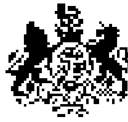
[2010] SC (Bda) 39 Civ (14 July 2010)



In The Supreme Court of Bermuda

IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2008: No. 50

BETWEEN:

SHAWN KNIGHT
(suing on behalf of himself and GINA KNIGHT)

Plaintiff

-v-

DWIGHT EUGENE WARREN

-and-

WENDIE PATRICIA WARREN
(sued on their own behalf and on behalf of all the owners of property located at Lot 9 Perry Drive, Warwick)

Defendants

RULING ON COSTS

(In Chambers)

Date of Hearing: June 17, 2010
Date of Ruling: July 14, 2010

Mr. Eugene Johnston, J2 Chambers, for the Plaintiff
Mr. Nathaniel Turner, Attride-Stirling & Woloniecki, for the Defendants

Introductory

1. On April 27, 2010 following a four-day trial I found that the Plaintiff was entitled to recover $300,000 out of the $330,000 claimed by him, an amount which was not in dispute in gross terms. The trial focussed on the Defendants' Counterclaim for $255,024.26, which was successful to the extent of $140,066.93. The net result was that the Plaintiff was entitled to receive $159,933. My provisional views as to interest and costs were set out in paragraph 95 of the Judgment as follows: (a) there should be no pre-judgment interest granted to the Plaintiff because he had declined to pursue mediation proposed by the Defendants, and (b) each side should bear its own costs because the net result was that each side had more less succeeded to equal extents.

2. A hearing took place to determine the issues of interest and costs, which hearing focussed almost exclusively on the issue of the effect of the payment into Court which the Defendants had made on June 5, 2008 in the amount of $180,000. It was common ground that this sum was paid in with respect to the Plaintiff's net claim after the Defendants' Counterclaim was taken into account. No grounds for exercising the Court's discretion with respect to pre-judgment interest in a different way to that contemplated by me on April 27, 2010 was advanced by the Plaintiff's counsel; the Defendants' counsel supported my provisional view which I confirm by way of formal order on June 17, 2010. Far less straightforward was the question of how the fact that the net amount recovered by the Plaintiff was better than the amount the Defendants could have recovered, based on their pleaded case as at the date of payment in, impacted on the appropriate costs order to be made.

3. I reserved judgment after hearing oral argument and allowed the parties additional time to file supplementary submissions on the law (the Plaintiff) and any evidence tending to show that the Plaintiff had notice of the amendments to the quantum of the Counterclaim long before they were formally made at the commencement of the trial.

Applicable legal principles: impact of payment into court on final costs order made at trial

4. The general principles governing the impact of payment in of a sum greater than that recovered at trial in costs terms were not in controversy. Paragraph 22/5/7 of the 1999 White Book states as follows:

> "*Rule 9(1)(b) of O.62 provides that in exercising its discretion as to costs the Court shall, to such extent,, if any, as may be appropriate in the circumstances, take into account any payment of money into Court and the amount of such payment. The discretion, however, must be exercised judicially, so that a defendant who pays money into Court which exceeds the sum awarded to the plaintiff is the*

successful party, and as such is entitled to be paid his costs as from the date of the payment in (Findlay v. Railway Executive [1950] 2 All E.R. 969,CA). He can only be deprived of such costs by the proper exercise of judicial discretion upon proper materials arising out of the instant litigation or the conduct of it…"

5. Mr. Johnston however relied on the following passage from the same paragraph of the cited text:

> "*This is, of course, always subject to any particular order as to costs which the Court may make in the exercise of its judicial discretion. Where an amendment is allowed at the trial to enable the plaintiff to add fresh allegations of damage, the discretion as to costs must be exercised by reference to the case as originally pleaded and not as so amended, and therefor if the damages awarded are less than the amount of the payment in on the basis of the original pleaded case even though they exceed such amount on the basis of the new case as amended , the defendant will be entitled to costs after the payment in (Cheeseman v. Bowaters Ltd [1971] 1 W.L.R. 1773; [1971] 3 All E.R. 513, CA).*"

6. On the face of this passage, the fact that the Plaintiff's net recovery exceeded the amount paid in by the Defendants based on the state of the pleadings at the date of payment would appear to be dispositive. However, Mr. Turner had the tenacity to extract a refinement of this principle from the leading judgment of the English Court of Appeal in *Cheeseman*, delivered by Davies LJ:

> "*Mr. Joseph sought valiantly to say that the defendants ought at any rate to have anticipated a claim in respect of the October-December being off work because they must have known that the plaintiff was off work. There is not much force in that contention. There is nothing at all in the case which should have made them anticipate the claim in respect of the accelerated retirement.*"[1]

7. From this *obiter dictum*, which appears not to be supported by any direct authority, the Defendants' counsel submitted that the Court could have regard not just to the Defendants' pleaded Counterclaim but also its expert evidence which supported the uplift to the pleaded quantum and which was served shortly after the payment in. Even the other separate judgment delivered in *Cheeseman* by Karminski LJ did not support the dictum relied on; instead the importance of all items claimed being pleaded from the earliest opportunity in personal injuries cases was articulated.

8. Nevertheless, having regard to the philosophy underlying the exercise of the judicial discretion in relation to costs in the modern civil litigation context, it must

[1] [1971] 1 WL.R. 1771 at 1777A-1778B.

be right that in circumstances where at the time of or shortly after the date of payment in a plaintiff becomes aware of a potential increase in the quantum of a counterclaim, it *may be* appropriate to take the "true" quantum figure into account rather than relying rigidly on the formally pleaded position. The whole purpose of payment in (and indeed "*Calderbank*" letters) is to promote settlement and save costs; this goal is achieved by punishing plaintiffs in costs for failing to accept settlement amounts which the final result demonstrates they ought to have accepted. While the pleaded case on quantum is a usual starting point in terms of ascertaining whether the sum recovered at trial exceeded the amount paid into court or otherwise tendered, it must be open to either party to rely upon other evidence which is relevant to the issue of whether the plaintiff acted reasonably in rejecting the settlement offer. This is the sort of point of practice which is perhaps too obvious to form the subject of explicit judicial authority. Moreover, it is significant that Davies LJ in *Cheeseman,* in rejecting the submission that the amendment to the pleaded quantum claim made at trial ought to have been anticipated, apparently based this rejection on evidential rather than on legal grounds.

9. What evidential threshold must be met by parties such as the Defendants who seek to bring themselves into what amounts to an exception to the general rule that whether the payment in has been bettered or not is determined by reference to the state of the pleadings at the date of payment in? Firstly, regard must be had to the comparative rigidity of the rules relating to payment in, when compared with other settlement offers, in their application to costs orders. This may be illustrated by reference to the following passage from my Judgment in *Francis-v-Carruthers* [2007] Bda LR 32:

> "*18. Where a letter offering settlement may be taken into account, the Court is not concerned with the narrow issue of whether the Plaintiff has recovered more than the sum paid into Court. The Court is concerned with the broader question of whether it was reasonable for the Plaintiff to have refused the settlement offer having regard to the final amount awarded. In Chrulew v Borm-Reid & Co (a firm) [1992] 1 All ER 953* at 959–960, *Waller J held:*
>
> > *'In relation to a Calderbank offer it furthermore seems to me there must be in any event further room for flexibility ..... It would be wrong, in my judgment, to equate an offer of compromise in proceedings such as these precisely to a payment into court. I see no advantage in the court surrendering its discretion in these matters as it has to all intents and purposes done where a payment into court has been made. A Calderbank v Calderbank offer should influence but not govern the exercise of the discretion. Thus I can summarise the position as it seems to me in the normal litigation context as follows. (1) Where a payment in has been*

> *made and accepted under Ord 22, rr 1 and 3, a party is absolutely entitled to its costs (see Ord 62, r 5(4)). (2) Where there has been a payment in not accepted, then, if that payment in is equal to or beaten by the defendants, the defendants are entitled to their costs as the successful party unless there are special reasons for depriving the defendants thereof. (3) A Calderbank offer can only be used where the payment-in provisions are inapplicable, but where it is properly deployed, if the party to whom the offer is made has unreasonably failed to accept that offer, then the offering party will be entitled to costs post the time at which that offer should have been accepted ... The basis for the above approach is that the successful party in litigation is entitled to have his costs unless there are special reasons.'*"

10. The application of the costs rules in the context of payments into court entails "*the court surrendering its discretion in these matters as it has to all intents and purposes done where a payment into court has been made*". This suggests that clear evidence should be adduced that an amendment only made at trial should be held to have taken effect at some earlier date for the purposes of determining whether or not the amount paid in ought to have been accepted. In Cheeseman v. Bowaters Ltd [1971] 1 W.L.R. 1773, it was the plaintiff who increased his claim at trial thus beating the payment in and the defendant whom the Court held was entitled to its costs prior to the date of the late amendment. Earlier in Davies LJ's judgment before he rejected the argument that the new claim ought to have been anticipated, he described the state of the evidence as follows:

> "*The course that the case took was somewhat curious. There was in the statement of claim a claim for three weeks of being off work, and three periods only. There was no reference to any other period, and no amendment by correspondence.*"[2]

11. This supports the finding that a claim may be expressly amended either formally or informally by way of correspondence; but where no such explicit amendment to the quantum of the relevant claim takes place, the question of whether or not a plaintiff has bettered the amount paid into court will be determined based on the pleaded quantum claims. After all, the normal rule is that a party's case is to be determined by its pleadings and it would potentially create great uncertainty into civil litigation if comparatively strict rules such as the incidence of costs when a payment in has been rejected were to be governed not just by the state of the pleadings or express indications of changes proposed thereto but also by inferred changes to a parties case. Such a loose approach would undermine the ancient adversarial art of contentious correspondence in which lawyers take care to clearly state their respective positions and expressly reserve their clients' rights. Requiring such specificity in pre-trial correspondence does not undermine the

[2] At page 1776E.

modern goal of promoting cost-saving and efficiency and reducing excessive formality and unnecessary court applications.

Findings: did the Plaintiff have sufficient notice of the proposed amendments to the Counterclaim before the amendments were made at trial?

12. The Defendants are bound to accept that as at the date of payment in on June 5, 2008, the Plaintiff had no knowledge of the proposed uplift to the gross sum claimed in their Counterclaim. However, they rely on the contents of the expert report served in September 2008 by their former attorneys as giving actual notice to the Plaintiff of the amendments to their quantum claim which they proposed to make. At the costs hearing, Mr. Turner made a bundle of email correspondence between the parties' respective lawyers available to the Court.

13. On September 3, 2008, the Defendants encouraged the Plaintiff to consider settlement and requested a two week extension of time for serving their expert report. The Plaintiff agreed to the extension request a quarter of an hour later, in an email which concluded as follows: "*If you have any amendments you wish to make to the pleadings, I would be obliged if you let me have sight of what you have in mind* ". By email dated September 12, 2008, the Defendants again encouraged the Plaintiff to consider settlement, and suggested that after the expert report was served "*we can hopefully have some fruitful discussion regarding settlement*". There was seemingly no response to this email which was sent just before Mr. Johnston had previously indicated that he would be abroad. On September 19, 2008, the Defendants forwarded their expert report without comment and stated:

    "*You will receive my proposed amendments to the Defence/Counterclaim early next week.*"

14. Just over an hour later, the Plaintiff responded indicating that this was counsel's last day in the office that month and, *inter alia*, agreeing to an extension of time for the Defendants to file a witness statement and making the following request: "*Please send your proposed amendments to my email as an attachment. That way I could read them while overseas.*" Just over 10 minutes later, the Defendants responded indicating, inter alia: "*I'm in a rush at the moment but I will send you the documents requested early next week.*" There the correspondence trail runs dry.

15. What is noteworthy about the correspondence is the fact that at no point did the Defendants' then attorneys suggest that the amendments were a mere formality and that the substance of them could be found in the expert's report served on September 19, 2008. It is difficult to see how the Plaintiff's legal advisers could reasonably infer that the Defendants intended to formally rely on all items of quantum referenced in the expert report when the correspondence emanating from the Defendants' then attorneys, in response to two requests for sight of the

proposed amendments, simply promised to clarify the proposed new pleadings at some future date. So while the Plaintiff had actual knowledge of evidence capable of supporting an increase in the Counterclaim, nothing in the correspondence produced made it explicit that the proposed pleading amendments would adopt this evidence in its entirety.

16. On March 16, 2009 the Defendants current attorneys came onto the record. On October 22, 2009, the original pre-trial directions made by Bell J on June 26, 2008 were updated. The Plaintiff was granted leave to amend the Statement of Claim and his Reply and Defence to Counterclaim and the Defendants were given 14 days after service of the Plaintiffs' pleadings to file an Amended Counterclaim.

17. At the commencement of the trial on March 16, 2010, Mr. Turner applied for leave to amend the Counterclaim. He submitted that: (a) most of the amendments stemmed from the Trent Report; and (b) the Plaintiff had constructive notice of the proposed amendments for 20 months. I granted leave to amend over Mr. Johnston's objections, primarily on the grounds that the Plaintiff was not prejudiced in defending the Counterclaim in the sense that he was unable to meet any of the "new" allegations. I accepted the submission that the Plaintiff had constructive notice of the late pleading changes and did not require time to amend their own pleadings to respond to the new averments.

18. But I was not then deciding whether or not the Plaintiff knew or ought to have known for costs purposes, in or about September, 2008, that the gross sum claimed in the Counterclaim was increased by a specific amount. The Defendants were unable to point to a single piece of correspondence in the 18 months between the service of the Trent Report and the trial where the fact that their pleaded quantum claim had now increased by a specific amount was expressly mentioned. Having regard to the fact that the general rule is that a defendant will get his costs where the amount recovered by the plaintiff is less than the amount paid into court having regard to the state of the pleadings, any contemplated change to the pleaded position ought in my judgment to be made explicit. It is not enough for the Defendants to prove that the Plaintiff had constructive knowledge of the facts which formed the basis for the amendments at trial, as opposed to actual or constructive knowledge of the fact that the Defendants were formally asserting an enhanced claim.

19. In my judgment, if a litigant wishes to rely for payment into court costs purposes on the quantum of a claim not reflected in the formal pleadings, based on the contents of an expert report or other evidence, they must at a minimum have taken the following steps. When serving the relevant evidence or at any convenient time thereafter, it should be expressly stated in correspondence (or in a witness statement) that the party asserts a claim larger than the formally pleaded claim, or reserves the right to amend their claim up to a specified level. If an uplifted claim

is advanced in oral settlement discussions, this can always be confirmed in a letter which is without prejudice save as to costs.

20. Accordingly, I find that the Plaintiff's net award was more than the amount paid into Court having regard to the state of the pleadings at the date of payment in (June 5, 2008) and until the amendments made at trial (March 16, 2010). The Plaintiff did not better the amount paid into Court having regard to the Defendants' Counterclaim as amended at trial on March 16, 2010.

Conclusion: costs award

21. The provisional views I expressed on costs were as follows:

> "*As far as costs are concerned, I would have regard to: (a) the fact that the parties' respective claims have been successful approximately to the extent of 50% in each case; and (b) the fact that the parties appear to me to be equally responsible for contracting on an unclear basis which was highly likely to generate disputes of the type which gave rise to this litigation, I would make no order as to costs.*"

22. Having regard to the principles applicable to payment into Court, the Plaintiff is entitled to the costs up to the commencement of the trial. The Defendants are entitled to the costs of the trial. As the Plaintiff essentially succeeded on the costs hearing but the Defendants would otherwise have been awarded those costs as part of the trial costs, no order as to these costs is the appropriate order. I would make an order in these terms.

23. Of course the parties are still free to agree at the eleventh hour, in a case which appears to be costs sensitive, that the process of computing the various costs and possibly taxing them would prove un-commercial. It just may be that a rough and ready justice will be achieved if each side bears its own costs.

Dated this 14th day of July, 2010 ___________________________

KAWALEY, J