In The Supreme Court of Bermuda

CIVIL JURISDICTION
2012: No. 98

BETWEEN:-

KAMAL WILLIAMS

Plaintiff

-v-

THE BERMUDA HOSPITALS BOARD

Defendant

EX TEMPORE RULING

(In Chambers)

Date of hearing: 13th February 2013

Mr Jai Pachai, Wakefield Quin, for the Plaintiff
Mr Allan Doughty, Trott & Duncan, for the Defendant

1. In a judgment given on 9th January 2013 ("the Judgment"), I ruled, as requested by the parties, that costs should follow the event, but that there should be liberty to apply. The consequence was that, subject to the outcome of today's hearing, the Defendant, the Bermuda Hospitals Board ("BHB"), must pay the Plaintiff, Kamal Williams ("Mr Williams"), his

costs. The amount of costs claimed is $79,543.06. The BHB has exercised its liberty to apply and seeks an order that there should be no order as to costs.

2. The background to this application is the finding at paragraph 115 of the Judgment:

"*If the BHB had not breached its duty of care to Mr Williams the pain and discomfort that he experienced prior to the operation would have been shortened by several hours. To that limited extent, the BHB's negligence did cause Mr Williams harm. I propose to acknowledge this with a nominal award of damages for pain and suffering of $2,000.00. The award is nominal because the period of pain and discomfort for which it compensates Mr Williams was of short duration. But that does not mean that the additional pain and discomfort was inconsequential.*"

3. In the light of authority cited to me today, it is clear that my use of the word "*nominal*" was not accurate. In "*The Mediana*" [1900] AC 113 in the House of Lords, the Earl of Halsbury LC stated at paragraph 116:

"*'Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term 'nominal damages' does not mean small damages.*"

4. Suitably chastened, I take this opportunity to clarify that what I meant by "*a nominal award of damages*" was "*a small award of damages*". It was my intention that Mr Williams should receive small but real compensation for his pain and suffering.

5. Having thus "set the scene", I turn to the helpful submissions of both counsel. Mr Doughty, who appears for the BHB, referred me to the case of Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd [1951] 1

All ER 873 in the King's Bench Division. It will be helpful to set out the headnote.

"*In their statement of claim in an action for damages for breach of contract the plaintiffs pleaded in effect that goods sold to them by the defendants were valueless and claimed the full purchase price which amounted with certain other items to £2,028. At the trial evidence was given by the defendants that the defect in the goods could be easily removed at a cost of £52, and the plaintiffs were permitted to amend their statement of claim to cover damage under this head, no question as to costs being raised at the time. The plaintiffs failed on their main claim, but the judge held that there was in law a breach of contract and gave judgment for the plaintiffs for the sum of £52 on the amendment to their statement of claim. On the question of costs,*

Held *– The amendment to the statement of claim was not a mere technicality but a matter of substance, as, if the plaintiffs had pleaded its terms in their original statement of claim, the defendants might have settled the action or paid the £52 into court, and, therefore, the plaintiffs' success on the amendment should not affect the order for costs which would have been made if the judgment had been given on the original pleadings; apart from the amendment, although the plaintiffs would have been entitled to nominal damages, they could not be regarded as 'successful' plaintiffs as they could not have established anything which was of value of (sic) them; and, therefore, the court had a discretion to award the costs of the action to the defendants.*"

6. Thus the order for costs was made on the basis of the original statement of claim, on which the plaintiffs would only have been entitled to nominal damages, and not the amended statement of claim, on which the plaintiffs were awarded damages of £52. This is important to bear in mind when considering the following passage from the judgment of Mr Justice Devlin (as he then was) on which Mr Doughty relies:

"*No doubt, the ordinary rule is that, where a plaintiff has been successful, he ought not to be deprived of his costs, or, at any rate, made to pay the costs of*

the other side, unless he has been guilty of some sort of misconduct. In applying that rule, however, it is necessary to decide whether the plaintiff really has been successful, and I do not think that a plaintiff who recovers nominal damages ought necessarily to be regarded in the ordinary sense of the word as a 'successful' plaintiff. In certain cases he may be, eg where part of the object of the action is to establish a legal right, wholly irrespective of whether any substantial remedy is obtained."

7. Mr Justice Devlin was not a judge who used words in an imprecise way. Considered in the context of the headnote, I am satisfied that he was using "*nominal*" damages in the sense in which that term was used by the House of Lords in "*The Mediana*".

8. Strictly speaking, therefore, his observations are not applicable to the instant case, where the damages that I awarded were small but real. Nevertheless, I can properly have regard to the fact that those damages were much lower than the damages claimed. Indeed, Mr Doughty has helpfully calculated that they are only 1.3% of the damages claimed. They were also much lower than the costs claimed by Mr Williams.

9. I can also properly have regard to the fact that had the claim been put on the alternative basis on which I awarded damages, the BHB might have been encouraged to make a payment into court under rule 22 of the Rules of the Supreme Court 1985. The counter to that point is that, as Mr Pachai rightly points out, it was open to the BHB to make a payment into court in any event. Had they done that, they would not have been at the same risk of costs as they are now.

10. My intention when awarding damages to Mr Williams was that he should be compensated in the sum of those damages. Unless I make an order for costs in his favour, that intention will be rendered nugatory. No authority has been cited to me that prohibits me from taking this into account.

11. I was referred to the decision of the Court of Appeal of England and Wales in Pamplin v Express Newspapers Ltd (No 2) [1988] 1 WLR 116. That, I accept, is authority for the proposition that the finder of fact should not

concern themself with costs when apportioning damages. However, and this was common ground, it is not authority for the obverse proposition that the court, when awarding costs, may not take into account the effect that an award of costs would have on its award of damages. On the contrary, when considering costs, the court can take into account all the circumstances of the case.

12. One such circumstance was that in my judgment this claim was properly brought. I do not accept Mr Doughty's description of it as a "*nuisance claim*", whether as a term of art or otherwise.

13. In all the circumstances I am satisfied that there is no reason for me to depart from the general rule that costs should follow the event. I therefore make an order for costs on that basis.

14. [After hearing the parties as to the costs of the instant application, the court ordered that they, too, should follow the event.]

Dated this 13th day of February 2013 _____

Hellman J