Propinvest Group Limited (in administration) V Glenn Maud **JUDGMENT**
Royal Court **18/2014**
7th April, 2014

Supplementary judgment on costs arising from the Court's decision on the substantive issue handed down on 16 December 2013.

Approved Text
07.04.2014

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between

PROPINVEST GROUP LIMITED (IN ADMINISTRATION) **Plaintiff**

-v-

GLENN MAUD **Defendant**

Hearing dates: 2nd, 3rd, 4th and 18th July 2013

Costs Decision handed down: 7th April 2014

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Plaintiff: Advocate A Lyall
Advocate for the Defendant: Advocate N Robison

Cases, Texts & Legislation referred to:
The Royal Court Civil Rules, 2007
Shahm v Lloyds TSB Offshore Treasury Limited and Fooks [2007-08] GLR 323
HLB Kidsons v Lloyds Underwriters [2007] EWHC 2699 (Comm)
Re Elgindata (No. 2) [1992] 1 WLR 1207
J Murphy & Sons Ltd v Johnston Precast Ltd (No. 2) [2008] EWHC 3104 (TCC)

Introduction

1. This is a short supplementary judgment on costs arising from the Court's decision, which was handed down on 16 December 2013, on the substantive issue between the parties. By paragraph 92 of that judgment, the Court indicated that the costs of the action brought by Propinvest Group Limited (in administration) against Glenn Maud would, in default of any application for a different outcome, follow the event. Because the Defendant had successfully opposed the

Plaintiff's claim against him, this would have meant he had his costs on the standard recoverable basis.

2. In giving that indication, what I had envisaged happening was that the parties' Advocates would communicate between themselves as to whether an outcome was agreed and, if not, to coordinate whether to proceed by way of written submissions or listing the matter before the Interlocutory Court. To have done so would, in my view, be consistent with the parties' duties pursuant to rule 1(4) of the Royal Court Civil Rules, 2007. In the event, that course of action does not appear to have happened. Without prior reference to the Defendant's Advocates, the Plaintiff's Advocates lodged their submissions opposing any award of costs in favour of the Defendant or, in the alternative, suggesting that any costs award should be reduced by half or only operate from the date when the Defendant's case was adequately clarified in the witness statement filed on his behalf. Those written submissions were filed at the Greffe on the last day of the 21-day period I gave before the default position arose.

3. The submissions of the Defendant's Advocate were lodged just over two weeks later. The first point made is that the Plaintiff's Advocate's unilateral submission without giving any forewarning of the making of an application for a different costs outcome does not comply with the directions given about how to apply in respect of costs. Accordingly, I am invited to disregard those submissions entirely and proceed to make the default order I had in mind from the trial proceedings.

4. Whilst it is tempting to do so, I recognise now that I may not have spelt out with sufficient clarity what I expected to happen. This is one of the drawbacks of handing down judgments without convening the Court. If a decision is given with the parties present, the issue of costs will be addressed immediately thereafter. That is why I felt it appropriate to give an indication as to the order I had in mind, thereby inviting discussion between the parties and, if appropriate, submissions contrary to the default position identified. For these reasons, and also having read and considered the submissions made by both parties, I have decided to adjudicate on those submissions rather than treat any different interpretation of what was expected as debarring the Plaintiff from making any submissions in support of a different outcome. In my judgment, a decision not to take into account those submissions would result in the Plaintiff feeling aggrieved and would not, in my view, amount to dealing with the case justly.

5. The parties' submissions were lodged during January 2014. Due to an administrative oversight, they did not reach me until early April 2014. Having endeavoured to give the parties a generous period following the judgment, bearing in mind that Christmas and the New Year intervened during that time, the resolution of the costs issue has taken significantly longer than it should have and I must apologise to the parties for the delay, which has not been of their making. In the Court's substantive judgment, the possibility of resolving the question of costs on the papers and without convening a further hearing was raised. In the circumstances, having read the full submissions of both Advocates, I am satisfied that a decision on the papers is appropriate and justified.

6. Both parties accept that the Court has a wide and unfettered discretion in relation to ordering costs. Rule 82 of the 2007 Rules simply provides that the Court may make such order as it thinks just. Further, it has also been acknowledged on behalf of the Plaintiff that the starting point is that the unsuccessful party will be ordered to pay the costs of the successful party (see, eg, *Shahm v Lloyds TSB Offshore Treasury Limited and Fooks* [2007-08] GLR 323, in which it was also recognised that there needed to be appropriate flexibility to move away from that starting point, otherwise a winner-takes-it-all attitude could result in wastefulness and act as a disincentive to focus clearly on the most efficient way to seek success in the case). It is clear, therefore, that the Court retains a discretion to depart from that starting point in any case where that is appropriate.

Issues based approach

7. The first contention on behalf of the Plaintiff is that the Defendant raised four defences, of which only two were successful. It has, therefore, drawn attention to what Chadwick LJ stated in the English Court of Appeal in *Summit Property Ltd v Pitmans (a firm)* [2001] EWCA Civ 2020 (at para. 27, expanding slightly the quotation to which Advocate Lyall referred me):

> "*An issue based approach requires a judge to consider, issue by issue in relation to those issues to which that approach is to be applied, where the costs on each distinct or discrete issue should fall. If, in relation to any issue in the case before it the court considers that it should adopt an issue based approach to costs, the court must ask itself which party has been successful on that issue. Then, if the costs are to follow the event on that issue, the party who has been unsuccessful on that issue must expect to pay the costs of that issue to the party who has succeeded on that issue. That is the effect of applying the general principle on an issue by issue based approach to costs.*"

Accordingly, taking an issue-based approach, the best that can be said for the Defendant's case is that half of what it argued was successful and so, unless the other matters advanced on behalf of the Plaintiff lead to no order as to costs being made, the split of effort on these issues should, it suggests, result in the costs awarded being reduced by 50%.

8. In response, the Defendant's Advocate has relied on the explanation given by Gloster J (as she then was) in *HLB Kidsons v Lloyds Underwriters* [2007] EWHC 2699 (Comm) (at paras. 10 and 11):

> "*10. The principles applicable to costs were not in contention. The court's discretion as to costs is a wide one. The aim always is to "make an order that reflects the overall justice of the case" (Travellers' Casualty v Sun Life [2006] EWHC 2885 (Comm) at para 11 per Clarke J. As Mr Kealey submitted, the general rule remains that costs should follow the event, i.e. that "the unsuccessful party will be ordered to pay the costs of the successful party": CPR 44.3(2). In Kastor Navigation v Axa Global Risks [2004] 2 Lloyd's Rep 119, the Court of Appeal affirmed the general rule and noted that the question of who is the "successful party" for the purposes of the general rule must be determined by reference to the litigation as a whole; see para 143, per Rix LJ. The court may, of course, depart from the general rule, but it remains appropriate to give "real weight" to the overall success of the winning party: Scholes Windows v Magnet (No. 2) [2000] ECDR 266 at 268. As Longmore LJ said in Barnes v Time Talk [2003] BLR 331 at para 28, it is important to identify at the outset who is the "successful party". Only then is the court likely to approach costs from the right perspective. The question of who is the successful party "is a matter for the exercise of common sense": BCCI v Ali (No. 4 (supra)). The matter must be looked at "in a realistic … and … commercially sensible way": Fulham Leisure Holdings v Nicholson Graham & Jones [2006] EWHC 2428 (Ch) at para 3 per Mann J.*
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> *11. There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially complex litigation such as the present case, any winning party is likely to fail on one or more issues in the case. As Simon Brown LJ said in Budgen v Andrew Gardner Partnership [2002] EWCA Civ 1125 at para 35: "the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues". Likewise in Travellers' Casualty (supra), Clarke J said at para 12:*

> *"If the successful claimant has lost out on a number of issues it may be inappropriate to make separate orders for costs in respect of issues upon which he has failed, unless the points were unreasonably taken. It is a fortunate litigant who wins on every point."*"

9. As I have already indicated, the parties both acknowledge that the successful party was the Defendant, with the consequence that the usual order would be for the Defendant to have his costs paid by the Plaintiff. The central issue, therefore, is whether there was anything in the case to entitle me to depart from that usual order. I accept that in doing so the Plaintiff is not obliged to demonstrate that the successful Defendant had acted unreasonably or improperly (see ***Re Elgindata (No. 2)*** [1992] 1 WLR 1207).

10. I am not persuaded that it would be an appropriate exercise of the Court's discretion to attempt to de-construct the Defendant's case in the manner suggested on behalf of the Plaintiff. In reality, there was a straightforward denial by the Defendant that he owed money to the Plaintiff. There was a single defence really, namely that his indebtedness had been transferred from the Plaintiff to Navarro Ventures S.a.r.l. There was then a number of routes advanced on his behalf by which the Court could reach that conclusion. Accordingly, I can properly take the view that there was a single issue on which the Defendant succeeded, meaning that the issue by issue based approach is, in any event, inapplicable. That is why I have chosen to describe the different routes as such, rather than being distinct "issues"; a more accurate label perhaps being "sub-issues".

11. Even if I should not treat this as being a single issue case, of the two routes that did not find favour with the Court, the construction argument was the narrowest and, in my estimation, had the least impact on the trial, albeit perhaps a slightly greater impact on the preparation of the skeleton arguments because it involved making submissions on the law. However, even then, the Court needed to engage in an element of fact-finding, just as it did for the routes on which the Defendant succeeded. Consideration of the first route advanced by the Defendant, involving variation of the Loan Agreement was also, in my view, relevant background information to the consideration of the routes under which the Defendant was entitled to resist the Plaintiff's claim. There was little, if any, waste of resources in covering these matters.

12. Overall, therefore, this case is not one which lends itself to an issues-based costs determination because the entirety of the Defendant's case was interwoven. Moreover, the Defendant only needed to establish one route to win the case and defeat the Plaintiff's entire claim. This is precisely the type of situation in which advancing alternative bases to reach the same end result should not, in my judgment, result in the successful party facing some reduction in his costs for the sole reason that one or more of the defences argued fails. This was a case in which the options for the Court were to find in favour of the Plaintiff or the Defendant. It was an "*all-or-nothing*" case (see ***J Murphy & Sons Ltd v Johnston Precast Ltd (No. 2)*** [2008] EWHC 3104 (TCC)) or, as I might term it, a winner-takes-it-all case. It might be otherwise if one line of defence is wholly unrelated to the other lines and the defendant can be criticised for taking that line where it really should never have been run or abandoned earlier. This is not the situation in this case. I am satisfied that each of the routes underpinning the defence that the indebtedness had been novated could properly be pursued, albeit that two of those routes were rejected on the evidence. Because it was not unreasonable for the Defendant to advance his defences on the bases he did, I have reached the conclusion that this is not a reason to deprive the Defendant of the costs award that he would otherwise be likely to receive.

Defendant's conduct

13. The second issue raised on behalf of the Plaintiff relates to the conduct of the Defendant. It has highlighted two particular respects. The first relates to the Court's findings that errors occurred which can be attributed to the Defendant or his agents. The second is that the Plaintiff, through the Joint Administrators, had no knowledge of the facts involved because they were known to the Defendant and Mr Southern, who for these purposes is to be treated as the Defendant's agent.

14. I take the view that the Joint Administrators of the Plaintiff were well aware when they instituted the proceedings against the Defendant that this was going to be a fact-sensitive case if the Defendant intended to oppose the debt claim made against him. As the Court's decision records, the Plaintiff's case rested on putting forward the documents available to the Joint Administrators, which appeared to show that the Defendant still owed the money claimed as a debt due to the Plaintiff. There can be no criticism of the Joint Administrators for forming that view. Both sides may have done more during the course of the company being in administration up to the trial to have discussed the issues that fell to be resolved. However, they still proceeded to an adjudication before the Court on those issues and the Defendant prevailed.

15. I take the view that it is important to remember that the Plaintiff decided to pursue this perceived debt action with the result that the Defendant had a choice between conceding it or opposing it. The Defendant did not choose to face litigation. From the outset, the Defendant said that the indebtedness appearing on the face of the Plaintiff's documents had been transferred by agreement to Navarro. The precise basis on which he took that single position developed over the time between the commencement of the action and the trial, but I do not regard that as a reason for depriving the Defendant of the costs order in the light of the Court's judgment to which he is otherwise entitled.

16. The impression given by the way in which this action has been dealt with is that the Joint Administrators are unimpressed by the Defendant's actions. They appear to attribute the failure of the Plaintiff to the Defendant. That question, however, is a wider one than the focus of this action. The sloppiness in recording the transactions to which the Court referred in its judgment is not directly attributable to the Defendant, but to Mr Southern who was the directing mind of the Plaintiff at the relevant times. In terms of which of the parties brought about the underlying basis for the Plaintiff's claim against the Defendant, the balance in my judgment tips against the Plaintiff, by which I mean the company as it was at the time and not the Joint Administrators.

17. In relation to the overall conduct of the litigation, as I have just mentioned the Plaintiff has criticised the Defendant for the way the defence evolved. Had it done so in such a way that a distinct issue had been raised late in the day and that was the element on which the Defendant succeeded, I would have been quite prepared to take that into account and depart from the usual approach by depriving the Defendant of some or all of the costs. Once the routes of demonstrating that the Defendant's indebtedness had crystallised in the way they had, and was supported by the witness statements of the Defendant and Mr Maud, the Plaintiff faced the choice of whether to accept those explanations or proceed to trial. It was an issue that turned, in very large part, on credibility and, having decided to proceed, the Joint Administrators must, in my view, have been conscious that the Court would face the binary decision of giving judgment for the full amount for the Plaintiff or accepting the Defendant's defence and dismissing the entire claim. In either case, the costs would be more likely than not to follow the event.

18. Against this background, I am not minded to depart from the usual approach to costs orders and will make the order that the Defendant has his costs on the standard recoverable basis. Whilst I can understand the levels of frustration within the Joint Administrators, I consider that they should be more willing to recognise that the Defendant is entitled to defend himself against their claims consistently with the Rules. Both sides appear to me to have become entrenched in their positions rather than working cooperatively and collaboratively and, in those circumstances, in a winner-takes-it-all situation, the party that ends up losing has to face the costs consequences.

Conclusion

19. Despite the submissions made on behalf of the Plaintiff seeking to persuade me that the Court should deprive the Defendant of some or all of the costs to which he would otherwise be entitled, for the reasons given, I have rejected them and so confirm the provisional view I had taken that costs should follow the event in this case. Accordingly, the Defendant is awarded his costs on the standard recoverable basis, to be taxed if they are not agreed.

