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Leigh Day hit with £27million indemnity costs order in Colombian pipeline case

Pedro Emiro Florez Arroyo & others v Equion Energia Limited
[formerly BP Exploration Company (Colombia) Limited]
[2016] EWHC 3348 (TCC)

Article by David Bowden

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Executive speed read summary

Following a 5 month trial from autumn 2014 to spring 2015, Stuart-Smith J dismissed all claims in July 2016 brought against BP Exploration Company (Colombia) Limited in relation to damage which Colombian farmers claimed they had suffered when a pipeline had been laid in the mid 1990s. The claimants' cases were funded by 'no win, no fee' agreements. The matter came back before the judge on a contested hearing in November 2016 in relation to costs. In his reserved judgement handed down on 21 December 2016, Stuart-Smith has ordered that the defendants be awarded indemnity costs from 28 August 2014. This was done because of a siege mentality that the claimants' team had developed, serious irregularities with the claimants' expert evidence, allegations which should never have been brought in the first place and the claimants' failure to accept a pre-trial Calderbank offer from the Defendant to drop hands. In relation to a limited issue in relation to a 'dangerous activity' doctrine which the defendant failed on, the judge made an unusual costs order. This was that the Defendant's recovery of its costs would be reduced by 4 times the costs attributable to the attendance of counsel and solicitors who attended trial for the duration of one witness's evidence on this issue. The costs of this hearing are to be on the standard basis only.

Pedro Emiro Florez Arroyo v. Equion Energia Limited [formerly BP Exploration Company (Colombia) Limited] [2016] EWHC 3348 (TCC) 21 December 2016
High Court of Justice, QBD, Technology & Construction Court (Mr Justice Stuart-Smith)

What are the facts?

In the mid-1990s the Ocensa pipeline was laid to carry oil from the Cusiana-Cupiagua oilfield in the central Colombia over 500 miles to Caribbean coastline at Coveñas. The companies involved in the Ocensa project were Equion Energia Limited, Total France, Triton and Ecopetrol (a Colombian state company).

The case concerned claims brought by 109 claimants concerning 73 farms that the Ocensa pipeline caused damage to those farms. The Cusiana-Cupiagua oilfield was discovered in 1991. During the 1990s and early 2000s it produced around 50% of crude oil in Colombia. Initially, the oil was transported along another pipeline known as the ODC (Oleoducto de Colombia) pipeline which had been constructed in 1990-1991. When the much larger Ocensa pipeline was laid between December 1995 and August 1997, a substantial part of its course followed that of the ODC pipeline.

Leigh Day was initially instructed by a group of Colombian farmers in 2004 in respect of similar claims and settlement was reached with this group in June 2006 following mediation. However proceedings were issued in May 2007 after another group of Colombian farmers also instructed Leigh Day. A Group Litigation Order was made in September 2008. Of the 74 claims, 10 were selected as lead cases. This number was eventually reduced to 4 because of the volume of the evidence.

The courts of England and Wales assumed jurisdiction to hear the dispute on the basis that Equion Energia Limited was an English-domiciled company. The claims were that damage had been caused to the claimants' properties from the construction of the Ocensa pipelines. At its highest the total of the various claims was no more than £18 million. The claims specifically focused on the reduction in the economic capacity of the farms and for specific losses of cattle. There was an unsuccessful attempt to introduce new claims for the costs of reinstatement of the land along with a general damages claim.

What did Stuart-Smith J rule in the underlying litigation?

Following a hearing which lasted nearly 5 months, 17 months later in July 2016, Mr Stuart-Smith handed down his mammoth 648 page reserved judgment **[2016] EWHC 1699 (TCC).** He held that all 4 four claims failed in their entirety. The claims were found to have largely failed on the facts. The judge also issued a health warning to any person tempted to read the judgment in its entirety, on the basis that both the findings with respect to how Colombian law would apply to the facts and the underlying facts themselves would be of limited interest and utility to those unrelated to the parties.

Each of the claims failed on at least one of these bases:

- there was insufficient factual evidence to demonstrate that any harm had occurred by reason of the Ocensa pipeline at all,
- there was insufficient factual evidence to demonstrate that the Ocensa pipeline (rather than the ODC pipeline) had caused the damage claimed,
- where there had been damage, no loss had occurred, or

- where there had been damage attributable to the Ocensa pipeline, any tortious rights to claim in respect of such damage had been extinguished through a series of settlement agreements which had been entered into with the claimants.

How were these cases funded?
The claimants' cases were funded by means of a 'no win, no fee' conditional fee agreement ('CFA'). The CFAs were entered into before April 2013 such that success fees and 'after the event' ('ATE') premiums were recoverable from the other side in the event of success. The defendant had to pay its own costs on a standard retainer basis.

How much costs had been incurred?
By the time of the November 2016 costs hearing, the Defendant had incurred £34million in defending these hopeless claims. The claimants' costs budget was £24million in September 2014. The claimants had ATE insurance on risk for only £1.8million. The Defendant was naturally concerned as to how poor Colombian farmers would be able to pay the balance of their £32million costs.

What were the issues which the Stuart-Smith J had to resolve in this application?
There were 3 issues that Stuart-Smith J had to resolve:

- Whether the defendant's recoverable costs should be reduced at all,
- Whether the claimants should be ordered to pay the Defendant's costs on an indemnity basis, and
- If so, from what date should indemnity costs be awarded from.

What did the judge rule on whether the defendant costs should be reduced?
The Defendant from the outset made it a central part of its case that it had no responsibility for the Ocensa pipeline and was not a guardian under the 'dangerous activity' doctrine. This part of its defence failed. The judge found that just over 3% of the trial representing the cross-examination of one witness was taken up on this issue.

Stuart-Smith J ruled that '*the fact that 3% of trial time was discretely attributable to the issue does not mean that either 3% of the Defendant's overall trial costs or 3% of its litigation costs are discretely attributable to the issue*' and he noted that there was '*no evidence to enable the Court to make an assessment of the Claimants' costs of the issue, even on the broadest brush of assessments, save by identifying the costs attributable to two days' attendance at trial by those who were present for Mr Swaroop's cross-examination*'. However he ruled that an '*inability specifically to quantify or express costs as a percentage of the whole does not prevent a separate order being made'* in relation to them.

The judge rejected the claimant's submission that these should be reduced by 40%. The judge said he was not able to quantify any reduction on a percentage basis. The judge ruled that that he did '*not think it would be just for the Claimants to have to bear the trial costs that were discretely attributable to the dangerous activities doctrine, even allowing for the fact that the trial had been preceded by the Defendant's Calderbank offer. The making of that offer is a factor to be taken into account, but it does not and did not give the Defendant carte blanche to run every issue without risk of a separate order being made*.'

So the actual order made by the judge was that he directed that '*the Defendant's recovery of its costs shall be reduced by 4 times the costs attributable to the attendance of those counsel and solicitors who attended trial (i.e. were present at the hearing) for the Defendant on the date and for the duration of Mr Allison's evidence, to be assessed if not agreed*'.

What did the judge rule on the defendant's application for indemnity costs?
Stuart-Smith J ruled that the defendant could have costs on the indemnity basis but only for costs incurred from a date 5 weeks before the liability trial started.

The defendant relied on 8 matters in the litigation to justify indemnity costs particularly:

- the expert evidence (which was served late, without permission or which didn't make sense) and,
- the claimants' rejection of its Calderbank offer dated 11 April 2014 in which it offered a drop hands settlement.

What criticisms were made of the claimants' expert witnesses?
As to its expert evidence Stuart-Smith J ruled that '*the Claimants' experts' reports as a body were superficially impressive, at least to my eye'* and noted that a '*major feature of the body of evidence was*

the way in which it appeared to be mutually supportive with cross-references to the findings of other experts'. However this backfired with Stuart-Smith J noting that this '*proved to be a misleading impression' and that the 'culture of misplaced inter-dependence continued right through to trial, the most obvious later example being Dr Obando's quite unjustified reliance upon Dr Card's 4th report'*.

As to where the blame should lie, Stuart-Smith J was clear ruling that '*responsibility must be shared between the experts, who should not have let it happen, and the lawyers who, on the evidence at trial, promoted it. In my judgment it went way beyond the norm of proper expert evidence and 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'*.

Particular criticism was reserved for one of the claimants' expert witnesses, Dr Card. Stuart-Smith J ruled that the '*inclusion of the new calculations in Dr Card's fourth report constituted a deliberate and serious breach of the Court's order limiting the scope of additional reports. The seriousness of the breach was compounded by the timing of the fourth report, coming as it did so shortly before trial'*. He went on to say that the '*breach was further compounded by failing to provide the workings that lay behind the new calculations until 1 October 2014, the day before the trial started'* and that having '*realised that his calculations were wrong, Dr Card then tried to improve his position by providing his fifth report'* 4 days before he was called to give evidence. As to this Stuart-Smith lambasted him for giving '*an explanation for the new calculations which was seriously misleading*'. The judge ruled that Dr Card '*lost those qualities of objectivity and independence of mind which are essential for an expert in contested litigation and that he had become caught up in the siege-mentality which was painfully obvious on a number of occasions (on both sides) during the trial'.*

Another of the claimants' experts (Dr Tobon) also came in for criticism on 2 grounds by the judge. Firstly his report contained a '*wrongful citation from the academic text'* which was '*entirely attributable to Dr Tobon'*. However Stuart-Smith J ruled that this '*would not on its own justify or make a substantial contribution in support of making an overarching order for indemnity costs'* but he ruled that what was more serious was the '*failure to disclose his lack of expertise'* which was compounded '*because he did refer to it on two separate occasions*'. The judge ruled that Dr Tobon '*lacked the objectivity and scientific rigour that was required both by the task and the standards he would set himself and by the Court'* and that '*his work showed (unknowing) bias, and that he was prepared to include information in support of his conclusions without verifying it'*.

What criticisms were made of the claimants' lawyers?
The judge's criticisms also extended to the claimants' solicitors (Leigh Day) with the judge blasting a letter they had sent serving Dr Card's expert report being '*not a fair summary of what had happened and was itself seriously misleading'*. Overall Stuart-Smith was scathing of the '*siege mentality'* of the claimants' legal team which he ruled led to a '*lack of independence of mind'* which had '*penetrated the legal team as well'*.

Allegations were made by the claimants of 'dolo' which also failed at trial. As to these, Stuart-Smith J ruled that these included '*allegations that the Defendant was guilty of cunning and deceitful conduct and a wilful assault against the rights and interests of the Claimants*' and noted that the Defendant submitted that '*they should never have been brought in the first place and should not have been maintained at trial*'.

What relevance were pre trial offers?
As to the Calderbank offer, the claimants submitted that their failure to settle on the terms of the letter was not unreasonable. The judge noted that there had been an ADR meeting to discuss settlement on 28 November 2013. The judge ruled that '*the Defendant's refusal to make an offer of £10 million'* for Leigh Day to consider with their clients was '*justified*'. He ruled that the drop hands offer made by the Defendant on 28 November 2013 could not '*properly be characterised as demonstrating a lack of good faith in entering into the mediation process'*. Again the judge criticised Leigh Day for its '*suggestion that the Defendant should offer to pay the Claimants millions of pounds in damages and their costs'* because that carried '*an air of unreality in the light of the evidence that was available at the time'*.

What test did the judge apply in deciding if indemnity costs were appropriate or not?
Stuart-Smith J said he would remind himself '*not to cherry-pick but to see the litigation as a whole and to have regard to all the circumstances of the case'* and that to obtain indemnity costs a '*high threshold'* has to be passed and because '*there are facts that take the case out of the norm does not automatically or*

even probably lead to an order for indemnity costs'. However he ruled there were 4 factors in this case that did lead him to award indemnity costs:

- the various iterations of the Schedules of Loss which were beyond the norm both in the inadequacy of their preparation or construction and in their consequences for the progression of the case,
- the service in mid-2013 of a body of expert evidence that was seriously defective as a result of the misleading presentation of an interdisciplinary approach. That defect was compounded by the failure of the experts to give proper attention to the ODC pipeline,
- the Calderbank offer and its timing in the context of the litigation as a whole, and.
- the history surrounding Dr Card's fourth and fifth expert reports.

Whilst Stuart-Smith ruled that '*each of these facets carries weight on its own'* he said they were also '*illustrations of a piece of litigation that, having set off on the wrong foot, went out of control as trial approached'*. In conclusion Stuart-Smith J ruled that he had '*come to the conclusion that the failings outlined here and in the Main Judgment progressively affected the proper course of the litigation so as to take the case beyond the norm to an extent that both justifies and requires the signal mark of an order of indemnity costs*' He said that the '*tipping point'* had come when Dr Card's 4th report had been served because it presented '*what was essentially a new expert case in deliberate disregard of the Court's order'* and this was a '*very serious error of judgment which had extensive consequences in placing unfair additional burdens upon the Defendant and the trial process'*.

From what date did the judge order that indemnity costs will run from?
Stuart-Smith J ruled that the Defendant should have its costs on the standard basis until 28 August 2014 and on the indemnity basis after that date.

What order for costs did the judge make on this application?
The judge ruled that the costs of the consequential orders hearing including that to determine costs were to be assessed on the standard basis if not agreed.

What did the judge say about whether such a costs order would have a chilling effect?
Leading counsel for the claimants pleaded with the judge at the hearing that an order for indemnity costs would have a chilling effect for similar claimants bringing environmental damage claims against large corporations or for access to justice more generally. On this Stuart-Smith J ruled that his order for indemnity costs '*should not'* have a chilling effect but that 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*.'

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