In The Supreme Court of Bermuda

COMMERCIAL COURT

CIVIL JURISDICTION

2004: No. 257

BETWEEN:

ALLEN WALSH

-and-

HANS TAAL

Interpleader Plaintiffs

-and-

HORIZON BANK INTERNATIONAL LIMITED

(in Liquidation)

First Defendant

RULING ON COSTS

Date of hearing: April 14, 2008
Date of Ruling: April 15, 2008

Mr. Narinder Hargun and Mr. Christian Luthi,
Conyers Dill & Pearman, for the Plaintiff
Mr. Jan Woloniecki and Ms. Shade Subair,
Attride-Stirling & Woloniecki, for the Defendant

1. The Plaintiffs seek (a) the costs of the action (consequent upon my March 31, 2008 Judgment), (b) on an indemnity and (c) against the Defendant's liquidator personally. In addition, they seek the costs of that portion of the January 2008 discovery applications which was resolved, by concession, in their favour.

2. The Plaintiffs' discovery Summons dated January 16, 2008 was dismissed for the reasons set out in my Ruling dated January 28, 2008. The Defendant's January 3, 2008 Summons was granted in terms of paragraph 2, with no order being made in terms of paragraph 1 which was disposed of by way of a concession on Mr. Woloniecki's part. Since the costs attributable exclusively to the subject matter of the concession are *de minimis*, the most commercially sensible order to make is to award the costs of the applications disposed of on January 28, 2008 to the Defendant in any event.

3. As far as the costs of the present action are concerned (excluding the costs of the original interpleader action), the Plaintiffs are awarded their costs on a standard basis, to be taxed if not agreed. The suggestion that the costs generally should be awarded on an indemnity basis on the grounds of either (a) the nature of the claims, or (b) the unreasonable way in which the defence has been conducted, is rejected in the exercise of my discretion. While the application for leave to plead a new defence of illegality supported by fresh expert evidence, made at trial, looked at in isolation probably warranted costs on an indemnity basis, I have very narrowly come down in favour of adopting an holistic approach to the basis on which costs should be taxed, if not agreed.

4. Mr. Hargun accepted that exceptional circumstances were required to justify an award of costs against the Defendant's sole permanent liquidator, Mr. Marcus Wide, personally. In my judgment, there is no material before this Court which would warrant such an exceptional order in all the circumstances of the present case. This is a case where both sides may fairly be said to have been playing hardball, but in which (a) the liquidator made a substantial open settlement offer at an early stage which was rejected by the Plaintiffs, (b) the liquidator's attorneys saved substantial costs through sensible voluntary case management, and (c) an insolvent company was advancing arguable defences in a difficult evidential and legal context (especially as regards questions of attribution of knowledge).

5. It is correct that the Plaintiffs' rejection of the early settlement offer has been clearly (though not dramatically) shown to have been reasonable and that, in the event, the crucial documentary evidence has been decisively construed in the Plaintiffs' favour. But this does not mean that this result was so obviously inevitable as to make the liquidator's defence of these substantial claims unreasonable. There is a world of difference between what seems clear to a Court at the end of a trial, having heard and considered the competing arguments, and what ought to have been obvious to the party which loses at trial at the outset. In particular, the attribution of knowledge issues were less than clear. Bearing in

mind a liquidator's duty to have regard to the interests of the general body of unsecured creditors, the Defendant's liquidator has not been shown to have acted unreasonably in failing to capitulate after an offer which represented more than the principal amount of the Plaintiffs' ultimately successful proprietary claims was rejected by them in or about late 2005.

6. However, I am bound to reject Mr. Woloniecki's submission that the Defendant should be awarded the costs of the entire action up to the date of the Plaintiffs' amendment at trial to meet a challenge to their standing first raised in the Defendant's Skeleton Argument. If, contrary to the views set out in my Judgment as to why the Defendant's case on standing ought to have been explicitly pleaded from the outset, I were required to compensate the Defendant in costs for the Plaintiffs' failure to prove their initial case on standing, I would do so on the following basis. I would simply award those costs attributable solely to the standing issue to the Defendant in any event. The overwhelming majority of the costs, having regard to the pleadings, the evidence and the submissions, appear to have been incurred in connection with other issues. It would be wholly artificial to dispose of the bulk of the cost of an action because the Plaintiffs' failed to prove tangential averments which were never explicitly in controversy until shortly before the trial.

7. In my judgment, the facts of the present case, in which the Plaintiffs' new case on standing was only advanced at trial because the Defendant belatedly choose to expressly put the standing issue into controversy on the eve of trial, do not engage the principle articulated by Stuart-Smith LJ in *Beoco Ltd. –v- Alfa Laval Co. Ltd.* [1995] QB 137 at 154A-B, on which counsel relied. The precise factual and legal basis upon which the individual Plaintiffs were entitled to sue remained, even after their right to sue was positively challenged, peripheral to the essential elements of the causes of action upon which they relied. It cannot, it seems to me, sensibly be contended that the Plaintiffs' amendment at trial to meet an issue which was not even raised as part of the defendant's pleaded case is a "*late amendment…which substantially alters the case the defendant has to meet*", even if the Plaintiffs' pleaded case might well have failed if they were not permitted to rely on the newly pleaded facts.

8. The change which occurred here may be compared with a patent case where the plaintiff sues for breach of patent XY, and shortly before trial learns that the defendant is asserting he lacks standing because the evidence produced in agreed trial bundles shows that patent XY had been assigned to a third party. Relying on the same trial bundles, the plaintiff in answer to this new argument seeks leave to amend to assert that in any event the assignment agreement was rescinded, so title to sue nevertheless exists on this alternative basis. The trial which proceeds on this "new" basis is still fundamentally a trial about whether or not a breach of patent has occurred, and if the Court accepts the rescission argument, the challenge to standing has substantially failed. It is to this breach of patent issue

which most of the pleadings, evidence and arguments have been directed, because the defendant elected not to raise the standing issue at the pleadings stage.

9. After all, commercial litigation is quintessentially about resolving disputes which have been identified in the pleadings, not trial by ambush based on wholly unanticipated new points raised in written submissions on the eve of the trial.

Dated this 15th day of April, 2008

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KAWALEY J