HILL v. ELLUL, CHIPOLINA and CLARKE

SUPREME COURT (Pizzarello, Ag. C.J.): September 11th, 1998

Civil Procedure—costs—timing of order for costs—costs may be deferred following judgment on liability pending assessment of damages—wide discretion to award costs according to parties' conduct, success of issues argued and quantum of damages awarded

Civil Procedure—costs—apportionment—costs to follow event unless successful party significantly increases length of trial by arguing issues which fail—may order successful party to pay other party's costs if acts unreasonably or recovers only nominal damages

The plaintiff brought an action for damages against the defendants in contract and tort.

The plaintiff alleged, *inter alia*, breach of contract and fraudulent misrepresentation by the defendants. He was ordered to give security for the defendants' costs. The court found that although the defendants had not acted fraudulently, they were liable to pay damages to the plaintiff and adjourned the hearing of the issue of quantum to a later date. The plaintiff applied for an order that costs should follow the event.

He submitted that (a) as the successful party he was entitled to his costs of the trial, and the court should withhold such an order only if he had

been guilty of misconduct in the pursuance of his case, which he had not; (b) the costs should include those incurred in arguing the issue of fraud, which had not, in any event, occupied a significant amount of the court's time; (c) his costs should also include those incurred prior to the amendment of his statement of claim, which the court had reserved pending the assessment of damages; and (d) he should be released from his obligation to provide security for the defendants' costs.

The defendants submitted in reply that (a) costs should be reserved generally until the issue of quantum had been decided, since if only nominal damages were awarded this would affect the question of all parties' costs; (b) since a great deal of the hearing had been taken up with allegations which had either been withdrawn or disproved, the plaintiff should not be awarded his costs in respect of arguing those issues and, indeed, the court had a discretion to order that he should pay the costs wasted in responding to those allegations; and (c) accordingly, it would be improper for the court to decide on the question of costs or to release the plaintiff from its obligation to provide security for their costs.

Held, reserving costs generally pending the assessment of damages:

Since the present stage of the proceedings was akin to an interlocutory stage in that it was impossible to say who would effectively be the successful party, the question of costs would be reserved pending the court's decision on the quantum of the damages to be awarded. It would then be within the court's discretion to order that reduced costs or no costs at all should be awarded to the plaintiff, if it found that the length or cost of the proceedings had been significantly increased by issues raised by him on which he had failed and, furthermore, to award the defendants their costs if he had raised such issues unreasonably or acted oppressively, or if only nominal damages were ultimately awarded to him (page 377, line 16 – page 378, line 26).

Cases cited:

(1) *Anglo-Cyprian Trade Agencies Ltd.* v. *Paphos Wine Indus. Ltd.*, [1951] 1 All E.R. 873; (1951), 95 Sol. Jo. 336, applied.
(2) *Elgindata Ltd. (No. 2), In re*, [1992] 1 W.L.R. 1207; [1993] 1 All E.R. 232, applied.
(3) *Scherer* v. *Counting Instruments Ltd.*, [1986] 1 W.L.R. 615n; [1986] 2 All E.R. 529; [1977] F.S.R. 569, followed.

H.K. Budhrani, Q.C. for the plaintiff;
G.C. Stagnetto for the defendants;
D.J.V. Dumas for the third party.

PIZZARELLO, Ag. C.J.: Following the delivery of the judgment in this matter, which was limited to the question of liability and the right to
45 damages, Mr. Budhrani seeks an order for costs to follow the event and

submits that there are no circumstances which militate against such an order. He asks for the plaintiff's costs against the defendants.

Mr. Stagnetto opposes the application and submits that costs should be reserved until the assessment of damages. He argued that if nominal damages are to be granted, that may affect the question of costs, and he refers to *Anglo-Cyprian Trade Agencies Ltd.* v. *Paphos Wine Indus. Ltd.* (1). At the trial there was little evidence as to quantum and therefore the court ought to be slow to accede to the plaintiff's request. Furthermore, Mr. Stagnetto submits that the plaintiff should not be allowed his costs of arguing the question of fraud which has been dismissed by the court (see *In re Elgindata Ltd. (No. 2)* (2)). Thirdly, he submits that the plaintiff amended his statement of claim in October 1997 and the plaintiff should pay the costs wasted up to that date. Those costs were reserved. In so far as the other costs are concerned, these should be costs in the cause, and at this stage should also be reserved.

In reply, Mr. Budhrani submitted that there were a number of issues in the case and the case was pleaded in the alternative. In this particular case there were allegations of breach of contract and fraudulent misrepresentation and the defendant put in several defences. The action followed the normal course and the court must take an overview and deal with it accordingly: see the *Elgindata* case.

As for the claim for fraud which did not succeed, the misrepresentations had to be proved in substantially the same way in the context of the claim in contract and in tort and the only additional ingredient was the state of mind of the defendant. Four volumes of documentary evidence were put in as exhibits and only two or three letters which were directly referable to the claim in tort dealt with Mr. Eric Ellul's state of mind. As far as the affidavit was concerned, that issue concerned a very small part of it at the trial. Mr. Ellul did not spend much time on this part of the case in examination-in-chief (curtailed because the affidavit was relied on as the basis of examination-in-chief), cross-examination and re-examination, and so in terms of the case as a whole the failure by the plaintiff to prove the fraudulent misrepresentation adds up to nothing very much.

As for the submission of Mr. Stagnetto that costs should be reserved, Mr. Budhrani submits that this court had to determine liability, that the case was decided on the issue of liability, and the plaintiff won. No payment was made into court and so there is no reason to reserve costs at this stage. If nominal damages are given, the usual order should apply. The court should withhold an order for costs only if the plaintiff has so misconducted himself that the court might withhold costs (see *Anglo-Cyprian Trade Agencies Ltd.* v. *Paphos Wine Indus. Ltd.* (1)) and in this case, the plaintiff cannot be said to have misconducted himself in any way. He submits that the court can take a view now and the plaintiff has not misbehaved in any manner. Furthermore, the plaintiff has paid

£40,000 into court as security for costs and he should now be released from his obligations. £15,000 is in the client account of Budhrani & Co. and £25,000 is secured by way of bond (which comes back for renewal). As that entails costs, he suggests that the plaintiff should be released from having to provide for costs. Mr. Budhrani suggests that it is manifestly unfair that he should still have to maintain his security.

In reply, Mr. Stagnetto refers to O.62, r.3 of 1 *The Supreme Court Practice 1997*, at 1056. The defendants intend to appeal and so there is still a possibility that the plaintiff will have to pay costs in the end. As for minimal and nominal damages, Mr. Stagnetto reminds the court that the plaintiff said that he would withdraw the claim for the value of property and resiled from any complaint about the lack of title deeds. A lot of time was spent at the trial on those matters. He does not agree that the misrepresentation point only added an hour or so to the action. The whole question of representation concerned misrepresentation.

I turn to consider the arguments. In the *Elgindata* case, Nourse, L.J. in the Court of Appeal set out the principles which ought to be applied. He said ([1993] 1 All E.R. at 237):

> "The principles are these. (1) Costs are in the discretion of the court. (2) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (3) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (4) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but order him to pay the whole or a part of the unsuccessful party's costs. Of these principles the first, second and fourth are expressly recognised or provided by rr. 2(4), 3(3) and 10 respectively. The third depends on well-established practice. Moreover, the fourth implies that a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's costs."

The discretion has to be exercised judicially and I look for guidance to the *White Book*. Mr. Stagnetto draws attention to 1 *The Supreme Court Practice 1997*, para. 62/2/9, at 1052, which reads:

> "Where plaintiffs in an action for breach of contract recover only nominal damages and do not establish anything which is of the least value to them, they are not to be regarded as successful plaintiffs, and the court will normally treat the defendants as having succeeded and award the defendants the costs of the action, whether or not the defendants have at any stage made a payment into court of nominal damages."

That was held in *Anglo-Cyprian Trade Agencies Ltd.* v. *Paphos Wine Indus. Ltd.* Mr. Budhrani has drawn attention to para. 62/2/10 (*loc. cit.*, at 1053) which reads:

> "Where there are no materials on which the Judge can exercise his discretion, he is not justified in depriving a successful party of his costs….
>
> A successful party may be deprived of his costs if he presents a false case or false evidence, or acts repressively in the action."

This plaintiff did nothing of the sort, said Mr. Budhrani.

My attention was also called to the case of *Scherer* v. *Counting Instruments Ltd.* (3). There the principles on which a judge makes his decision in costs was discussed by Buckley, L.J. (they are those set out by Nourse, L.J. in the *Elgindata* case (2)) and he goes on ([1986] 2 All E.R. at 536):

> "When these principles fall to be applied to an interlocutory step in an action, the circumstances may be such that it is not then possible to see on which side justice requires that the decision who should bear the costs of that step should ultimately fall. This may depend on how the issues in the action are eventually decided. Consequently, costs in interlocutory matters are often made costs in the cause or reserved."

The instant case is not one of an interlocutory matter but I consider, after a lot of hesitation, that Mr. Stagnetto is right. The matter needs to be further examined as to the measure of damages. Until that is done, one may not say who is the successful party. I shall reserve the question of costs generally until that aspect of the case has been dealt with.

Order accordingly.