



## How to get costs on the indemnity basis

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Dixon v Radley House Partnership and Mr Christopher Reading and Others  
[2016] EWHC 3485 (QB), Stuart-Smith J

### Outline

In Dixon v Radley House Partnership and Another [2016] EWHC 3485 (QB) the Court considered costs on the indemnity basis.

This article gives practical guidance on:

1. The legal principles of costs on the indemnity basis.
2. Practical guidance on how to get costs on the indemnity basis.

### Introduction on costs

Costs in civil proceedings can be assessed on the standard basis or the indemnity basis.

CPR r.44.3(2) provides where costs are to be assessed on the **standard basis**, the Court will:

- a. only allow costs which are proportionate to the matters in issue;
- b. resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

CPR r.44.3(3) provides where costs are to be assessed on the **indemnity basis** the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party. There is no automatic proportionality requirement.

Obtaining a costs order on the indemnity basis carries substantive and tactical advantages.

### Main judgment - Dixon [2016] EWHC 2511 (TCC)

This decision is of importance to all civil practitioners. It concerned payment of incorrect court fees and attempts by the Defendants to amend to plead limitation, notwithstanding that the claims had been issued by the Court.

The Defendants argued that the claims were a nullity and of no legal effect at all.

The Court handed down its main judgment at [2016] EWHC 2511 (TCC). The Court dismissed the applications as “*misconceived*” and having “*no real prospect of success*”.

I provided [practical guidance on court fees and the main judgment in a separate article](#).

In addition to the legal flaws in the applications, the Claimants had also argued in resisting the Defendants’ applications to amend that the Court should also refuse the amendments on discretionary grounds by reason of the Defendants’ conduct.

The Claimants submitted that the Defendants’ conduct, particularly the First Defendant (Radley House Partnership) was a trap: an abuse of process by which the Defendants knowingly participated with the proceedings for a number of years as if they were valid, and then called “snap” after limitation had expired alleging they were of no effect at all.

The Court did not have to decide those points in the underlying application, as it accepted the Claimants’ legal submissions as to why the applications must fail.

The Court considered conduct at the subsequent costs hearing.

### **Costs judgment - Dixon [2016] EWHC 3485 (QB)**

The Claimants applied for costs on the indemnity basis, to be subject to detailed assessment, with payment on account.

The Court held that “*the point being taken by the defendants on the application was thoroughly bad*” and “*as close to being unarguable as one is likely to get*”.

None of the “*authorities which went nowhere near supporting the defendants' position*” save for “*a brief mention in the decision of Warby J in Bhatti*”. However, the First Defendant did not refer to it in their application notice or written submissions.

The Court found that the First Defendant had stored up its purported defence and sprung a trap on the Claimants. The Court found that the point occurred to the First Defendant’s legal team in February 2016, *prior* to pleading a conventional defence in March 2016, and *prior* to their application in April 2016 after waiting for all limitation periods to expire.

The Court held: it was “*not within the norm to act in such a way that continues to acknowledge the validity of the proceedings whilst storing up for a few weeks later the contrary suggestion*”.

It included a “*significant level of unreasonableness or otherwise inappropriate conduct*”.

The Court found the Second Defendant’s conduct to be different from the First Defendant’s, in that the Second Defendant “*jumped on the bandwagon*” and followed the First Defendant.

The Court ordered costs to be assessed against the First Defendant on the indemnity basis, to be subject to detailed assessment and with payment on account.

### **Legal principles – costs on the indemnity basis**

See Dixon [2016] EWHC 3485 (QB). Key points:

1. 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 merely wrong or misguided in hindsight.
2. The court must decide whether there is something in the conduct of the action, or the circumstances of the case in general, which takes it out of the norm in a way which justifies an order for indemnity costs.
3. The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, provided that the claim was at least arguable.
4. The pursuit of a hopeless claim, or a claim which the party pursuing it should have realised was hopeless, may well lead to such an order.
5. The degree of badness of a point may go into the scales when considering whether indemnity costs should be awarded even though the mere fact that a point has been rejected or would have been rejected on an application for summary judgment is not of itself in the normal case reason for awarding indemnity costs.
6. It is not within the norm to act in such a way that continues to acknowledge the validity of the proceedings whilst storing up for a few weeks later the contrary suggestion.

### **Practical guidance on how to get costs on the indemnity basis**

Each case will turn on its own facts. Some practical tips:

1. Consider critically in advance of making an application for indemnity costs the legal merits of the underlying point on which costs are sought.
2. If the point was unarguable or close to it, consider the wider circumstances. Pursuit of a weak or unarguable point may not, in itself, be sufficient to establish the indemnity basis. Consider, for example, the party taking the point, whether it has legal representation (solicitors and/or Counsel), the timing, circumstances in which the point was raised and its consequences on the conduct of the litigation and costs.
3. Seek to establish particulars and evidence of the opposing party:
  - a. Acting with a significant level of unreasonableness in the litigation or otherwise inappropriate conduct.

- b. Failing to act in accordance with the overriding objective in a material matter such that it is beyond the norm of how civil litigation ought to be conducted.
4. Correspondence which raises legitimate and appropriate questions of the opposing party as to their conduct may assist in:
  - a. Considering whether or not there are grounds for applying for indemnity costs
  - b. Establishing the conduct required for an order on the indemnity basis.
5. If there is opportunity, it may assist to put the opposing party on notice from an early stage of an intention to claim costs on the indemnity basis, the reason(s) for doing so, and give the opposing party an opportunity to resile from their position.

### **Conclusion**

Whether to apply for costs on the indemnity basis will often be an important litigation decision, on which substantial sums and advantage in the proceedings may turn.

Costs are discretionary. The tribunal will have to decide whether such an order is justified. Each case is likely to be different. Each is likely to require considered analysis and, moreover, effective advocacy if the application is to succeed.

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Tom Owen appeared for the Claimants in successfully pursuing the First Defendant for costs on the indemnity basis and in successfully defeating the Defendants' limitation arguments.

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