In The Supreme Court of Bermuda

CIVIL JURISDICTION

2009: 361

IN THE MATTER OF A TRUST

REASONS FOR RULING ON COSTS

(in Chambers)

Date of hearing: March 21-22, 2013

Date of Reasons: April 1, 2013

Mr Frank Hinks QC of counsel and Mr Keith Robinson, Appleby (Bermuda) Ltd, for the 2nd Defendant ("D2")

Mr Nikki Singla of counsel and Mr Justin Williams, Williams, for the 9th Defendant ("D9")

Mr Delroy Duncan and Ms Nicole Tovey, Trott & Duncan, for the 8th, 10th, 12th, 30th and 31st Defendants ("the Adult Beneficiaries")

Mr Adam Collieson, Appleby (Bermuda) Ltd, for the Guardian ad Litem of the 32nd and 34th -37th Defendants ("the Guardian")

Mr Nicholas Le Poidevin QC of counsel and Mr Alex Potts, Sedgwick Chudleigh, for the 45th Defendant ("D45")

Introductory

1. On December 12, 2012 I substantially granted relief sought by D2 against D9 which was supported by all other parties in a highly contentious application designed to ward off a threatened attack on the Trust structure. The structure had been erected following the compromise of previously threatened attacks by D9 on proposed arrangements which almost all other beneficiaries considered to be satisfactory. D2's Summons was filed in the existing proceedings commenced to establish the Trust structure and immunize it from attack. The penultimate paragraph of the Judgment read as follows:

> "*84. I find that D2 is entitled to a permanent injunction restraining D9 from filing the Onshore Application and/or any other proceedings raising substantially similar issues or seeking substantially similar relief. This remedy is granted on the grounds that D9 has breached the Settlement Terms, subverted and/or threatened to subvert Proposal No. 4 and/or because such proceedings are prohibited by clause 18.1 of the Trust Deed, which I find to constitute an exclusive jurisdiction clause for the purposes of the relevant claims.*"

2. One narrow aspect of the relief sought on D2's application, which was not supported by the Trustee (D45) or the Guardian ad Litem, was refused. As regards this issue the following observations were made in the Judgment:

> "*83. Taking these broader considerations into account, together with the fact that I will be granting permanent injunctive relief (and likely making an adverse costs order of some sort against D9), I do not think it would be reasonable to deprive D9 of all or some of his preferential payment. Nor indeed would it be reasonable to direct that the Trustee is at liberty to remove him as a director of his Family Holdcos, a role which I accept he genuinely cherishes. However, it is only appropriate to note that if D9 were to continue to conduct his role as a director as he has to date, it is difficult to see what choice the Trustee would ultimately have but to seek his removal.*" [emphasis added]

3. It seemed to me to be clear beyond serious argument that the costs of this contentious application should be primarily determined on the basis of the usual principle that costs follow the event, subject to any modifications necessitated by the Trust context. Skeleton arguments were filed in advance of the hearing by all parties setting out their respective positions as to the appropriate form of final order in terms of relief and costs. The hearing started on Thursday afternoon and continued on Friday morning.

The scope of relief was largely agreed by the end of Friday morning; the issue of costs remained contentious.

4. At the beginning of the hearing Mr Singla for D9 applied to adduce a bundle of documents he contended was relevant to costs. The way in which he opened this application strongly suggested that the general drift of his submissions was aimed at persuading the Court to ignore the main implications of the findings which had been made against his client at 'trial'. Without ruling on the application, I attempted to make it clear that no useful purpose would be served by seeking to contend for a costs result that was inconsistent with the serious findings that had been made against his client.

5. I heard Mr Hinks at some length on costs but cut short Mr Le Poidevin; this seemingly signalled to Mr Collieson and Mr Duncan that their oral submissions should be brief.

6. Despite the fact that this was the sort of case where D9's counsel might ordinarily be expected to concede that costs must follow the event and simply quibble about the standard of taxation, it was clear from his Skeleton Argument that D9 sought to advance the following arguments, key aspects of which appeared to me to be unrealistic in the extreme:

    (a) the costs awarded to D2 should be reduced because the Court rejected his application for forfeiture in both of its two dimensions (monetary/removal as a director);

    (b) the Trustee (D45), the Guardian and the Adult Beneficiaries ought not to recover their costs at all (or ought to recover substantially reduced costs) because it was unnecessary for them to participate in support of D2's Summons at all or to the extent of engaging Leading Counsel;

    (c) if settlement offers were taken into account, the parties arrayed against D9 had acted unreasonably and this impacted on their entitlement to costs;

    (d) indemnity costs should not be awarded in favour of the Trustee (D45), the Guardian or the siblings, because such awards were only appropriate for "*exceptional circumstances, involving grave impropriety going to the heart of the action and affecting its whole conduct*": *American Patriot Insurance Agency Inc et al-v- Mutual Holdings (Bermuda) Limited* [2012] CA (Bda) 3 Civ (at paragraph 26).

7. Early on in Mr Singla's substantive submissions on costs, I again got the distinct impression that D9's framing of the factual matrix applicable to the incidence of costs

was, perhaps somewhat subtly, hinged upon recasting altogether the true nature of the findings made at the substantive hearing. I put to counsel that the main points he advanced, save for his complaint about the potential duplication of costs arising from the Adult Beneficiaries' full-blown participation in a wholly supportive role, were not arguable.

8. Rather than seeking to dissuade me from this somewhat forcefully expressed preliminary view, counsel sought a brief adjournment. When the hearing resumed, D9's counsel indicated that he proposed to pursue his arguments in another place and sought leave to appeal. I indicated, with no dissent from other counsel, that a costs order would, in my judgment, be final, giving rise to an automatic right of appeal[1].

9. I also noted that Mr Singla had done an excellent job in difficult circumstances, it being evident from the main hearing that he had an unusually combative client; by D9's own account, he makes a practice of giving specific and firm tactical instructions to his lawyers.

10. After hearing counsel for the Adult Beneficiaries, D2 and the Trustee (D45) briefly in reply, I made an Order (as regards costs) for D9 to pay the following amounts (and declined to direct that the sums should be payable forthwith) and to be taxed if not agreed:

    (a) the costs of D2 on the standard basis;

    (b) the costs of the Guardian on an indemnity basis;

    (c) the costs of the D45 (the Trustee) on an indemnity basis;

    (d) the costs of the Adult Beneficiaries on the standard basis.

11. In addition I ordered that the Trustee and the Guardian should be entitled to recover any shortfall between their taxed costs and their actual costs out of the Main Account, with D2 and the Adult Beneficiaries recovering the difference between the costs they would recover upon a taxation on the indemnity basis and a standard basis taxation out of the Main Account. In other words, any taxation of the costs of D2 and the Adult Beneficiaries will require the Registrar to make dual findings on both bases of taxation, one for the purposes of the formal order which will be enforceable against

[1] Mr Potts subsequently diplomatically advised the Court that the view expressed during the hearing was probably wrong. It was clearly wrong. Section 12 of the Court of Appeal Act 1964 provides:

"*(2) No appeal shall lie to the Court of Appeal—*
(a) against the decision in respect of any interlocutory matter;
or
(b) against an order for costs,
except with leave of the Supreme Court or of the Court of Appeal."

D9, and the other to assist the Trustee to ascertain what shortfall (if any) will be recoverable by those parties out of the Main Account.

12. I set out below in summary terms the reasons for this costs award.

Why the fact that D2's forfeiture claim failed did not constitute grounds for modifying the rule that costs follow the event.

13. In paragraph 83 of the Main Judgment I concluded as follows:

> "*Taking these broader considerations into account, together with the fact that I will be granting permanent injunctive relief (and likely making an adverse costs order of some sort against D9), I do not think it would be reasonable to deprive D9 of all or some of his preferential payment. Nor indeed would it be reasonable to direct that the Trustee is at liberty to remove him as a director of his Family Holdcos, a role which I accept he genuinely cherishes. However, it is only appropriate to note that if D9 were to continue to conduct his role as a director as he has to date, it is difficult to see what choice the Trustee would ultimately have but to seek his removal.*"

14. I refused to order forfeiture, which involved a minor portion of the argument, on two grounds. Firstly I found that D9 was partially motivated by family harmony and that D2 failed to appreciate this in ignoring an open settlement order relied upon by D9. When the without prejudice correspondence save as to costs was placed before me by Mr Hinks, it was immediately obvious that D2 had acted entirely reasonably in rejecting the open proposal. The open settlement letter, read in isolation from the without prejudice letters to which it was closely linked, gave the Court a quite distorted picture of the true state of the pre-trial negotiations.

15. Secondly, it seemed self-evident that D9 could not achieve a dual 'recovery' based on the same central fact. I declined to order forfeiture because I would likely make an adverse costs order. It was entirely circular, as Mr Hinks rightly submitted, to rely on the refusal of that same relief as grounds for reducing the costs that D2 was otherwise entitled to having achieved substantial success.

Why the parties other than D2 were entitled to recover their costs.

16. It seemed plain and obvious to me that the Trustee (D45) and the Guardian had distinctive interests to represent in support of D2's application. It followed necessarily that the position of the Adult Beneficiaries and the other two parties

supporting D2's Summons were not identical. The authorities supporting the proposition that where multiple parties have an identical interest multiple costs orders ought not to be made did not appear to me to have any application to the facts of the present case: *Moore's (Wallisdown) Ltd.-v- Pensions Ombudsman* [2002] 1 WLR 1649; Bolton *Metropolitan District Council et al-v-Secretary of State for the Environment* [1995] 1 W.L.R. 1176.

17. In addition it seemed to me to be inconsistent with standard litigation practice and fundamental fairness for one party to allow other parties to deploy substantial resources in relation to a highly contentious application only to raise the reasonableness of such deployment for the first time at the costs stage. Order 1A of this Court's Rules obliges the parties to assist the Court to achieve the Overriding Objective and, *inter alia*, to save costs. Even if such considerations were wholly misconceived, it substantially undermined the credulity of the contention that only D2 was entitled to recover costs that this argument had not been raised at an early stage, or in any event before the commencement of the substantive hearing.

Why D2 did not act unreasonably in rejecting D9's settlement offers.

18. As mentioned above, when the open July 18, 2012 settlement letter sent on behalf of D9 is looked at in the light of earlier and subsequent without prejudice save as to costs correspondence, it seemed clear to me that D2 did not act unreasonably in deciding that no useful purpose would be served by pursuing negotiations further. D9's response to D2's counter-offer was to make more extravagant demands, moving further away rather than closer to D2's position. This conduct on D9's part was so far removed from traditional negotiating patterns that it is impossible for D9 to plausibly contend that D2 ought to have realised that he was simply seeking information. Moreover, my recollection of the evidence adduced at the main hearing was that the Trustee's delay in offering to disclose certain information about the Trust to D9 was explained to my satisfaction. D9's counsel sought, at the costs stage, to resurrect a complaint which was at least implicitly rejected at the main hearing.

Indemnity costs

19. D9's Skeleton Argument incorrectly implied that the following quotation of a passage from a case dating back to the pre-2006 costs regime was in fact the operative finding of the Court of Appeal in *American Patriot Insurance Agency Inc et al-v- Mutual Holdings (Bermuda) Limited* [2012] CA (Bda) 3 Civ (at paragraph 26). The full passage (which was only partially reproduced in paragraph 50 of D9's Skeleton Argument) reads as follows:

> "*In Phoenix Global Fund Ltd. v. Citigroup Fund Services (Bermuda) Ltd. [2009] Bda LR 70, Bell J. cited the present Chief Justice, as follows –*

> *'Ground J. in De Groote v. MacMillan at al [1993] Bda LR 66 was clearly making comments of general application when he indicated that he considered that an award of indemnity costs as against a defendant should be reserved for exceptional circumstances, involving grave impropriety going to the heart of the action and affecting its whole conduct."*'

20. In fact the true *ratio* of the Court of Appeal (Evans JA) Judgment on costs in *American Patriot* appears in the following subsequent paragraph:

> "29. *In our judgment, it would be wrong to say that indemnity costs should be ordered in every case where fraud is proved, but equally wrong to suggest that they can only be ordered when the proceedings have been misconducted by the losing party. Both 'the way the litigation has been conducted' and the 'underlying nature of the claim' (per Kawaley J. in Lisa SA v. Leamington and Avicola at para.6) may be relevant in determining whether or not the circumstances are such as to make an indemnity costs order just.*"

21. Because of this binding authority it was not open to this Court to adopt the test for awarding indemnity costs contended for by D9's counsel. The Trust context and the particular roles played by the Trustee (D45) and the Guardian respectively made it appropriate to award them indemnity costs as against D9. They were seeking to defend the Trust structure, erected at considerable expense and sanctioned by this Court from an attack which both attempted to subvert a contractual agreement and a confirmatory Order of this Court.

22. The suggestion that this conduct did not warrant an award of indemnity costs flies in the face of the Main Judgment's central findings. After all, D2's application for permanent injunctive relief was granted "*on the grounds that D9 has breached the Settlement Terms, subverted and/or threatened to subvert Proposal No. 4 and/or because such proceedings are prohibited by clause 18.1 of the Trust Deed, which I find to constitute an exclusive jurisdiction clause for the purposes of the relevant claims*".

23. Despite this backdrop, and reference to authorities suggesting that he was entitled to claim costs on an indemnity basis, D2 quite reasonably only sought costs on the standard basis for himself. Also, because Mr Singla's plea for elemental fairness did not fall on deaf ears, I declined to award indemnity costs to the Adult Beneficiaries as Mr Hinks initially sought. This was specifically to place the burden on them to prove the reasonableness of their claim at the taxation stage having regard to the fact that there appeared to be considerable overlap between their position and that of D2. This approach also seemed congruent with the essentially agreed direction that the recoverability of the costs in relation to overseas lawyers generally should be decided upon taxation.

24. However, because the involvement of all parties supportive of D2 in general terms had been manifestly directed at protecting the Trust, I felt it appropriate to ensure that the representative parties should ultimately recover all of their actual costs and that

the other receiving parties should ultimately recover costs on an indemnity basis, with the shortfall being payable out of the Trust.

Conclusion

25. These are the reasons for the costs I ordered on March 22, 2013.

Dated this 1st day of April, 2013 _____
IAN R.C. KAWALEY CJ