ALGOL MARITIME LTD. v. ACORI

COURT OF APPEAL (Fieldsend, P., Huggins and Davis, JJ.A.):
March 21st, 1996

Civil Procedure—costs—costs against third party—may award against third party insurer financing unsuccessful defence if seeking to benefit from outcome, e.g. if attempting to avoid issue of liability under policy when defendant insolvent—irrelevant that plaintiff knew defendant insolvent, or that insurer not joined to action if gives insurer adequate notice of intention to seek costs in any event

The respondent obtained an order for costs against a third party following his successful action against the appellant in the Supreme Court.

The respondent, a seaman, was injured whilst working on board a ship owned by his employer, the appellant, and was no longer able to work. He sued the appellant under his contract of employment, which incorporated the standard terms of an agreement between the appellant and a trade union. This provided, *inter alia*, that (a) if he were injured "through no fault of his own" whilst working for the appellant, he would be entitled to an annuity based on the degree of disability he suffered as a result; and (b) the appellant was obliged to obtain insurance cover in respect of any liability arising out of that provision. The appellant was insured with a third party, the "Swedish Club," which contested its liability to pay out under the contract in respect of a claim of the kind made by the respondent.

By the time the action began, the appellant had become insolvent, a fact of which the respondent had apparently known. The respondent's action was successful and although the appellant's subsequent appeal succeeded in part, it remained liable to pay substantial damages and meet the ongoing annuity payments as they fell due. (These proceedings are reported at 1995–96 Gib LR 146.) There was correspondence which showed that prior to the hearing of the action, the respondent had informed the Swedish Club that he would seek to obtain his costs from it, whatever the outcome of the trial. It also appeared that the appellant's solicitors were obtaining instructions from and conducting the proceedings on behalf of the Swedish Club, with the appellant's approval. On the respondent's subsequent application, the trial court (Pizzarello, A.J.) awarded costs against the Swedish Club.

On appeal against this award, the appellant submitted, *inter alia*, that since the Swedish Club had not been a party to the action, the judge had been wrong to award costs against it, in particular (a) because he had always intended to seek costs from it, the respondent should have applied

to join it as a party and his failure to do so could not now be circumvented by seeking a third-party order; and (b) the respondent had known from the outset that the appellant was insolvent but had nevertheless proceeded with its action and should not now be allowed to seek costs from any other party.

The respondent submitted in reply that (a) he was perfectly entitled to seek an order for costs against a third party under the rules in force in Gibraltar (which were the same as those in England), and it was irrelevant to that legal entitlement that he had not sought to join the Swedish Club as a party; and (b) it was similarly irrelevant that he had known of the appellant's insolvency.

Held, dismissing the appeal:

The Gibraltar law in respect of an award of costs against a non-party was that in force in England under s.51 of the Supreme Court Act 1981, and was governed by English principles. Applying these, it was clear that the Swedish Club had been sufficiently interested in the action to fund a vigorous defence and, if the appellant had been successful, would have avoided having to meet the respondent's claim or contest the issue of its liability to pay out under the insurance agreement. Furthermore, it was clear that the appellant's legal solicitors had contested the action on the instructions and solely on behalf of the Swedish Club. In these circumstances, it would be wrong to allow it to take advantage of the appellant's insolvency in the manner in which it sought to do and, on the available evidence, there was no reason to fault the judge's exercise of his discretion to award costs against the Swedish Club. In particular, it was no answer that the respondent had known all along that the appellant was insolvent and would be unable to pay any costs, nor that he might in some way have avoided the need for the joinder of Swedish Club as a party to the action since he had given it adequate notice of his intention to claim costs from it whatever the outcome of the trial. For these reasons, the order for costs would not be disturbed (page 245, line 25 – page 246, line 24; page 247, line 15 – page 248, line 35).

Cases cited:

(1) *Aiden Shipping Co. Ltd.* v. *Interbulk Ltd.*, [1986] A.C. 965; [1986] 2 All E.R. 409.

(2) *Jacobs* v. *Schmaltz* (1890), 62 L.T. 121; 6 T.L.R. 155, considered.

(3) *MacFarlane* v. *E.E. Caledonia Ltd. (No. 2)*, [1995] 1 W.L.R. 366; [1995] 1 Lloyd's Rep. 535, considered.

(4) *Tharros Shipping Co. Ltd.* v. *Bias Shipping Ltd. (No. 3)*, [1995] 1 Lloyd's Rep. 541, *dicta* of Rix, J. considered.

Legislation construed:

Supreme Court Act 1981 (c.54), s.51(1):

> "Subject to the provisions of this or any other Act and to rules of court, the costs of and incidental to all proceedings in the civil

division of the Court of Appeal and in the High Court . . . shall be in the discretion of the court, and the court shall have full power to determine by whom and to what extent the costs are to be paid."

G. Aldous with *L.E.C. Baglietto* for the appellant;
P.J. Isola for the respondent.

FIELDSEND, P.: These are my reasons for dismissing the appellant's appeal against the orders as to costs in the court below.

The appeal is concerned with two aspects of an order for costs made by Pizzarello, A.J. on August 18th, 1995, following his decision on the merits of an appeal in a judgment of March 20th, 1995. At the outset of the appeal, Mr. Isola for the respondent contended that in each case leave to appeal was required and should not be granted. We ruled that leave to appeal was not required because both orders as to costs arose out of, and were part and parcel of, the main issue of liability. This issue we determined, albeit in a separately numbered appeal, on January 3rd, 1996. Thereafter, by consent, the appeal on the merits and the appeal on costs were consolidated.

The issues in regard to costs were (a) whether the learned judge was right in awarding the costs of the action to the plaintiff (now respondent) with the exception only of the costs thrown away by reason of the late amendment in the statement of claim of the date of the plaintiff's accident from January 31st, 1987 to "on or about" January 31st, 1987 (including the costs of the hearing on the morning of February 28th, 1995 (which were to be for the defendant); and (b) whether the learned judge was right to order that in default of payment of the costs of the action by the defendant, the plaintiff's costs should be paid by Sveriges Anfartyges Assurans Forening (known as the "Swedish Club"), a non-party to the action.

Amendment-related costs

From the start of proceedings in 1993, the plaintiff had alleged that he had suffered his injury in the Swedish port of Halmstad on January 31st, 1987. This allegation was denied generally in the pleadings. It emerged during the later stages of the preparation for trial that the defendant's ship was at sea and not at Halmstad on January 31st. On the Friday before trial, February 24th, 1995, some intimation of an impending amendment was given and at the opening of the trial on February 28th, an amendment was sought and granted to allege that the injury was suffered "on or about January 31st," and the evidence was that it occurred on January 29th.

Mr. Aldous for the appellant contends that the defendant should be awarded the costs of trial or at least all the costs up to and including the costs of the first day of trial. He cited *Jacobs* v. *Schmaltz* (2), a defamation case in which the plaintiff was said to have twice set fire to

his property and was a dangerous man to have as a tenant. At the close of the plaintiff's case, it was successfully argued that the words were not slanderous and that there was no innuendo pleaded that the words meant that the plaintiff had committed a criminal offence. Stephen, J. refused leave to amend except on terms that the plaintiff should pay all the costs incurred up to the date of the trial, on the ground that the amendment sought was "substantial" (62 L.T. at 122).

In the present case, all the relevant facts were before the trial judge and the order he made was one which, in the exercise of his discretion, he was entitled to make. The order cannot in my view be faulted on any of the grounds which apply to an appeal against the exercise of such a discretion. In my view, the appeal on this aspect of the costs order must be dismissed.

The non-party order

This aspect of the case requires fuller consideration. The defendant is a Gibraltar-registered company which in 1987 was operating its ship, the *M.V. Meonia*. It employed the plaintiff as a seaman on terms which included Article 18 of the International Transport Workers' Federation Collective Agreement. This included a term requiring the defendant to insure against any liability arising under that Article. The defendant was insured with the Swedish Club, but there is a dispute between the defendant and the Club as to whether this insurance covers the defendant's liability under Article 18.

As early as May 10th, 1991, Messrs. Hill, Taylor & Dickinson became aware of the plaintiff's accident. They were clearly then acting for the Swedish Club and are in fact the Club's English solicitors. Proceedings were started in February 1993, when the writ was served on the defendant's agents, Sorek Services in Gibraltar. Thereafter, the defendant's solicitors, the Gibraltar firm of J.A. Hassan & Partners, acted for the defendant, receiving information and instructions from Hill, Taylor & Dickinson. It is quite clear from the correspondence that Hill, Taylor & Dickinson were acting for the Swedish Club throughout and, through Hassan & Partners, were controlling the litigation on the defendant's side.

The letters of October 7th, 1993 and July 7th, 1994 written to the English solicitors for the ITWF and of August 26th, 1994 written to the plaintiff's solicitors, amongst others, show clearly that Hill, Taylor & Dickinson, whatever their connection with the defendant, were acting for the Swedish Club. Indeed, it was common cause that the Swedish Club and the ITWF are in dispute over the question as to whether the liability of the Swedish Club covers claims under Article 18 of the ITWF Agreement.

What is also quite clear is that well before Hill, Taylor & Dickinson's letter of August 26th, 1994 to Isola & Isola, the plaintiff's solicitors, they, and therefore the Swedish Club, knew that the defendant had no assets

and was in fact not trading and was insolvent. In that letter, they refer to the plaintiff's expressed intention of pursuing the Swedish Club should he succeed against the defendant, and continue:

> "If your client would confirm that in the event that he should succeed in the action against our client [*i.e.*, the defendant] then he would not pursue the Swedish Club to effect recovery, then the Club may take the view that they no longer have any interest in the proceedings and may cease to fund its defence. Since it is clear that your client will not give this confirmation, the Club have sufficient interest in the proceedings to fund our client's defence."

Isola & Isola gave notice to Hassan & Partners on January 18th, 1995 that irrespective of the outcome of the impending trial, they would seek to recover the plaintiff's costs from the Swedish Club. In fact the plaintiff was successful in the trial at first instance and on April 4th, 1995 they gave notice to Hassan & Partners that at the hearing (which had been adjourned to consider the question of costs), they would seek an order against the Swedish Club, as a non-party, for the costs of the action. In my view, although a formal joinder of the Swedish Club was desirable, I think this notice was clearly sufficient. The Club did not take the point that it was insufficient and through Mr. Aldous, ostensibly acting for the defendant, full argument was put before the trial court as to why the order sought should not be granted. This argument must be regarded as having been on behalf of the Swedish Club, as it was really of no concern to the defendant itself why the order should not be granted.

These are basically the facts and circumstances that were before the learned judge below. He repeated what he had said at the trial: "I am satisfied that [the defendant] is the vehicle the Swedish Club is using to defend the action brought by the plaintiff." And after finding that the Swedish Club had a significant interest in the conduct of the case, he continued in his judgment on costs: "However, if it supports this litigation and the action is lost then it must pay the costs." In a new paragraph, he said this:

> "It is argued that there is in fact no Club cover and that in any case the liability of the Swedish Club is on an indemnity basis, 'pay and be paid.' In the circumstances of this case, the contention is a charade, in view of the Swedish Club's obvious and vigorous defence of this action. There must have been, I deduce from the correspondence and the manner in which the defence has been conducted, an undertaking amounting in law to a contract that the Club would discharge any liability for costs which the defendant might incur. The defendant is itself without funds. I consider it proper to make the order sought by the plaintiff and I do so."

Mr. Aldous for the appellant has put his argument in a simple way. He contends that on the authority of *Tharros Shipping Co. Ltd.* v. *Bias Shipping Ltd.* (4), the present case is not one in which it is appropriate to

make a non-party costs order but even if it is, the basis upon which the learned judge made the order cannot be supported and as there has been no cross-appeal, the respondent cannot rely upon any other basis for the grant of the order made.

I have some difficulty with the sentence in which the learned judge referred to "an undertaking amounting in law to a contract that the Club would discharge any liability for costs which the defendant might incur." He cannot have meant an agreement with the plaintiff, because the Club had persistently and vehemently rejected any suggestion that it would pay the plaintiff his costs. He can only mean that the Club had agreed to fund the defendant in its defence of the action. This it may well have done, but this would not mean that the Club had agreed that it would pay the plaintiff any costs awarded to him. In neither case can the agreement of itself form any basis for awarding costs to the plaintiff as against the Club. There was, however, sufficient material in the judgment to show in effect that the learned judge did base his conclusion upon what is termed in the *Tharros* case the "liability of a funder" ([1995] 1 Lloyd's Rep. at 559).

I therefore turn to that aspect of the matter. It was, of course, common cause that the law in Gibraltar in regard to the award of non-party costs is that in force in England and set out in s.51 of the Supreme Court Act 1981, as interpreted in *Aiden Shipping Co. Ltd.* v. *Interbulk Ltd*. (1). Since then there have been such cases as *MacFarlane* v. *E.E. Caledonia Ltd. (No. 2)* (3), in which a commercial company financing litigation for a fee based on a percentage of what was recovered in an action was held liable to pay an unsuccessful defendant's costs, and the *Tharros* case (4).

The latter case needs further consideration. The facts bear some similarity to those before us. A defendant, Bias, had insurance cover from an indemnity club and was sued for damages by the plaintiff, Tharros. There was some dispute between the defendant and the club as to the extent of the cover given by the club, but the club did agree to fund the defence though without agreeing to pay the costs of the plaintiff if it were successful. Tharros gave notice to the association that it would be looking to it for recovery of any costs it could not recover from the defendant but received no positive reply. In the event, the plaintiff was successful and obtained an order for costs against the defendant on which it was unable to recover, as the defendant had become insolvent. The plaintiff claimed costs from the club on a number of grounds but was successful on none of them. The final ground relied upon was that of the club's liability as a funder. After considering a number of factors which weighed on either side, Rix, J. found that the considerations were well balanced but on a final analysis, he did not consider them sufficiently weighted in the plaintiff's favour to warrant the making of a non-party order. He held that a court should be cautious in making such a summary order, however convenient it might seem, to side-step any other normal process (in that

case by procedure under the Third Parties (Rights against Insurers) Act 1930). In particular, he found that he could not regard the club as sheltering behind the emerging insolvency of the defendant. He went on to say, albeit *obiter* ([1995] 1 Lloyd's Rep. at 560):

> "I would be inclined to think that reliance by a club on a pay and be paid provision in response to an application under s.51 may well not be viewed with favour in a case where a member was supported although known to be weak or insolvent."

He found that the part played by insolvency was not present to the club's mind, adding (*ibid*.): "[V]ery different considerations may arise where an insurer supports an insured known to be insolvent or to be potentially so, especially where the insurer is fighting for his own interests."

In the instant case, the Swedish Club had known at the latest at the institution of proceedings that the defendant was not trading, had no assets and was insolvent. It funded the defendant's defence because a successful defence would have precluded any liability it might have to meet a judgment in the plaintiff's favour. This would obviate the need to fight the main basis of its denial of liability to cover the defendant under Article 18 of the ITWF Agreement, which was a serious bone of contention between it and the Union, which was supporting the plaintiff.

Mr. Aldous contended that it was a factor against the plaintiff that he had always known of the defendant's insolvency and of the stance of the Swedish Club on the question of its liability for costs. This does not, to my mind, weigh against the plaintiff, who was entitled to bring his action and to rely on the law in regard to non-party costs in the event of his being successful. His rights do not depend upon whether he was somehow encouraged to hope to recover costs, but whether the law will entitle him to do so. In the same way, it is not a factor against him that he may in some way be "side-stepping" joining the Club in his action either here or in Sweden. He is doing no more than following the most straightforward way of seeking a judgment against his contractual debtor in the hope of being able eventually to recover from the debtor's insurer.

In my view, there was ample material upon which the learned judge was entitled in his discretion to make the order he did and no basis for interfering with the exercise of that discretion.

HUGGINS and **DAVIS, JJ.A**. concurred.

Appeal dismissed.