In The Supreme Court of Bermuda

CIVIL JURISDICTION

2020: No. 265

BETWEEN:

JOSEPH REYNOLDS

Plaintiff

- and -

ATTORNEY-GENERAL OF BERMUDA
(AS THE RELEVANT ENTITY UNDER THE CROWN PROCEEDINGS ACT 1966)

Defendant

RULING (COSTS)

Usual rule that costs follow the event, Reasons to depart from usual rule, Undisclosed Calderbank offer, Payment on account

Date of Hearing: **10 August 2022**
Date of Ruling: **19 August 2022**

<u>Appearances</u>: **Ben Adamson, Conyers Dill & Pearman, for Plaintiff**

Laura Williamson, Kennedys, for Defendant

RULING of Mussenden J

Introduction

1. This matter comes before me on an application by the Plaintiff for costs of the liability trial.

2. On 26 May 2022 I issued a judgment in respect of the trial of this matter. In summary, I made the following findings:
   a. That the BPS failed to comply with the statutory obligations set out in the OSHA.
   b. That PC Joell made an error of judgment in his response to the actions of PC Reynolds.
   c. That PC Reynolds contributed to the cause of the accident in a significant way. Accordingly, an award to PC Reynolds should be reduced by 60% to reflect his responsibility for his own loss and injury.
   d. That PC Reynolds is not entitled to compensation under the WCA.

The Law on Costs

3. In *Binns v Burrows* [2012] SC (Bda) 3 Civ at [6], Kawaley J (as he then was) set out the general principles with regard to the award of costs as follows:

   " …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:

   i. determine which party has in common sense or "real life" terms succeeded;
   ii. award the successful party its/his costs; and
   iii. 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."

4. Kawaley J noted that Bermuda does not apply an issue based approach but follows the approach laid down in *In re Elgindata Ltd. (No. 2)* [1992] 1 WLR 1207.

Submissions by the Plaintiff

5. Mr. Adamson submitted that the Plaintiff was the winner in common sense terms. Although he did not win everything, he succeeded in obtaining a ruling on liability and will ultimately be awarded non-nominal monetary compensation. Thus, the Court should find that Mr. Reynolds was the overall winner in common sense terms.

6. Mr. Adamson submitted that the next step is to consider whether any deductions should be made. He anticipated that the Defendant would argue that no order for costs should be made on the basis that a Calderbank offer dated 24 January 2022 was made shortly before trial to settle the issue of liability on a percentage basis. The offer was below what the Plaintiff obtained at trial, thus he beat that part of the Calderbank offer. The Defendant also made a global financial offer which has not been disclosed to the Court. Again, Mr. Adamson anticipated that the Defendant would urge the Court to defer the issues of costs until the final outcome is known. However, Mr. Adamson argued that such a submission would be wrong and unjust as: (i) it would be impossible for the Plaintiff to continue with the litigation, given the disparity in resources; (ii) the English Court of Appeal has held that this is not the appropriate thing to do, not least given the injustice this can cause; and in any event, the vast majority of costs were incurred prior to the date of the offer and the logic of the Calderbank principle applies to costs after an offer is made, not before.

7. Mr. Adamson submitted that the Court has a discretion to make a reduction in the costs payable if the Plaintiff lost on issues which occupied a material amount of hearing time. He referred to *Binns v Burrows* where Kawaley J cited *Seepersad v Persad* [2004] UKPC 19:

   "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 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. "

8. Mr. Adamson argued that no reduction was warranted as the Plaintiff succeeded on the first issue of the liability of the BPS due to failure to supervise even if he did not succeed on the second issue of the liability of BPS due to PC Joell's actions. He argued that there was no waste in time in addressing the claim in respect of the actions of PC Joell as the exercise had to be analysed as a part of the Plaintiff proving his case. Further, all the issues had to be considered in respect of contributory negligence. He noted that very little time was spent on the Workers Compensation Act. He relied on the case of *Conceicao v Silva Cleaning* [2020] JRC 229 where the issue was whether there had been a breach of duty and whether the employee was partly to blame and was contributorily negligent. The Court found a deduction was not warranted as the employee was successful in establishing breach of duty and, whilst he was not successful on every aspect of breach, the sub-issues were simply aspects of proving a breach and did not add materially to the length or cost of the trial. In any event, if the Court was minded to order a reduction then Mr. Adamson argued it should be in the range of 10 – 25% in all the circumstances.

9. Mr. Adamson submitted that if the Defendant wished to protect itself, it should have made a more generous Calderbank offer, the one made being pitched too low, thus the Defendant should abide by the consequences. He cited *Conceicao v Silva Cleaning* which supported this argument.

10. Mr. Adamson submitted that the Defendant should be ordered to make a payment on account as the Plaintiff is not wealthy, is self-funded, and is unfit to work as a result of his injuries. Without a payment on account, he will be in great difficulty funding the quantum stage despite being entitled to compensation. Thus, the Court should make an order to prevent injustice. He noted that the Courts have a general discretion to make an award on account of costs, and in this case a basis was set out for payment of $60,000 on account. He cited the *Credit Suisse* case [2022] SC (Bda) 56 Civ where Hargun CJ stated:

"118. It is clear from the reasoning in Al Sadik that the fact that there is a statutory power to make rules to provide for interim payments on account of costs, or that the Registrar can issue an interim certificate, does not affect the court's inherent power, exercisable by the court, to make an interim payment order on account of costs. Such an order can be made by the court if it is satisfied that it is appropriate that such an order should be made in the circumstances of a particular case. The inherent power to make interim payment orders is unlikely to be exercised in every case but this jurisdiction need not be confined to "rare and exceptional circumstances". Clearly, the applicant will have to make a case why it is appropriate for the court to make such an order."

Submissions by the Defendant

11. The Defendant conceded that the Plaintiff was technically the successful party because he succeeded in establishing liability and therefore some entitlement to damages, albeit that liability was reduced significantly by 60% as a result of the Plaintiff's own conduct. On the other hand, Ms. Williamson argued that the Defendant succeeded in relation to the Plaintiff's instructions, the Plaintiff's behaviour and PC Joell's conduct.

12. Ms. Williamson submitted that there was good reason to depart from the usual order that costs follow the event, namely that the conduct of the Plaintiff resulted in a significant finding of 60% for contributory negligence. She expanded her arguments as follows:

    a. The Court has the discretion to depart from the usual order taking into account all the circumstances including the conduct of the parties.
    b. In the English case of *Parkes v Martin* [2009] EWCA Civ 883, where the claimant was found to be 65% responsible for the accident that caused his injuries, whilst the defendant was found to be 35% liable, the Court of Appeal upheld the judge's decision to award the claimant only 35% of costs.
    c. In *Owners, Demise Charterers and Time Charterers of the Western Neptune v Owners and Demise Charterers of the Philadelphia Express* [2009] EWHC 1522 (Admlty) the claimants were awarded only 65% of their costs, despite having

succeeded in establishing liability against the defendants with a 1/3 reduction for the claimants contributory negligence. The Court made clear that whilst the reduction in the costs awarded was not based on the apportionment of liability, it considered such an approach would be within its discretion.

d. The issue of the Plaintiff's instructions in relation to the training exercise accounted for the majority of the witness evidence adduced by the Defendant and took up the majority of the Court time. The issue on which the Plaintiff was successful, that is the positioning of the safety officers, involved a small amount of witness evidence and Court time. Thus, had the Plaintiff proceeded on the basis of the instructions that the Court found he was given, then much time and cost would have been saved in trial preparation and conduct. The issue of the Plaintiff's instructions significantly increased the costs of both parties.

13. Ms. Williamson submitted that there should be no order as to costs in respect of the liability trial as this would fairly reflect the Court's findings in relation to the relative liability of the parties, the Plaintiff's culpability and the fact that the Plaintiff lost on the issue of his instructions which took up the most preparation and trial time. She relied on the case of: (i) *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2017] EWCA Civ 1032 where there was no order as to costs where the claimant recovered only 50% of the damages claimed and the bulk of the cost on both sides was for an issue the claimant had lost; and (ii) *Abbott v Long* [2011] EWCA Civ 874 where there was no order as to costs where the claimant's claim was reduced by 75% on account of contributory negligence, based on the claimant's conduct of the case in relation to issues which the defendant ultimately succeed and which led to an increase in overall costs.

14. Ms. Williamson also submitted that the Court should not make any order for payment of costs to the Plaintiff. Instead, the Court should reserve costs until the conclusion of the quantum trial as the Defendant had made a Calderbank offer of settlement which may still be beaten following the determination of quantum. If the Defendant beat its offer at the quantum stage, this ought to be taken into account in relation to the Plaintiff's claim for costs in the usual way. If the Court made no order as to costs now and then reviewed the

issue after quantum, then if the Plaintiff fails to beat the offer made by the Defendant, then the Defendant will seek to recover its costs from the Plaintiff in the usual way.

Discussion and Analysis

15. In my view, I should grant costs to the Plaintiff with a reduction and make an order for payment on account for several reasons. First, I find that the Plaintiff was the winner in common sense terms.

16. Second, in my view there should be reduction in the level of costs awarded. Mr. Reynolds was successful in the main aspect in establishing the liability of the BPS. Upon review of the issues where the BPS was successful, the issues of the Plaintiff's instructions and the conduct of PC Joell took up considerable time. PC Joell's conduct had to be analysed as a part of establishing the BPS' liability and therefore it will not be a factor in reducing the level of costs. Thus, it was the issue of the Plaintiff's instructions which was not necessary and incurred further time and costs in preparation and trial. In all the circumstances of this case, including the finding that he was contributorily negligent to 60%, in my view a reduction of 40% is the appropriate reduction.

17. Third, I have considered the justice of the matter. Mr. Reynolds is now out of work, is unable to work in the UK police service and has used his own resources to fund the litigation thus far still resulting in a debt to his counsel's firm. The Crown is in a markedly different position such there is a huge disparity in resources. Without a payment on account, he is at risk of not being able to continue to fund the litigation to conclusion although he was successful. I have considered the fact that a Calderbank offer has been made, the outcome of which will be determined after trial on quantum. Ms. Williamson's arguments to make no order as to costs and to review the costs issues after quantum initially have merit as the Calderbank offer could fall either way. However, in placing the issues in the balance, in my view, based on the principles of fairness and what is just in this case, I should make an order for payment on account but for a lesser amount than requested. I accept Mr. Adamson's arguments that the majority of the costs were incurred prior to the

date of the Calderbank offer which was made shortly before the start of the trial but the uncertainty of the Calderbank offer still hovers over this phase of the litigation. On that basis, I find that $45,000 in all the circumstances is an appropriate amount for payment on account.

Conclusion

18. In summary I have made the following findings:
    a. That the Plaintiff was the winner and that costs should follow the event in his favour against the Defendant subject to a deduction of 40%.
    b. That the Defendant should make a payment on account of $45,000. I did not hear any submissions on the time period for making the payment on account but I take judicial notice that the mechanisms for the Crown to make payments to anyone involve various steps, thus I order that the payment be made within 21 days of the date of this Order.

19. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs of this application, I direct that costs shall follow the event in favour of the Plaintiff against the Defendant on a standard basis to be taxed by the Registrar if not agreed.

Dated 19 August 2022

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HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT