

## **The OCENSA Pipeline Group Litigation: costs in group litigation**

**By Noel Dilworth**

**On 21 December 2016, Mr Justice Stuart-Smith gave judgment in relation to the costs issues arising out of the OCENSA Pipeline Group Limitation (Arroyo v Equion Energia Limited [2016] EWHC 3348 (TCC)). This judgment followed the very lengthy judgment ([2016] EWHC 1699 (TCC)) given on 27 July 2016, in which he dismissed, on the facts and on the law, 4 Lead Claims.**

1. In his judgment on costs he ordered the Claimants to pay the Defendants' costs of the litigation on a standard basis to 28 August 2014, and on an indemnity basis thereafter. The trial commenced in October 2014, therefore the trial costs were ordered to be paid on an indemnity basis.
2. In ordering indemnity costs the Judge was highly critical of the conduct of the claim by the Claimants' solicitors, Leigh Day. In particular:
  - a. The Claimants' Schedules of Loss were so unreliable and subject to such exaggeration that they failed to achieve their purpose of enabling the Defendant to gain an understanding of the potential value of the claims being made (paragraphs 52 – 53). There was a "serial failure to obtain and present information and documents that

- could be relied upon for their proper purpose in the context of contested litigation.” (paragraph 53)
- b. The scale and extent to which the factual evidence misled, particularly in relation to the causal relevance of an earlier pipeline that passed through the Claimants’ properties went beyond the norm (paragraph 54);
  - c. The interdisciplinary approach of the experts, vitiated by misleading cross-references “exerted an influence on the litigation that was corrosive of trust and highly detrimental in an area that was of central importance for the litigation.” (paragraph 56);
  - d. A litany of criticisms were directed at the production of supplementary reports by the Claimants’ principal geotechnical expert, Dr Card in the period shortly before trial (paragraphs 57-59);
  - e. The failure to accept a Calderbank offer earlier in the year of trial (paragraphs 65 – 70).
3. The Judge accepted that aspects of the case did not merely fail, but were thin and far-fetched, including the case on dolo (deceit/bad faith), the case on water quality, the case on pipeline project management and the case based on the Claimants’ geotechnical expert’s supplementary reports.
  4. The judgment also provides a summary of the relevant principles in respect of awards of indemnity costs. In particular
    - i. The primary objective is to make an order that reflects the overall justice of the case, bearing in mind the general rule that costs should follow the event;

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- ii. There is no automatic rule which requires the reduction of a successful party's costs, despite the fact that the winner overall is likely to fail on one or more issues;
    - iii. It is not, however, required to establish that the winning party acted unreasonably or improperly in taking or pursuing the point on which he failed;
    - iv. Various approaches to issue-based reductions are permissible, but the reasonableness or unreasonableness of the winning party may be taken into account when deciding whether to deprive that party of a proportion of its costs.
  5. The Judge summarised at paragraphs 25 – 27 of his judgment the principles relevant to the question whether to order indemnity assessment under CPR r.44.3(1)(b). Mere defeat is in itself insufficient; what is required was the identification of circumstances or conduct which take the case away from the norm, in which context, the conduct of both the party and of those whom he engages to act on his behalf (including lawyers and expert witnesses) may be relevant.
  6. What distinguished this case for the Judge was the scale of costs which was “huge by any standards. They run to tens of millions of pounds on each side and dwarf any sums that the Claimants might have hoped to recover at trial even on the most optimistic projections.” (paragraph 2). However, the Judge also made a number of telling observations in paragraph 70 in acquitting the Defendant of unreasonable conduct, in particular arising from its stance in negotiation:
    - a. First, the key item of the Claimants' solicitors' correspondence to which attention was directed focussed on a comparison of the value

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- of the claims against the impact of costs “to the exclusion of any reasoned argument based on the merits of the claim.”
- b. Second, given the findings in the main judgment, the Defendant’s refusal to make “any offer involving the payment of damages and/or costs... was justified.”
  - c. Moreover, the offer to drop hands could not “properly be characterised as demonstrating a lack of good faith in entering into the mediation process. It was a reasonable offer in the light of the evidence as it then stood and in the light of the eventual outcome of the litigation.”
  - d. The suggestion in correspondence that the Defendant should offer to pay the Claimant’s millions of pounds in damages and their costs was described as carrying “an air of unreality in the light of the evidence that was available at the time and the further evidence discussed in the Main Judgment.”
7. Of course, the Claimants’ failure to accept the Defendant’s offer was one factor to which the Court had regard in concluding that an indemnity order was appropriate, but the wider implications of the observations in paragraph 70 cannot be ignored. First, negotiation by correspondence ought not to ignore (and arguably ought to prioritise) reasoned arguments on the merits of the case; insofar as the focus sharpens on the well rehearsed arguments concerning proportionality, there is a risk of it doing so at the expense of those merits-based arguments. Second, a robust merits-based position (and a defendant’s refusal to concede the making of any payment) can and, if the evidence holds up, is likely to be vindicated in costs. A defendant is as entitled as a claimant to rely on a principled defence of a claim it considers to be thin and far-fetched. Third, given the

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inherent uncertainties of litigation, a robust negotiating stance may be the subject of very close scrutiny if it fails. The boldness of such a position ought, on any analysis, to warrant thorough testing internally before the position is communicated inter partes.

8. At paragraph 75, the Judge rejected the Claimants' submission that an order for indemnity costs would have "*chilling effect on access to justice in cases such as this.*" Rather, "*if... it has a chilling effect on the sort of failures of which this and the Main Judgment are critical, it may possibly serve a useful purpose beyond the scope of this litigation.*"
9. Looking at the matter in the round, the significance of this order in the context of vigorously contested group litigation ought not to be lost. The order for indemnity costs serves to underscore the importance of taking stock throughout the litigation process of the reasonableness of the evidence a party has marshalled, despite the fact that several years may have gone into the preparation for trial.

Noel Dilworth was led by [Charles Gibson Q.C.](#) and [Oliver Campbell Q.C.](#), along with [Kathleen Donnelly](#) on behalf of the successful Defendant in *Arroyo*.