rates for the period after 17 September 2019 (with the Claimant giving details of the rent she had paid, and of any grant monies received).

15. However, as I have noted, the parties were unable to agree costs. An order was made in standard Tomlin Order form, the trial was vacated, and a hearing was listed to deal with costs, which took place today.

16. In deciding what order, if any, to make about costs, the court will have regard to all the circumstances, including the conduct of all the parties and whether a party has succeeded on part of its case, even if that party has not been wholly successful: CPR 44.2(4). The conduct of the parties includes (a) conduct before, as well as during, the proceedings; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; and (c) the manner in which a party has pursued or defended its case or a particular allegation or issue: CPR 44.2(5). The starting point is always to identify which party was the winner. The general rule is that the loser should pay the costs, although the court may depart from that general rule, and has a wide discretion to make some other order.

17. Where, as in the present case, there has not been a trial, the approach to costs has been considered in a number of cases.

18. In *Boxall v London Borough of Waltham Forest*, an unreported decision from 21 December 2020, Scott Baker J as he then was set out, in a passage approved by the Court of Appeal in *Brawley v Marczynski* [2003] 1 WLR 813, the following principles:

"(i) the court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.

(ii) it will ordinarily be irrelevant that the Claimant is legally aided;

(iii) the overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost;

(iv) at each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.

(v) in the absence of a good reason to make any other order the fall back is to make no order as to costs.

(vi) the court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage."

19. In *R (M) v Croydon London Borough Council* (CA) [2012] 1 WLR 2607, Lord Neuberger MR, as he then was, held at [59-63]:

"59. Where, as happened in *Bahta*, a claimant obtains all the relief which he seeks, whether by consent or after a contested hearing, he is undoubtedly the successful party, who is entitled to all his costs, unless there is a good reason to the contrary. However, where the claimant obtains only some of the relief which he is seeking (either by consent or after a contested trial), as in Boxall and Scott, the position on costs is obviously more nuanced. Thus, as in those two cases, there may be an argument as to which party was more 'successful' (in the light of the relief which was sought and not obtained), or, even if the claimant is accepted to be the successful party, there may be an argument as to whether the importance of the issue, or costs relating to the issue, on which he failed.

60. … Thus, in Administrative Court cases, just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims. While in every case, the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.

61. In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the

claimant can, at least absent special circumstances, say that he has been vindicated, and, as the successful party, that he should recover his costs. In the latter case, the defendants can no doubt say that they were realistic in settling, and should not be penalised in costs, but the answer to that point is that the defendants should, on that basis, have settled before the proceedings were issued: that is one of the main points of the pre-action protocols. Ultimately, it seems to me that *Bahta* was decided on this basis.

62. In case (ii), when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. Given that there will have been a hearing, the court will be in a reasonably good position to make findings on such questions. However, where there has been a settlement, the court will, at least normally, be in a significantly worse position to make findings on such issues than where the case has been fought out. In many such cases, the court will be able to form a view as to the appropriate costs order based on such issues; in other cases, it will be much more difficult. I would accept the argument that, where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs. That I think was the approach adopted in Scott. However, where there is not a clear winner, so much would depend on the particular facts. In some such cases, it may help to consider who would have won if the matter had proceeded to trial, as, if it is tolerably clear, it may, for instance support or undermine the contention that one of the two claims was stronger than the other. *Boxall* appears to have been such case.

63. In case (iii), the court is often unable to gauge whether there is a successful party in any respect, and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases, it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win."

20. In *Powles v Reeves* [2016] EWCA Civ 1375, Richards LJ considered the prominent factors when determining the appropriate order for costs:

"19. I think it is fair to say that, deprived of the compass normally provided by the outcome of the case, judges often find this to be a difficult exercise. It is neither desirable nor generally practical for the whole case to be heard solely for the purpose of determining costs and it would usually be an unacceptable waste of the court's resources, as well as the parties' resources, to do so. The judge instead has to look for other factors to determine the appropriate order for costs, prominent amongst them being the result of the settlement, the conduct of the parties in the course of the litigation, any reasonable offers of settlement that may have been made and, in any case where it is tolerably clear, which party would have succeeded at trial."

21. The Court of Appeal went on to approve the principles set out in the *Boxall* and *Croydon BC* cases, which I have set out above.

22. It is also relevant to note [32-33] of the same judgment:

> "32. Ground 3 challenges the decision of the judge to read and have regard to the schedules to the two Tomlin orders settling the action. It is of course right that the court is not generally concerned with the terms of settlement scheduled to a Tomlin order. They do not have the effect of an order of the court and they take effect as a contract between the parties. The purpose and effect of a Tomlin order is to provide a convenient means of enforcing the terms of the settlement agreement. It does not, however, follow that the court is not entitled to look at the scheduled terms and, in appropriate circumstances, to have regard to them. Of course, the court will be directly concerned with the terms if either party seeks to enforce them, but that is not, in my judgment, the only circumstance in which the court can have regard to them.
>
> 33. I can see no reason why the court cannot have regard to those terms in determining the issue which the parties have invited the court to decide in this case, namely the appropriate order for costs."

23. These are the principles which I apply to the question of which party should pay the costs.

24. For the Claimant, Mr Clarke sought to persuade me that the Claimant was the successful party, as she would have succeeded at trial. In summary, he said as follows.

    (1) The Defendant was granted temporary permission to run the Claimant's business pending the grant of a new lease, and this is admitted in paragraph 11 of the Defence. The Claimant's permission was sought for removal and disposal of fixtures and fittings.

    (2) No new lease was agreed, and the landlord terminated negotiations. It was the Defendant who declined to approve the draft new lease.

    (3) There are outstanding payments due for the Defendant's use of the premises, although the Claimant paid (some but not all) rent to the landlord.

    (4) It is implicit in the Defence that the Defendant's occupation of the premises was dependant on the grant of a new lease or the assignment of the existing lease.

    (5) The Claimant properly terminated the Defendant's licence.

    (6) The Defendant remained in occupation and the landlord withdrew permission for the Defendant to occupy on behalf of the Claimant, making the Defendant a trespasser; no new lease has been granted, nor was there an assignment of the existing lease (although that is now what is intended, by virtue of the settlement agreement).

    (7) Under the settlement agreement, it is the Defendant who is paying money, not the Claimant.

(8) The Defence was bound to fail.

25. It seems to me that there are two difficulties with this argument.

26. First, it seems to me is that it is far from clear that had this gone to trial the Claimant would have won on the basis of the pleaded case. It seems to me strongly arguable even on the pleaded case (and without even considering the evidence) that the Defendant was not occupying under a licence, or paying a licence fee, but was occupying the premises as a tenant at will. If that is right the notice of termination of a licence was ineffective.

27. Secondly, and I think more importantly, it ignores the effect of the settlement agreement itself set against the background of the pleaded case. This was a possession claim under CPR Part 55. The Claimant sought possession. The Defendant resisted it. There was a settlement under which the Claimant did not get possession, but rather the Defendant's entitlement to possession was confirmed (subject of course to the landlord's consent to an assignment, which is a bridge yet to be crossed).

28. The fact is that the Claimant did not get what she sought by this claim. I do not think that is undermined by the two factors identified by Mr Clarke which were that the settlement was giving effect to what the parties had wanted to achieve in September 2019, or that payment was made under the settlement by the Defendant. This was not a claim for specific performance of the September 2019 agreement, but for possession, and the payment of money for occupation is the natural corollary of the Defendant having resisted a possession claim. Often the unsuccessful party is the one who has to "write out the cheque" (or more accurately nowadays, I expect, "make the payment"), but this was not such a case. As Mr Katz put it, it was a claim for possession where, after the settlement, it was the Defendant who was left "holding the keys".

29. In oral submissions, Mr Clarke appeared to concede that it might in fact not be possible to say which of the parties would have won, and what had been his secondary contention then took centre stage, which was to say that if it was not possible to determine which of the parties would have been successful at trial, the proper order will be no order as to costs.

30. In support of that contention, Mr Clarke relied primarily on this being a case in category (iii) as identified by Lord Neuberger in the *Croydon BC* case.

31. In my judgment, this is a category (i) and not a category (iii) case. The Defendant has been wholly successful in resisting the possession claim. That is clear from the settlement agreement. This is not a case where the compromise does not actually reflect the Defendant's Defence.

32. I think it is necessary to replace the words "claimant's claim" with "Defendant's Defence" in that part of Lord Neuberger's judgment in order to apply it to this case and this settlement agreement – and I think with respect the failure to have done so shows why this is indeed within category (i).

33. I am entirely satisfied that the Defendant was the winner, applying the principles I have set out. As Mr Katz submitted, the Claimant sought possession, and the Defendant defeated the claim for possession, as is reflected in the settlement. The Defendant was

clearly the successful party on that basis. I also agree with Mr Katz that it would be wholly wrong to categorise the Defendant, who had paid a six-figure sum to the Claimant for the purchase of the business, as a trespasser. That being so, I do not see how the Claimant's possession claim on the basis of the termination of a licence could have worked at trial. The Claimant sold the business, and had no right to retake possession from the Defendant. Any issues over the licence to occupy were for the landlord and the Defendant.

34. Parties compromise claims for all sorts of reasons (and in Lord Neuberger's judgment in the *Croydon BC* the Master of the Rolls refers to this). I do not see how one can go behind the pleaded case and the settlement reached to try to identify why a compromise was agreed. It was sensible for the parties to reach an agreement. It is a pity that they could not also have reached a compromise on the costs. But it is the terms of the settlement which is the principal reason for saying that the Defendant was the successful party. I can see no other factor here which should displace that reason.

35. There are no factors identified by Mr Clarke which I am asked to take into account under CPR 44.2(4)-(5).

36. In my judgment, therefore, for all these reasons, and on the basis of the principles identified, the Claimant must pay the Defendant's costs.

37. Mr Katz suggested a payment on account of those costs of 60% of the Defendant's capped costs. Mr Clarke did not resist that as a percentage although he asked for 21 days to pay, and Mr Katz did not object. I will therefore order a payment on account of 60% of £135,000, which is £81,000, and that is to be payable by 7 April 2022.

38. The Defendant should also have the costs of this hearing. These should be the subject of a detailed assessment, together with the remainder of the costs, if not agreed.

39. Finally, I want to thank both counsel for their written and oral submissions, which were of great assistance to me in reaching a determination of this issue.

(End of judgment)