[2020]GCA015

IN THE COURT OF APPEAL OF GUERNSEY
CIVIL DIVISION – APPEAL NO. 529 & 531

Before:

George Bompas QC, President
David Perry QC
Sir Michael Birt

Between:

GRAHAM EDWARD HINDLE

Appellant

- and-

IAN KITCHING

Respondent

Judgment handed down: 25 March 2020

Counsel for the Appellant: Advocate M G Ferbrache
Counsel for the Respondent: Advocate A M Ozanne

Judgment on Costs

Perry, JA

1. This is the Court's judgment on costs.[1]It follows upon our judgment in the substantive appeal, dated 24 January 2020. For present purposes a brief summary of the background will suffice; our earlier judgment contains a full account of the proceedings in the lower court.

2. Before the Royal Court, the Appellant, Graham Edward Hindle, brought actions in detinue and conversion against the Respondent, Ian Kitching. Both causes of action were brought on the basis that Mr Hindle was the owner of a Jaguar motor car and that Mr Kitching had failed to deliver up the vehicle when requested to do so. Mr Hindle, who lives in Guernsey, had bought the vehicle in England in 2003. In 2008, he left it with a mechanic in Guernsey for repair. By 2011, the mechanic and the car had disappeared. Subsequently the vehicle passed through the hands of two purchasers in England before it was bought in 2013 by Mr Kitching,

[1]Since we handed down our judgment in the substantive appeal John Martin QC has retired from the Court. In these circumstances, Mr Bompas QC agreed to sit as the third member of the Court.

also in England. As we noted in our earlier judgment, Mr Hindle brought his claim as an innocent loser, while Mr Kitching defended it as a blameless purchaser.

3. The action was heard by the Royal Court between 29 and 31 October 2018, and on 1 November 2018. By judgment dated 3 April 2019, the Royal Court found that Mr Hindle was the owner of the Jaguar. Accordingly, the Royal Court ordered Mr Kitching to deliver up the vehicle, subject to a condition that Mr Hindle pay to Mr Kitching the sum of £46,989.42, an amount which reflected the value to Mr Kitching of repairs and improvements carried out on the vehicle. Alternatively, Mr Kitching was given the option of electing to pay Mr Hindle £20,000, which, should he decide to exercise it, would enable him to treat the Jaguar as his own. Mr Kitching exercised his election, as envisaged by the Order of the Royal Court, with the result that he remained in possession of the vehicle and ownership passed to him. In a subsequent judgment, dated 21 June 2019, the Deputy Bailiff ordered the costs of the proceedings to be paid by Mr Kitching on the recoverable basis.

4. By Notice of Appeal, dated 2 May 2019, Mr Hindle appealed against the Order made by the Royal Court.

5. By Notice of Appeal, dated 16 May 2019, Mr Kitching cross-appealed the finding of the Royal Court that Mr Hindle's claim was not prescribed and argued that Mr Hindle's right to claim title to the vehicle had been extinguished before the commencement of the proceedings.

6. By Notice of Appeal, dated 11 July 2019, Mr Kitching appealed against the Order of the Royal Court that he should pay the costs of the Royal Court proceedings.

7. Mr Hindle also made an application, dated 25 November 2019, to admit fresh evidence before the Court of Appeal, which, it was claimed, was relevant to the value of the Jaguar.

8. The hearing of appeal took place on 5 and 6 December 2019.

9. In our judgment, dated 24 January 2020, we dismissed Mr Hindle's appeal and rejected his application to admit fresh evidence, and dismissed Mr Kitching's cross-appeal on the issue of prescription, as well as his costs appeal.

Mr Kitching's Submissions as to Costs

10. Mr Kitching now seeks a costs order to the effect that:

    (a) Mr Hindle pay the costs of and occasioned by the substantive appeal and the application to adduce fresh evidence on the recoverable basis; and

    (b) Mr Kitching pay the costs of and occasioned by the cross-appeal and thecosts appeal on the recoverable basis.

    Advocate Ozanne, in her written costs submission on behalf of Mr Kitching, defines these various appeals, application and cross-appeal as together comprising "*the Appeal*".

11. Advocate Ozanne, on behalf of Mr Kitching, submits that the effect of these orders could properly be reflected by an order that overall Mr Hindle pay Mr Kitching 85% of his costs of "*the Appeal*", namely both Mr Hindle's appeal and fresh evidence application and Mr Kitching's unsuccessful cross-appeal and costs appeal. In support of her argument she relies principally on the fact that much of the work both before and during the appeal hearing was taken up by Mr Hindle's substantive appeal, and that he should therefore bear all but a small part of Mr Kitching's overall costs of "*the Appeal*".

Mr Hindle's Submissions as to Costs

12. Mr Hindle submits that the appropriate order as to costs of the appeal should be:

    (i) That Mr Hindle should pay Mr Kitching's costs of the substantive appeal and the fresh evidence application on the recoverable basis;

    (ii) That Mr Kitching should pay Mr Hindle's costs of the cross-appeal on the indemnity basis;

    (iii) That Mr Kitching should pay Mr Hindle's costs of the costs appeal on the indemnity basis.

13. Advocate Ferbrache, on behalf of Mr Hindle, seeks to justify such an order on the basis that the conduct of Mr Kitching in bringing both the cross-appeal and the costs appeal falls squarely with the range of conduct identified by this Court in earlier cases as "*out of the norm in a way which justifies an order for indemnity costs*". See, for example, *Investec Trust (Guernsey) Limited et al v Glenella Properties Ltd*, Judgment 04/2015, 21 January 2015; *C v P-S* 2010 JLR 645.

14. In relation to the cross-appeal, Advocate Ferbrache submits that the issue of whether Mr Kitching had failed to bring his claim in a timely manner was rejected by the Deputy Bailiff in advance of the trial. Thereafter by Act of Court of 12 September 2017, Mr Kitching was refused leave to amend Les Defenses to plead any exceptions de fond based on prescription. The Act of Court was not the subject of any appeal, and, at the trial, the Jurats rejected Mr Kitching's argument for the reasons given previously by the Deputy Bailiff. In these circumstances, it is submitted that the cross appeal was "*abusive and outside the norm*", and so justifies an award of costs on an indemnity basis.

15. In relation to the costs appeal, Advocate Ferbrache submits that Mr Kitching's argument was always bound to fail because: (1) he would have needed to persuade this Court to penalise the successful party on an indemnity basis; (2) he had conducted himself unreasonably in the lower court proceedings (in consequence of which indemnity costs awards had already been made against him on certain issues); and, (3) he continued to conduct himself unreasonably in the appeal. Accordingly, so it is submitted, Mr Kitching's conduct can properly be characterised as conduct outside the norm thus justifying an award on an indemnity basis.

Discussion

16. The principles governing awards of costs by this Court are not in doubt. Pursuant to section 18(1) of the Court of Appeal (Guernsey) Law 1961, the Court has power to determine "*by whom and to what extent the costs are to be paid*". It is settled law that all questions of costs are in the Court's discretion. It is also settled law that an order for indemnity costs may be made where considered appropriate, for example because there is something in the conduct of the proceedings by one of the parties which takes the case out of the norm.

17. In relation to the substantive appeal, including the new evidence application, both parties are agreed that Mr Kitching was the successful party and that in principle costs should follow the event.

18. In relation to the cross-appeal, we do not accept Mr Hindle's argument that Mr Kitching's conduct was abusive or of a character to take the case outside the usual run of contested litigationso as to justify an award of costs on an indemnity basis. As we noted in our earlier judgment, these proceedings were hard-fought and protracted, and Mr Hindle himself raised no fewer than 19 written grounds of appeal, many of which were overlapping and several of

which expressed the same point in different words. In these circumstances it would not be fair to single out Mr Kitching's conduct without at the same time considering Mr Hindle's conduct.

19. In our view, the appropriate order, to meet the justice of the case is to reflect the dismissal of the cross-appeal in our overall award of costs.

20. Similarly, and for the same reasons, we do not accept Mr Hindle's argument that Mr Kitching's conduct in bringing the costs appeal would justify an award of costs on an indemnity basis. We think this would be particularly unjust in light of our characterisation of several of Mr Hindle's grounds of appeal as being without merit. (See by way of example our discussion of Grounds 1 and 4 in our earlier judgment, at paragraphs 83 to 87, and 93 to 96, respectively.)

21. Further, we agree with Advocate Ozanne that the appropriate order is one that reflects the overall justice of the case, making a single costs order in relation to "*the Appeal*", namely the appeals, cross-appeal and the new evidence application, treating all the various matters as comprised in a single proceeding. This we explain further below.

22. Where we part company with Advocate Ozanne's submissions is that a fair outcome would be to order Mr Hindle to pay Mr Kitching 85% of his overall costs; in our judgment this would give insufficient weight to the substance of both the cross-appeal and the costs appeal on which Mr Kitching was unsuccessful and on which, even on Advocate Ozanne's written submissions, he is in principle the paying party. Moreover, while Advocate Ozanne's written submissions sought to impress on us that the merits lie with Mr Kitching as not being "a wrong doer", she did not submit that Mr Hindle's approach to the appeal proceedings was such as to justify any indemnity costs award against him on the individual matters on which was the losing party, or disallowance of costs on the matters on which he was the successful party.

23. Accordingly, we accept that, if we were to make separate orders for the constituent parts of "*the Appeal*", we would as submitted by Advocate Ozanne, order:

    (i) Mr Hindle to pay the costs of and occasioned by the substantive appeal and the new evidence application on the recoverable basis.

    (ii) Mr Kitching pay Mr Hindle's costs of the cross-appeal and the costs appeal on the recoverable basis.

24. However, as counsel made clear during the hearing of the appeal, this is a case where the costs are out of all proportion to the amount at stake. In those circumstances, we do think it would be undesirable to make an order which would lead to further costs being incurred in relation to a contested taxation hearing about how much time was properly spent on different issues. In this we accept the approach contended for by Advocate Ozanne: we think it preferable to take a broad approach by treating "*the Appeal*" as one proceeding and making a deduction from the costs awarded to Mr Kitching to reflect Mr Hindle's success on Mr Kitching's cross-appeal and costs appeal.

25. In our judgment, the appropriate deduction is one third. Specifically, we accept the thrust of the submission on behalf of Mr Kitching, that his appeal and cross-appeal were limited in that the parties' respective costs incurred, that is as a result of time and work spent, on that part of "*the Appeal*", was trivial in comparison to what was involved on Mr Hindle's unsuccessful appeal and fresh evidence application. Doing the best we can, we conclude that the costs involved in Mr Hindle's appeal and fresh evidence application were a multiple of several times greater than those involved in Mr Kitching's cross-appeal and costs appeal.

26. We therefore order that Mr Hindle pay two thirds of Mr Kitching's costs incurred in connection with the appeal proceedings as a whole on the recoverable basis.