In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: No. 149

BETWEEN:

ELDON BINNS (1)

TYRONE SAMPSON (2)

COMPASS HOLDINGS LIMITED (3)

Plaintiffs

-v-

KYRIL BURROWS
(also trading as Human Nature)

Defendant

RULING ON COSTS

(In Chambers[1])

Date of Trial: December 15, 2011
Date of Judgment: January 12, 2012

Mr. Jeremy Garrood, Mello Jones & Martin, for the Plaintiffs
Mr. Richard Horseman, Wakefield Quin

[1] Although argument took place in open court, to save the costs of an appearance to formally hand down the present Ruling, I decided to circulate it as a Chambers Ruling.

Introductory

1. The Judgment of this Court dated December 15, 2011 concluded as follows:

> "*26.The Company/Third Plaintiff is entitled to judgment for the following amounts:*
>
> *(a) $171,755.72 to be paid out of funds held in trust by Conyers Dill & Pearman Limited less the sum of $34,000 payable to the Defendant in respect of taxed costs, as agreed at the beginning of the trial;*
> *(b) $4250 in respect of an overpayment in respect of "At Task" software, as agreed at the beginning of the trial.*
>
> *27. I will hear counsel as to costs. Although it is difficult to see why the Plaintiffs should not be awarded the costs of the action, including preparing for trial, it seems necessary to consider what order is just as regards the costs of the trial as the time spent on the Plaintiffs' contested claims which failed was possibly 80% of the total trial time, compared with only 20% for the Defendant's unsuccessful Counterclaim.*"

2. The Defendant's counsel requested the Court not to award the Plaintiffs and/or the Company its costs. It was submitted that if an issues-based approach to costs was adopted, the Defendant had succeeded on all claims which were truly contested except for his Counterclaim. It would be inequitable for the Plaintiffs to recover any costs having regard to the way in which the claims had been commenced and pursued. The Plaintiff's counsel submitted that an issues-based approach was not appropriate in our procedural framework or in the circumstances of the present case in any event.

Principles applicable to Costs

3. The primary governing rules are contained in Order 62 which provides so far as is relevant as follows:

> "**62/3 *General principles***
>
> *3 (1) This rule shall have effect subject only to the following provisions of this Order.*
>
> *(2) No party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the Court.*

(3) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

4. Mr. Garrood correctly submitted that these principles are far narrower than the CPR 44.3 position, which rule expressly (in a procedural framework in which lists of issues are drawn up) empowers the Court to have regard to whether or not a party has succeeded on particular issues. This distinction is illustrated by the case to which he referred, *National Westminster Bank plc-v-Kotonou* [2007] EWCA Civ 223. Chadwick LJ observed in that case:

> "*20.So the judge came to the conclusion that the right approach was to make an order based on the separate issues in the case: an order which he described as a split costs order or an issue-based order. That course was plainly open to him in an appropriate case; as appears from CPR 44.3(6) paragraph (f):*
>
> > *'(6) The orders which the court may make under this rule [rule 44.3] include an order that a party must pay –*
> >
> > *(f) costs relating only to a distinct part of the proceedings.'"*

5. As I remarked in the course of argument at the costs hearing, my own previous decision to adopt an issues-based approach to costs was rebuffed by the Court of Appeal, albeit (on further analysis) in the context of assessing the costs of an action which had been settled save as to costs. In *First Atlantic Commerce Ltd.-v-Bank of Bermuda Ltd.* [2009] Bda L.R. 18, Evans JA opined as follows:

> *"64. In our judgment, the Judge was correct and certainly was entitled to regard this as a substantial or real-life success for FAC, and to make a costs order in its favour.*
>
> *Proportion*
> *65. The Judge rightly indicated that the fact that the recovery, regarded as equivalent to US$4 million was less that the amount claimed was not, of itself, a good reason for holding that the successful claimant could recover only a proportion of its costs (paragraph 29). However, he reduced the proportion to one-third on the ground that that was a generous estimate of the costs incurred in relation to the recoverable loss issue, as distinct from liability issues (paragraphs 30 and 32).*

66. We do not follow why the costs recovery should be limited in this way. The recoverable loss issue was concerned with causation and the measurement of quantum, questions that did not arise unless liability was first established. The position was complicated in the present case by the fact that the outcome was essentially an agreed settlement, though embodied in the first Order (7 November 2007), and the Court could not assess the chances of success on that issue alone (Judgment para.7, ref. para. 48 above). In our judgment, however, if the claimant is entitled to costs on the basis that he has achieved substantial success, as FAC is, he should recover the costs of establishing liability, as well as causation and damages.

67. But it does not follow that he shall recover the whole of those costs. The award remains subject to the principle recognised in In re Elgindata Ltd. (No.2) [1992] 1 WLR 1207 : in short, the successful party's recoverable costs can be proportionately reduced when superfluous issues were raised unnecessarily, or for other good reason. The question here, in our judgment, is whether the principle applies in the present case.

68. In our judgment, it should be applied, and we hold that FAC shall recover two-thirds of its costs of the proceedings, including its costs of the Counterclaim 10 (if any, because this is subject to special costs orders already made). The essential reason for the one third reduction is that FAC never made it clear how it contended that its monetary claims were to be reconciled with the Refinancing Agreement, which it ignored in its claims, or with the Bank's shareholding. Even when FAC pleaded, in its Defence to Counterclaim, that the Financing Agreement was voidable (or later, void ab initio), it conspicuously failed to make clear what its position would be in relation to the shareholding, if those pleas were to succeed. It was only when the Bank made its offer that the shares came to be recognised as a central issue, as they could and should have been from the start. Neither party identified and isolated this issue at an early stage, and their costs undoubtedly were greatly increased by their failure to do so. Overall, we consider that a one-third reduction of FAC's costs is appropriate in the circumstances of this case."

6. The above authorities suggest that, unless the Court or the parties have identified discrete issues for determination at the trial of a Bermudian action, the Court's duty in awarding costs will generally be to:

    (a) determine which party has in common sense or "real life" terms succeeded;
    (b) award the successful party its/his costs; and
    (c) consider whether those costs should be proportionately reduced because e.g. they were unreasonably incurred or there is some other compelling reason to depart from the usual rule that costs follow the event.

7. The Bermudian legal position, absent a directions order identifying discrete issues for determination at trial, requires reference (in terms of persuasive English authority) to the

old pre-CPR principles governing the award of costs. These principles were described as follows by Warren J[2] in *Actavis-v- Merck & Co. Inc.* [2007] EWHC 1625 (Pat):

> "*12… costs at the discretion of the court; follow the event, except where it appears that some other order should be made; the general rule does not cease to apply because the successful party raises issues which he fails on, but where that has caused a significant increase in the length of the proceedings, he may be deprived of the whole or part of his costs; where the successful party raises an issue improperly, he cannot only be deprived of his costs but be ordered to pay his opponent's costs.*"

8. I am fortified in reaching this conclusion by the following passage from the Judicial Committee of the Privy Council decision in *Seepersad v. Persad & Anor (Trinidad and Tobago)* [2004] UKPC 19 (per Lord Carswell):

> "[24] *The Court of Appeal gave the appellant only half costs of his appeal and the cross-appeal brought by the respondents against the amount of the award for pain and suffering and loss of amenity. In so ordering it must have treated the assessment of damages under this head as if it were a separate issue on which the appellant had lost, while succeeding on the other issues. In their Lordships' view this was an erroneous approach. The award of costs in Trinidad and Tobago is in the discretion of the court, as is usual in most common law jurisdictions. The general rule which should be observed unless there is sufficient reason to the contrary is that costs will follow the event. Where the party who has been successful overall has failed on one or more issues, particularly where consideration of those issues has occupied a material amount of hearing time or otherwise led to the incurring of significant expense, the court may in its discretion order a reduction in the award of costs to him, either by a separate assessment of costs attributable to that issue or, as is now preferred, making a percentage reduction in the award of costs: see, eg, In re Elgindata (No 2) [1992] 1 WLR 1207. The Court of Appeal's order was predicated upon the proposition that the assessment of damages for pain and suffering and loss of amenity was a separate issue from the assessment of the other heads of damage. This was an incorrect assumption. An issue for these purposes must be something so distinct and separate in itself that the decision of it constitutes an "event". The "event" was the quantum of damages to which the appellant was entitled and he succeeded on his appeal in obtaining a higher award than the judge had given him: even though one head was decreased, another was increased and one which the judge had omitted was added to the total. Their Lordships accordingly consider that the Court of Appeal had insufficient ground for reducing the award of costs made to the appellant and that he should have been awarded full costs in that court, without separating*

[2] These principles were taken from Nourse LJ's judgment in *Re Elgindata (No.2)* [1997] 2WLR 1207, and Warren J explicitly contrasted with the more flexible CPR approach then applicable under English law. Although neither *Actavis* (above) nor Seepersad (below) were referred to in argument, they raised no new point which warranted further submissions by counsel.

out any element attributable to the cross-appeal, which was only a means of putting in issue the quantum of all the items of damage in the judge's award." [emphasis added]

Did the Plaintiffs succeed in real life terms?

9. In my judgment there can be little doubt that the Third Plaintiff succeeded in real life terms to the extent that on the first day of the trial, the Defendant's counsel conceded that the Third Plaintiff was entitled to judgment in respect of the vast majority of the sum claimed as money had and received under paragraphs 9 and 10 of the Statement of Claim, and 50% of the "*At Task*" claim.

10. It is true that when the Writ was initially issued on May 6, 2010, the Third Plaintiff was not a party. But the Company was joined by way of amendment on June 17, 2010, just short of six weeks later. From that point, it was made clear that the Company was seeking restitution in respect of the $171,755.72 held by Conyers Dill & Pearman (paragraph 9); the First and Second Plaintiffs only asserted a right to the said monies "[s]*hould the Defendant seek to deny the Third Plaintiff's right to be reimbursed*" (paragraph 10). Mr. Horseman's submission that the Company's claim to these monies was admitted on the pleadings must be rejected. In paragraphs 7-11 of his Amended Defence, the right to insist that the monies in question should be held in escrow pending the determination of the minority shareholder oppression petition proceedings was asserted. In any but highly artificial and fanciful terms, this constituted a denial of the Company's right to receive its money.

11. Accordingly, I find that the Third Plaintiff succeeded in real life terms by obtaining judgment for the first limb of its claim and a portion of the fourth limb of its claim and, in addition, by successfully defending the Counterclaim. The net recovery to the Third Plaintiff was approximately one-third of the total sum claimed (Mr. Horseman suggested it was only 25% of the total sum in issue). However, the Defendant's case was that he was a net creditor of the Third Plaintiff. The final result was that the Defendant was found to be the Company's net debtor. The Company is accordingly entitled to the costs of the action from June 17, 2010 when it became a party to the present proceedings; I would make no order as to the costs before then.

12. However, this success was achieved not entirely by way of a judicial determination at the end of the trial; rather the Plaintiff succeeded in large part on the basis of a concession, astutely made by the Defendant's counsel, after almost two hours of the first day of trial. It remains to consider whether or not the usual rule that costs of the action including the full costs of trial follow the event is displaced by virtue of this somewhat unusual factual element.

Should the order made in relation to costs reflect the fact that the Defendant achieved substantial success in relation to the main issues ultimately in dispute?

13. The conceded portion of the Third Plaintiff's own claim was worth just over $170,000; the Counterclaim which the Third Plaintiff defeated at trial was worth only $9,500. The claims which the Defendant defeated at trial were worth almost $360,000.

14. Because of the late stage at which the Defendant's concession was made, it never occurred to the parties or the Court to seek or direct an adjournment of the ongoing trial to explore a settlement which might have avoided any further costs being incurred. It is often more cost-effective to complete a trial that has commenced than to adjourn it and start all over again. Moreover, the manifest animosity between the parties affords no basis for even imagining that any settlement discussions would have borne fruit at that stage, had they been pursued.

15. Accordingly, the Third Plaintiff did not act unreasonably in continuing with the trial despite the fact that, in the event, its adjudicated success was modest in the extreme in monetary terms. Nor did the Third Plaintiff act improperly in asserting the claims which were essentially rejected on the grounds that they were simply not proved. Accordingly, the post-concession trial costs cannot fairly be wholly detached from the costs of the action as a whole. The position would likely be otherwise if the concession had been made before the trial started so that the entire trial was focussed upon the Third Plaintiff's unmeritorious claims and the Defendant's monetarily minor Counterclaim.

16. Nevertheless, it would in my judgment be manifestly unjust to award the Third Plaintiff the costs of the action in full having regard to the undeniable fact that the claims upon which the Third Plaintiff failed occupied a "*material amount of hearing time*", both after the restitutionary claim was conceded and throughout the action as a whole. It is almost impossible to assess within any precision what proportion of preparation and/or hearing time was attributable to the Plaintiff's failed claims and what proportion was devoted to the Defendant's failed Counterclaim. And the predominant basis for the present consideration of depriving the successful party of its costs in full does not arise from the mere fact that a larger monetary proportion of its claims failed. This would not in the present case be sufficient to displace the usual rule.

17. Rather, the present analysis flows from my finding that an application of the usual rule would work injustice having regard to the peculiar fact that much of the trial itself concerned the Third Plaintiff's unsuccessful claims, in circumstances where the main claim upon which the Third Plaintiff succeeded was conceded after the commencement of the trial. This justifies a departure from the usual or preferred approach of making a proportional reduction of the global costs award and warrants a reduction of the costs to which the successful party would otherwise be entitled in respect of the trial itself.

18. However, the applicable principles do not justify quite so draconian a reduction as the 80% figure provisionally suggested in the final paragraph of my December 15, 2011

Judgment. Taking into account all of the circumstances of the present case, I would in the exercise of my discretion reduce the costs to be awarded to the Third Plaintiff in respect of the trial (from 9.30 am on November 28, 2011 up to and including the date of judgment) by 60%.

Summary

19. The Third Plaintiff is awarded the costs of the action from the date of its joinder in the present action to be taxed if not agreed on the standard basis, subject to the following qualification. The Third Plaintiff is only awarded 50% of its costs from the commencement of the trial until judgment.

Dated this 12th day of January, 2012 _____
KAWALEY J