



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012: No. 6

BETWEEN:

KATE THOMSON

Plaintiff

-v-

JAMES THOMSON

1st Defendant

-and-

COLONIAL INSURANCE COMPANY LIMITED

2nd Defendant

EX TEMPORE RULING ON COSTS

(in Court)

Date of Ruling: June 14, 2013

Mr. Paul Harshaw, Canterbury Law Limited, for the Plaintiff

Mr. Jai Pachai, Wakefield Quin Limited, for the 1st Defendant (“the Insured”)

Mr. Craig Rothwell, Cox Hallett Wilkinson Limited, for the 2nd Defendant (“the Insurer”).

Introductory

1. In this matter the 1st Defendant has succeeded in defeating defences advanced by his insurer, the 2nd Defendant, and he seeks his costs of the trial on liability which has just concluded with the handing down of judgment today.

Should the 1st Defendant's application for costs be dealt with at all at this stage?

2. Mr. Rothwell for the 2nd Defendant argues that, in the first instance, the Court should not actually deal with costs at all today. Because the Plaintiff is the wife of the 1st Defendant, he submits that the Court may be entitled to take into account in deciding the costs liability of his client to its insured whether or not the Plaintiff ought to have accepted a without prejudice offer before the accident began. In my judgment the possibility of this Court being influenced by the determination of this issue in its disposition of the costs as between the Insured and the Insurer are too remote to justify adjourning this aspect of the application to another date at the end of the trial on quantum.
3. It is clear that the question of the costs as between the Plaintiff and the 2nd Defendant must be dealt with at the end of the trial on quantum.
4. The second submission that Mr. Rothwell made was that if the Court does deal with costs that the Court should make no order as to costs because the Court found in its Judgment that the evidence of the 1st Defendant to the effect that he had not consumed any alcoholic drink before the accident was untrue.

Applicable legal principles

5. Mr. Rothwell referred the Court to the case of *Baylis Baxter Ltd-v-Sabath*[1958] 2 All ER 209 which illustrates the fact that a trial judge can make no order as to costs when a plaintiff has succeeded but the plaintiff's witness' evidence has been rejected almost in its entirety.
6. Mr. Pachai relies on the general principles as to costs which I considered in my May 1, 2013 Ruling in *Kentucky Fried Chicken (Bermuda) Limited-v- The Minister of Economy, Trade & Industry and The Bermuda Industrial Union* [2013] SC (Bda) Civ (1 May 2013) and the principles set out at paragraphs 14-15 of that Judgment. He says that in substance his client has won in real life terms and should accordingly be awarded his costs.
7. With respect to the real point that is made against him, that the conduct of the 1st Defendant who has succeeded may be taken into account, Mr. Pachai conceded in general terms that the Court has the jurisdiction to take this account but invites the Court to ignore it because its impact on the present proceedings was at best marginal.

Application of legal principles to the facts

8. Mr. Pachai points to the fact that the issues in this case involved not just the drink driving issue where the 1st Defendant's evidence was found to have been untrue, but also involved two other defences both of which were also rejected. It is right when one analyses the way the case was conducted and the nature of the coverage defence relating to drink driving that this was a matter that the Insurer had to prove. The burden was on the Insurer to prove with very clear and cogent evidence that the 1st Defendant was at the time of the accident over the prescribed legal alcohol limit.
9. It was not an allegation that could be easily proved and this is why when the 1st Defendant was charged in Traffic Court the Prosecution eventually decided not to proceed with the charges. They decided that, perhaps ignoring the statutory presumptions under the Road Traffic Act, it would be difficult for them to prove what his blood alcohol level was at the time of the accident because they knew that he had in fact had something to drink afterwards. So the Insurer started out with a difficult task on this issue and at the end of the day the case that they put forward was rejected as a result of cross-examination of the expert witness whom they relied upon.
10. In these circumstances the untruthful evidence of the 1st Defendant did only play a marginal role in the result which was achieved¹. This was a case, not of someone who was dishonest in a classical sense, but who was found by the Court to be a husband whose carelessness had caused his wife serious injuries and who was determined at all costs to put things right by her.
11. In these circumstances it seems to me that it would be inconsistent with established costs principles to deprive the 1st Defendant of his costs. He has succeeded and should be awarded his costs.

Should there be a discount on the costs awarded to the 1st Defendant by reason of his conduct?

12. The only matter I have been compelled to consider very carefully is the question of whether or not there should be some discount of the costs to reflect this Court's disapproval of the way in which the 1st Defendant gave his evidence. It does seem to me that this Court should not encourage persons dealing with insurance companies or any other parties who may be seen as having deep pockets to feel that they can do and say whatever they want with a view to obtaining the result that they want in Court.

¹ The Insured's supposedly exculpatory evidence to the effect that he had consumed no alcoholic beverages before the accident if accepted would have only helped to prove the Insurer's case.

13. In this case, as it happened, the issue which resolved in the 1st Defendant's favour was found to be a just result as result of independent (expert) evidence. But nevertheless this Court should mark its disapproval of the 1st Defendant's inaccurate evidence in some way. The approach which I intend to take is to make a small discount to the costs which he would otherwise receive.

14. Taking into account the marginal role played by the evidence that he gave which was rejected, not only in his evidence as a whole but also in the case as a whole, I propose to award the 1st Defendant 90% of his costs. And 10% represents the discount which I award to take into account what I consider to be his unreasonable conduct in the course of the proceedings. Those costs obviously are to be taxed if not agreed on the standard basis.

Dated this 14th day of June, 2013 _____
IAN R. C. KAWALEY