



Shelton & Barby
Royal Court
16th February, 2015

JUDGMENT
07/2015

Decision on costs, made on the papers.

Approved Text
16.02.2015

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between: **BARRY SHELTON** **Plaintiff**
-and-
ROGER BARBY **Defendant**

Costs decision (made on the papers)
Judgment handed down: 16th February 2015

Before: Richard James McMahon, Esq., Deputy Bailiff

The Plaintiff was not represented.
Counsel for the Defendant: Advocate G S K Dawes

Cases, texts & legislation referred to:

The Royal Court Civil Rules, 2007

Hulme v Matheson Securities (Channel Islands) Limited (1997) 24.GLJ.80

Jefcoate v Spread Trustee Company Limited (unreported, 17 November 2014)

Wates Construction v HGP Greentree Allchurch [2005] EWHC 2174 (TCC)

Three Rivers District Council v Bank of England [2006] EWHC 816 (Comm)

Introduction

1. At paragraph 97 of the Court's judgment handed down on 27 November 2014 dismissing the Plaintiff's action, I indicated that I expected that costs would follow the event on the usual recoverable basis, but invited the parties to make any further submissions they wished on the incidence of costs within 14 days thereafter. On behalf of the Defendant, in written

submissions dated 11 December 2014, Advocate Dawes has submitted that this is a proper case in which to award costs on the indemnity basis. That application for indemnity costs has been opposed by the Plaintiff in written submissions dated 3 January 2015. Indeed, the Plaintiff has invited the Court to exercise its discretion to disallow the Defendant's costs insofar as they relate to the preparation of both the Defendant's witness statements and in respect of the alleged deficient preparation of the Defendant's disclosure list. In a written reply dated 7 January 2015, Advocate Dawes has objected that the suggestion made to disallow certain costs was not raised within the timeframe envisaged in paragraph 97 of the Court's judgment.

2. Both parties indicated that they were content for me to adjudicate on the question of costs without there being an oral hearing. I am satisfied that I can reach a just conclusion without the need to convene the parties and so have considered this matter on the papers only.

Principles

3. The Court can award costs on the indemnity basis pursuant to rule 83 of the Royal Court Civil Rules, 2007 "*where any party has pleaded or otherwise pursued ... an action, claim or counterclaim unreasonably*". The Court of Appeal in Hulme v Matheson Securities (Channel Islands) Limited (1997) 24.GLJ.80 explained that it regarded the course as a paradigmatic one "*because there was no justification for putting Mrs Hulme to the expenses of any costs at all*". However, this was a case in which full and frank disclosure had not been made calling into question whether the ex parte *Mareva* injunction obtained would ever have been granted had the heavy burden of making full and frank disclosure actually been satisfied.
4. The Hulme case was explained recently in Jefcoate v Spread Trustee Company Limited (unreported, 17 November 2014) as establishing that "*it is not merely where proceedings are pursued or conducted with an ulterior or improper purpose that indemnity costs may be awarded, but also where they are pursued oppressively or in such a way as to cause costs disproportionate to the amount at stake to be incurred*". Further, by reference to Wates Construction v HGP Greentree Allchurch [2005] EWHC 2174 (TCC), it is clear that "*Maintaining a claim which the Plaintiff knows, or ought to know, is doomed to fail on the facts and on the law will justify an award of indemnity costs*".
5. I have also borne in mind the eight principles extracted from the authorities by Tomlinson J in Three Rivers District Council v Bank of England [2006] EWHC 816 (Comm):

- (1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.*
- (2) The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstances which takes the case out of the norm.*
- (3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness.*
- (4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations.*
- (5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.*
- (6) A fortiori, where the claim includes allegations of dishonesty, let alone allegations of conduct meriting an award to the claimant of exemplary damages, and those allegations are pursued aggressively **inter alia** by hostile cross examination.*

- (7) *Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that is a further ground.*
- (8) *The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings;*
 - (a) *Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time;*
 - (b) *Where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;*
 - (c) *Where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media;*
 - (d) *Where the claimant, by its conduct, turns a case into an unprecedented factual enquiry by the pursuit of an unjustified case;*
 - (e) *Where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;*
 - (f) *Where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;*
 - (g) *Where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat.”*

6. Ultimately, I should consider all the circumstances of the case and endeavour to make a just order that reflects what has taken place. In doing so, I can take into account the pre-trial offers of settlement. There was no payment made into Court. However, correspondence from the Defendant's various lawyers over the years pointed out the perceived weaknesses in the Plaintiff's claim and invited him to consider withdrawing it. As recently as 11 September 2014, the Defendant's Advocates offered the solution of the proceedings being withdrawn with no order as to costs, i.e., both sides bear their own costs.

Discussion

7. The Plaintiff alleged that there was an oral contract. His evidence was disbelieved, which is why he was unsuccessful and faces a costs order. In an ordinary case, the mere fact of bringing an action relying on an elected oral contract would not mean that the proceedings were out of the norm. Two perfectly reasonable people may honestly believe that each of their versions of events has a good prospect of being accepted. Accordingly, the fact that the Plaintiff was found to have a flawed recollection, or to have answered questions evasively, is not, in my view, of itself justification for awarding indemnity costs.
8. Although Advocate Dawes has submitted that the Plaintiff's case was "*speculative, weak, opportunistic and thin*" (my emphasis), any one of these will potentially result in indemnity costs. The descriptions taken from the *Three Rivers* case (*supra*) are not conjunctive. As a result, although the Court did not form the impression that all four matters were necessarily applicable, more than one of them was. If nothing else, I consider that the Plaintiff was being opportunistic in seeking to take advantage of the absence of anything written down confirming one way or the other whose version of events was correct and, further, that this

was a state of affairs that was fairly typical of the manner in which he appears to have done business. His history of litigating points unsuccessfully and generally struggling to be believed tends to make this latest example of his willingness to make claims to courts appear to be speculative.

9. In his written submissions, the Plaintiff has joined issue with some of the factors listed under the eighth consideration dealing with when a case may be taken out of the norm. He correctly points out that allegations of dishonesty or impropriety (factor (a)) are to be both serious and wide-ranging and I agree with him that the allegations he made about the Defendant were more self-contained. However, the fact that the Plaintiff has made these allegations against the Defendant and has done so without any shred of remorse or apology for having wrongfully attempted to blacken the Defendant's name is, in my view, something that can properly be taken into account in this context. I consider that "*such allegations*" as referred to in factor (b) should not be construed as narrowly as the Plaintiff submits, but rather are simply "*allegations of dishonesty or impropriety*" without further qualification.
10. Similarly, in relation to factors (e) and (f), I regard the attempts of the Plaintiff to argue against their relevance as closing his eyes to the tenor of the Court's judgment dismissing his action. This was a claim that was, when all is said and done, "*far-fetched*". The documentation prepared at the time supported the Defendant's contentions. There was no additional deal struck orally supplementing the terms agreed that were put to the regulatory authorities in Jersey as well as here.
11. I am satisfied, therefore, that Advocate Dawes has advanced on behalf of the Defendant a line of argument that enables me to award indemnity costs against the Plaintiff if I am minded to do so. The real question is whether that outcome has the feel of being just in all the circumstances of this case.
12. I am conscious that the Defendant offered to bear his own costs just a short time before the trial commenced and that the Plaintiff rejected that offer. I regard this as a further reason for awarding costs on an indemnity basis after that date. The Plaintiff has certainly not achieved a better outcome. Indeed, had he been willing to recognise that his claim was more likely to fail than succeed, which should have been apparent to him on reviewing the witness statements and the documents that had been obtained relating to Balchan Management Limited, the Plaintiff should have gladly accepted the opportunity provided to him by this offer to minimise the costs to which he has exposed himself.
13. In relation to the Plaintiff's complaints about the inaccuracies in the Defendant's witness statements and the non-compliance with the Defendant's ongoing disclosure obligations, I will treat these as matters being raised in opposition to the Defendant's application for indemnity costs rather than amounting to a costs application made by the Plaintiff himself outside the permitted timeframe for doing so.
14. It is unfortunate that the Defendant did not take steps to acquire the Balchan Management Limited documentation earlier than he did. Whether there was a disclosure obligation or not, it would potentially have assisted in clarifying matters and would have prevented the Defendant including material in his witness statement which he subsequently had to clarify. I have weighed carefully whether these small shortcomings in the way the Defendant's case was conducted should lead to anything other than an award of a full award of indemnity costs. In particular, I have asked myself whether the Plaintiff would have conducted his case any differently had the material been supplied earlier and the witness statements been free from error.
15. I have concluded that the Plaintiff is the type of litigant who relishes the fight. He was adamant that his version of what happened was correct and I strongly suspect that he would not have done anything differently if the Defendant's material in question had been provided exactly as it should have been. In these circumstances, although I am not particularly

impressed with what the Defendant has done in this regard, because it would not have made any difference to how the Plaintiff conducted his action, I have decided that it does not provide the justification for modifying what is otherwise the order that should, in my judgment, follow.

Conclusion

16. Overall, therefore, I am persuaded that these proceedings against the Defendant have resulted in him being forced to incur costs defending himself where there was no justification for putting him to any expense. The way in which the Plaintiff conducted his case as a litigant in person was not symptomatic of someone who does not have experience of courtrooms and so falls into error, but rather of a person going out of his way to make accusations which had no real prospect of success and were, at least at times, apparently designed to be as difficult as possible. One such example was the Plaintiff's contention that a document must not be genuine, resulting in the Defendant having to bring his wife to Court to give evidence to rebut that position. Accordingly, therefore, I will order that the Plaintiff shall pay the Defendant's costs on the full indemnity basis.