Pirouet & Batiste v The States of Guernsey
Royal Court
19th May 2017

JUDGMENT
25/2017

Applications for interim payments of Reserved Costs and Awarded Costs

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)
CIVIL NO. 1992

BETWEEN: **(1) MR. BEN GEORGE MATHEW PIROUET**
(2) MR. DALE BATISTE

PLAINTIFFS

and

THE STATES OF GUERNSEY

DEFENDANT

Date of hearing: 12th April 2017

Judgment delivered: 19th May 2017

Before: James Walker McNeill QC, Lieutenant Bailiff

Advocate Paul Richardson for the Plaintiffs
Advocate Alison Ozanne for the Defendant

JUDGMENT

1. By two separate applications, each dated 5 April 2017, the plaintiffs seek payments of costs. In the first application (the "Reserved Costs" application) they seek payment on the indemnity basis of certain costs which were reserved under paragraphs 2 and 7 of a consent order dated 19 January 2017 (the "Reserved Costs"). By that application they also seek an interim payment towards the Reserved Costs. By the second application (the "Awarded Costs" application) the

plaintiffs seek an interim payment towards certain costs awarded in their favour at paragraphs 2 and 7 of the consent order dated 19 January 2017 (the "Awarded Costs").

2. In response, the defendant has offered to pay £10,000 forthwith for the Awarded Costs but, otherwise, contends that those costs should be taxed in the usual way. As regards the Reserved Costs application the defendant submits that, in relation to a balance of costs claimed for paragraph 3 of the Plaintiffs' withdrawn strike-out Application, there should be no order as to costs, or, in the alternative, that costs should be awarded on the recoverable basis to be taxed if not agreed. As regards a balance of costs claimed by the plaintiffs in relation to applications withdrawn by the defendant, the defendant submits that costs should be in the Cause or, otherwise, be awarded on the recoverable basis, to be taxed if not agreed.

The Consent Order

3. The Consent Order came about in this way. By October 2016 the proceedings in this Cause had reached a stage at which the plaintiffs had filed an application to strike out the Defenses and the defendant had filed an application for permission to file a counterclaim with the intention of rendering the proceedings representative. Following a directions hearing on 21 October the defendant served an amended application and a further hearing took place on 15 December. At that hearing the court expressed some concern as to the manner in which the form and substance of the defendant's case had been pleaded and the defendant undertook to serve draft amended defenses by 12 January, which it did. In these circumstances the plaintiffs' strike-out application was not heard. Separately, the parties agreed that the defendant need not proceed for the time being with the application to have the proceedings made representative but allowed the defendant to preserve the right to issue a further application in the future.

4. Against that background the parties agreed in the Consent Order that the defendant should bear the plaintiffs' recoverable costs in respect of paragraphs 1 and 2 of the strike-out application with costs in relation to paragraph 3 being reserved. That paragraph had contained an argument that the defenses disclosed no reasonable grounds for defending the action. Further, as regards the amended defenses, the defendant was to bear the plaintiffs' consequential recoverable costs occasioned by filing and serving of the amended defenses but the costs in respect of the defendant's application to render the proceedings representative and amended application costs were reserved.

The Reserved Costs

5. The plaintiffs now seek payment of the Reserved Costs on the indemnity basis together with an interim payment.

6. Dealing first with paragraph 3 of the plaintiffs' strike out application, the plaintiffs submitted that their Application for strike-out had been necessary in order to ensure that the Defendant complied with proper procedures, the defendant having been given substantial prior written notice of the deficiencies in the pleadings but having failed to engage with the process. As regards the defendant's application and the defendant's amended application, they were ill timed, procedurally deficient and without a proper grasp of the requirements of written pleading. In the whole circumstances the defendant had presented its pleadings and applications on a wholly unreasonable basis and it was within the power of this court to award costs on an indemnity basis for such behaviour: see *Main v Laughton* [1995] 20 GLJ 62, at 65C-D.

7. For the defendant it was emphasised that paragraph 3 of the plaintiffs' strike out application had sought to identify that the principal limbs of the defenses disclosed no reasonable grounds for

defending the action. In the submission of the defendant, that application would have failed, as could be seen by the fact that whilst the defenses had been recast, no significant new limb of defense or legal argument was either removed or added.

8. In my judgment there is no reasonable basis for an award of costs in favour of the plaintiffs in relation to paragraph 3 of the plaintiffs' application. It was entirely appropriate for parties to agree to reserve that matter pending filing of the Amended Defenses on 23 January 2017. But, as the defendant has pointed out, the Amended Defenses do not innovate on the lines of defense either by addition or subtraction. Paragraph 3 having been withdrawn and not pleaded again in relation to the Amended Defenses, there is no basis for awarding costs upon the basis of an argument that the defenses disclosed no reasonable grounds for defending the action.

9. Turning to the defendant's withdrawn applications, the defendant's primary position was that a fair order in relation to the balance of costs arising from the defendant's withdrawn applications, aside from the already Awarded Costs, would be costs in the Cause. The defendant had not been ordered to amend the defenses but had responded to the views expressed by the court as to the unsatisfactory presentation of pleading.

10. In my judgment the plaintiffs are entitled to these costs. As regards the application to render the proceedings representative in nature, the prior history of this litigation shows that parties had differing concerns as to how widely, if at all, a decision in this matter would affect other members of pension schemes operated by the defendant. In such circumstances one can understand why the defendant considered it appropriate to seek to have the proceedings converted into some form of representative proceedings and, equally, on reflection decided against such an application. Such change of view is understandable but, without more, cannot be said to be improper or an abuse of process. As to any other costs of the amended applications, as these arose from a significant and late recasting of the pleadings, the plaintiffs should be entitled to their costs. The plaintiffs are therefore entitled to their costs on the standard, recoverable, basis. I deal below with the interim costs issue.

Interim Costs Orders

11. The plaintiffs seek interim payments and the parties appear to be agreed that this court has power to make such an order. It is appropriate to reflect, however, on views already expressed in this jurisdiction as to the exercise of that power.

12. In *Broadhead v Spread Trustee Company Limited and Others* (unreported, 10 March 2015), the Lieutenant Bailiff (Her Hon. Hazel Marshall QC) noted that the jurisdiction of the court to order an interim payment of costs, accepted by the parties appearing before her, was either inherent, or contained within the extremely wide terms of RCCR Rule 82. She considered it a principle of general application based on fairness allowing a successful party to receive an amount on account, so long as the court could be satisfied that the party would certainly be entitled to no less than the sum ordered. She emphasised, however, that the principle was to be applied conservatively as it was an inroad into the general principle that a party was entitled to have costs taxed: see paragraph 69.

13. The issue later came before the learned Deputy Bailiff (McMahon) in *Shelton v Barby* (unreported, 13 October 2015). The learned Deputy Bailiff was also of the view that the Court had jurisdiction, in the sense of enjoying a power, to make an order for a party to make an interim payment of costs on account, but based on the primary legislation on costs and in particular Section 1(1) of the Royal Court (Costs and Fees) (Guernsey) Law, 1969. The learned Deputy Bailiff was not persuaded that there should be any presumption that the court should always proceed to make such an order, but was prepared to identify that there might be a level

of presumption that, if sought, the Court would make such an order on the type of conservative basis indicated in *Broadhead*: see paragraph 10.

14. Most recently, in *Tchenguiz v Akers & Hamedani* (unreported, 7 October 2016) the Lieutenant Bailiff (Patrick Talbot QC), proceeding upon similar bases to the earlier cases, identified that the court must first decide, in the exercise of its discretion as to costs, whether, taking into account all the material circumstances, an order for an interim payment should be made. If it did, it was then for the court to determine an amount of costs which the receiving party was certainly going to be entitled to receive on taxation. On this latter point he quoted, without reservation, from *Broadhead* at paragraph 74 where the learned Lieutenant Bailiff had stated

> "… It is not appropriate for the court to aim to assess the minimum which the receiving party could be awarded on taxation and then award that sum, but rather to assess broadly the amount likely to be awarded and then build in a significant safety margin by awarding a conservative fraction of that sum as a payment on account. What that fraction will be is a matter for the court's discretion and according to its instinct as to what is fair and right in all the circumstances of the case. …".

15. For my own part, I find myself in agreement with the learned Deputy Bailiff as to principle – subject to what I say in paragraphs 17 and 18 below – and with the views of Lieutenant Bailiff Marshall and Lieutenant Bailiff Talbot as to the practical working out of an appropriate sum.

16. I note however that in each of these three cases the litigation had reached a conclusion: a circumstance which naturally tends to bring with it (i) a detailed appraisal by each party as to its costs, (ii) an extended appraisal by the losing party of the items and amounts claimed by the successful party and (iii) entering the queue for taxation if that appears inevitable. It is in such circumstances that the views of LB Marshall are apposite in seeking to be fair to see that the successful party should not have to bear undue inconvenience in being kept out of money undoubtedly due.

17. The points set out in the preceding paragraph and in LB Marshall's comments do not apply in the same way where the application for an interim payment order is made regarding an order for costs made in respect of part only of proceedings. When such an order is made, it may well have occurred in respect of one or other party as regards an individual procedural step. Almost invariably the party with such an award will not try to insist upon immediate payment unless there is doubt as to the solvency of the obligant, because to do so would require a proper Bill of Costs and, potentially, a taxation. During the course of an ordinary litigation there might be such orders either way, and the incurring of such costs would not be justified.

18. In my judgment, the limited presumption identified by the learned Deputy Bailiff should not apply to interlocutory decisions and awards. It seems to me that, at the stage before final judgment, the applicant for an interim order for payment must show why it is appropriate for such an order to be made. I consider that, unless the circumstances are quite exceptional, it will be exceedingly difficult for such an applicant to persuade the court that there will undoubtedly be a payment of costs due by the opponent to the applicant.

19. Nothing in the circumstances before me suggest that there will undoubtedly be a payment of costs due by the defendant to the plaintiffs. Nor could there be any apprehension that this defendant might, in due course, be unable to meet its obligations. It therefore follows that I am not prepared to make an order for interim payment in favour of the plaintiffs.