[2015] SC (Bda) 17 Civ (6 March 2015)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

Commercial Court

2014: No. 194

BETWEEN:

DAVID R.WHITING

Plaintiff

-v-

TORUS INSURANCE (BERMUDA) LIMITED

Defendant

EX TEMPORE RULING ON COSTS

(in Court)

Date of Ruling: March 6, 2015

Mr. Alan Dunch, MJM Limited, for the Plaintiff
Mr. Ben Adamson, Conyers Dill & Pearman Ltd., for the Defendant

Introductory

1. In this matter the Plaintiff, who has been today awarded $1909 out of a claim[1] that was potentially worth at the end of the day just over $300,000, has sought costs on the usual 'costs follow the event' basis. The Defendant has contended that having regard to the infinitesimal financial success that the Plaintiff has achieved, the appropriate order should be no order as to costs.

Governing legal principles

2. The relevant Rules of Court are the following. Firstly, Order 62 rule 3(3) reads as follows:

> "*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.*"

3. The next rule which falls to be taken into account in my judgment is Order1A of the Court's Rules, which sets out the Overriding Objective borrowed from the English CPR. The Overriding Objective is something that the parties are required to help the Court to achieve. The Court is required to deal with cases "justly". Order 1A (1) (2) provides:

> "*Dealing with a case justly includes, so far as is practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) saving expense;*
>
> *(c) dealing with the case in ways which are proportionate—*
>
> *(i) to the amount of money involved;*
> *(ii) to the importance of the case;*
> *(iii) to the complexity of the issues; and*
> *(iv) to the financial position of each party;*
>
> *(d) ensuring that it is dealt with expeditiously and fairly; and*
>
> (e) *allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*" [Emphasis added]

[1] For wrongful (constructive) dismissal.

4. Mr. Adamson for the Defendant placed three authorities before the Court in support of his submission that the Court should make no order as to costs[2]. The first case was the judgment of Mann J in *Fulham Leisure Holdings Limited-v- Nicholson Graham & Jones* [2006] EWHC 2428 (Ch). In this case, the central paragraph which Mr. Adamson relied upon was paragraph 3 in which the learned judge said this:

> "*3. The main claim in this action was for the sum of £7.75m, being the alleged costs of buying in a right which the claimant says was negligently omitted from the documentation under which the claimant purchased Fulham Football Club. I found that the defendants were negligent but not liable for that loss claimed. There was an additional claim for a little over £100,000 in respect of professional fees allegedly incurred in sorting out the negligence. I allowed £6,750 of that claim. The matter was heard over 25 days. This was a very substantial matter. So far as it is necessary for me to determine who is the 'successful party' for the purposes of CPR 44.3, I find that that was the defendants. It was certainly not the claimants… What his client has recovered was a very small part of a financially subsidiary part of the claim, and which is itself a very very small proportion of the overall claim….Looking at this matter in a realistic way, and in a commercially sensible way, I do not think it is fair to treat the claimant as being the successful party. I return to the significance of that determination later.*"

5. Mr. Dunch sought to dilute the persuasive value of this case by pointing to various distinguishing factors, including a huge payment into court of £500,000 in respect of a matter where only £6750 was recovered. I also accept that there was in that case, in addition, a 'drop hands' offer which was referred to in paragraph 12. However, I am bound to accept that this case does provide persuasive support for the proposition that a Court may, in appropriate circumstances, regard a party who wins a very small portion of a monetary claim as not having won at all for the purposes of costs. In that case, the order that was made was no order as to costs.

6. The next case that Mr. Adamson referred to was *Islam-v-Ali* [2003] EWCA Civ 612. This was a case where Auld LJ gave the leading judgment and it was again a case where there was a very small recovery in respect of a large claim. This emerges from paragraph 1 of Auld LJ's judgment where the following facts are summarised:

> "*1. This is an appeal by Mrs Afroza Ali, the defendant to a claim by Mr Abu Islam in the Central London County Court for remuneration for his services as a Chartered Accountant in running the accountancy business of her late husband. The judge, His Honour Judge Martineau, found for Mr Islam on his claim and gave him judgment for £12,746.41, inclusive of interest, and he ordered Mrs*

[2] I am aware of no local judgment which has considered this somewhat unusual factual and legal costs matrix.

> *Ali to pay Mr Islam's costs of the action. It is against the costs order, not the judgment sum, that Mrs Ali appeals. She maintains that the judgment sum of over £12,000 does not truly represent a win for Mr Islam, but merely a relatively small balance in his favour between much larger sums in play and on an issue between them to the end.*"

7. In this case, as Mr. Dunch rightly points out, although the result was that the appeal was allowed and that each side was required to bear their own costs, there was also a history of "*without prejudice bargaining sallies*", as they were referred to in paragraph 2 of Auld LJ's judgment. But again, in my judgment, that background does not undermine the principle that the Court is entitled to have regard to the commercial realities of the result in considering whether or not there has been a 'win' in what has elsewhere been referred to as 'real world terms'.

8. The final case that Mr. Adamson referred to was *Phonographic Performance Ltd.-v-AEI Rediffusion Music Ltd* [1999] 2 All ER 299. This was a Court of Appeal decision just before the new CPR came in. Mr Adamson relied upon the judgment of Lord Woolf to demonstrate that the Court's jurisdiction to depart from the costs follow the event rule was not substantially altered in the CPR, save to the extent that a new regime for issues-based costs orders was introduced. At page 313 j, Lord Woolf said this:

> "*I draw attention to the new Rules because, while they make clear that the general rule remains, that the successful party will normally be entitled to costs, they at the same time indicate the wide range of considerations which will result in the Court making different orders as to costs. From 26 April 1999 the "follow the event principle" will still play a significant role, but it will be a starting point from which a court can readily depart. This is also the position prior to the new Rules coming into force.*"

9. In this case, which was concerned not with a direct application of the Rules of Court but a decision made by a Copyright Tribunal, the same approach was supported. Namely, having regard to whether or not it could be said that the party seeking costs had substantially won.

Application of principles to the facts

10. In the present case I accept that the starting assumption must be, and was in fact the case in my mind, that the Plaintiff should be entitled to his costs. But, having regard to the authorities cited and looking at the huge disparity between the amount awarded and the amount originally claimed, in my judgment the Court is bound to find that in 'real world' terms the Plaintiff has not succeeded because this case was quintessentially a claim about money. That finding is consistent with findings reached in the Judgment.

11. The only question is to what extent the Court should award the Plaintiff any costs at all. It does seem to me that the Court should have regard to how the litigation should have been conducted. Mr. Dunch in seeking costs complained that the Defendant never encouraged serious debate about quantum issues before trial. But on the pleadings it is clear that issue was joined in a very firm and clear way on quantum in the Defence dated the 13th June 2014. Having received that Defence the Plaintiff, it seems to me, being the party bringing this claim, was under a duty to properly and seriously assess the merits of his claim. And the reality is that the Defence at paragraph 5 denied liability on all of the crucial issues which have resulted in the modest recovery that the Plaintiff has made. Two sub-paragraphs are pivotal, it seems to me:

> "*(a) It is denied that Mr. Whiting has suffered any loss, alternatively it is averred that Mr. Whiting has fully mitigated any loss by way of the Mt Logan Contract, which provides a greater remuneration package that [sic] his contract with Torus once the value of stock options and bonuses are taken into account;…*
>
> *(c) It is denied that Mr. Whiting has any claim to a bonus, in circumstances where bonuses were discretionary and no employees at Torus had received a bonus for the 2013 financial year*"

12. The resolution of those aspects of the quantum claim against the Plaintiff rendered his claim commercially almost valueless, having regard to the fact, as Mr. Adamson pointed out, that the amount that was awarded in the end was not an amount which would be pursued in the Supreme Court and probably not -with legal representatives- in the Magistrates' Court either.

Conclusion

13. In these circumstances the Order that I make is to make no order as costs after June 13, 2014 but to award the Plaintiff his costs up to that date. Because it does seem to me that the Court's duty in looking at this is to look at the background to the litigation and that from June 13, 2014 when the Defence was filed, it would not be reasonable for the Court to exercise its discretion to award the Plaintiff any costs.

Dated this 6th day of March 2015, _____

IAN R.C. KAWALEY CJ