
[2013–14 Gib LR 249]

INTERNATIONAL FRANCHISES LIMITED v. BARI PROPERTIES LIMITED.

COURT OF APPEAL (Kennedy, P., Aldous and Potter, JJ.A.):
October 10th, 2013

Civil Procedure—costs—appeal against costs—decision on costs only questionable if lower court has erred in law or principle, taken into account something it should not have or not taken account something it should, or decision so plainly wrong that factors must have been given wrong weight—no interference with discretion of trial judge if parties' relative degrees of success and conduct taken into account, unless decision plainly wrong so that wrong weight must have been given

Civil Procedure—costs—appeal against costs—Supreme Court entitled to find that party failing to obtain specific performance, injunctive relief or substantial damages not loser in proceedings when obtains nominal damages and ruling on construction of disputed clause—other party found in breach so defence not fully successful—decision not so plainly wrong that Court of Appeal should interfere

The respondent brought an action against appellant in the Supreme Court for breach of contract.

The appellant had leased the ground floor of a commercial centre from the respondent. The terms of the lease required the appellant, during business hours, to provide an access route for the public into the rest of the commercial centre through the premises leased to it.

On Saturday, August 23rd, 2009, the doors through which that access was provided were accidentally damaged by a member of the public on a

mobile utility vehicle, and could not be opened. The respondent applied for injunctive relief requiring the doors to be opened. The application was due to be heard on Friday, August 29th, but the doors were repaired and re-opened, and the application stayed. The Monday was a bank holiday, so the agreed access was unavailable for 3½ days. There had been four other closures of the doors since 1990, two of which were the result of strong winds making the doors unsafe.

The parties disputed the construction of the clause of the lease requiring access through the doors; the appellant denied that its actions constituted a breach, as it re-opened the doors as soon as reasonably possible, whilst the respondent argued that any closure of the access route was a breach of the access clause.

The Supreme Court (Dudley, C.J.) held that the access clause was unambiguous and, whilst the obligation on the appellant was onerous, it was clearly so from the wording of the agreement, and the need to ensure the doors remained open during business hours was understandable. The obligation on the appellant could not, however, be absolute. The appellant was not required to keep the doors open when doing so presented a danger to those using them, and those closures relating to the strong winds were therefore not breaches of the agreement. The Supreme Court held that the closure now in question—resulting from the damage caused by the mobile utility vehicle—could not have been prevented by the appellant, and the steps it took to rectify the situation were reasonable. However, there was still a breach of the agreement as it would have been possible, albeit financially onerous, for the appellant to have reinstated the access sooner than it did; reasonableness was not the standard required by the access clause.

The Supreme Court did not grant an injunction because the access clause imposed positive obligations, making specific performance more appropriate, and he did not order specific performance as ongoing supervision would be required to enforce it. He categorized the claim, whilst not trivial, as relating to a minor, technical breach awarded only nominal damages of £2. The respondent succeeding in getting a determination on the construction of the access clause, but failed in its claim for an injunction, specific performance, or substantial damages. The judge did not feel he could identify a winner and a loser, and decided that each party should bear their own costs.

On appeal against the decision on costs, the appellant submitted that the judge had misdirected himself when exercising his discretion: he had failed to accord proper weight—as he was required to do—to the respondent's unreasonable conduct and the relative degrees of success achieved by the parties, and his decision was plainly wrong. It submitted that the judge erred by (i) failing to find that the breach was trivial, and the respondent was unreasonable and unjustified in bringing the proceedings; (ii) failing to find that the respondent was, in reality, the loser, as it did not get injunctive relief, specific performance, or substantial damages; and (iii)

finding that the correct interpretation of the access clause fell between the positions advanced by either party.

The respondent submitted in reply that the trial judge's decision could not be faulted, and certainly was not plainly wrong. It submitted that (i) it was justified in bringing the claim, given the history of door closures, and the appellant's denial of any breach led the respondent to seek an authoritative construction of the access clause by the court—the closure of the doors was no trivial matter; (ii) it did not lose the case as obtaining damages had not been its main object in bringing the action, and it did obtain a determination of the construction of the access clause; and (iii) it had some success in advancing its interpretation of the access clause, as, on the correct interpretations, the agreement was found to have been breached.

Held, dismissing the appeal:

(1) The decision of the Supreme Court that each party would bear its own costs would not be overturned, as it would be wrong, in this case, to interfere with the discretion of the trial judge. He had taken into account the relative degrees of success and conduct of each party, and his decision was not plainly wrong such that it must have been reached by giving incorrect weight to each factors. A decision on costs should only be interfered with where the lower court had erred in law or principle; taken into account something which it should not have, or failed to take into account something it was required to; or the decision was plainly wrong and so must have been reached by failing to give the factors taken into account appropriate weight (para. 16; paras. 18–19).

(2) The Supreme Court did not err in finding that although the action concerned a minor, technical breach of contract, it was not trivial and that the respondent was not unreasonable in pursuing it. Having heard all the evidence himself, the trial judge was in the best position to make that assessment; his decision was not plainly wrong, and it would be wrong, therefore, to interfere with the exercise of his discretion (para. 28).

(3) Nor did the Supreme Court err in failing to find that the respondent was the loser; it was entitled to hold that it could not identify a winner or a loser in the proceedings. The respondent did not obtain specific performance, injunctive relief or substantial damages, but it did obtain a determination on the construction of the access clause, and it was found that the appellant had breached the agreement, on the proper construction of that clause, and the appellant's defence had not fully succeeded. The decision of the trial judge was not plainly wrong, and it would therefore be wrong to interfere with the exercise of his discretion (paras. 29–30).

(4) Similarly, the Supreme Court had not erred in concluding that the correct interpretation of the access clause (that it was an onerous but not absolute obligation) fell between the positions put forward by each party. Whilst its precise location on the spectrum between those positions could be disputed, the respondent clearly had had some success, as it was held

that the appellant had breached the agreement. Again, the decision was not plainly wrong, and the court would therefore not interfere with the exercise of the judge's discretion (para. 31).

Case cited:
(1) *Alltrans Express Ltd.* v. *CVA Holdings Ltd.*, [1984] 1 W.L.R. 394; [1984] 1 All E.R. 685, applied.

A. Vasquez, *Q.C.* for the appellant;
Ms. Y. Lhote and *C. Allan* for the respondent.

1 **ALDOUS, J.A.:** This is an appeal with the leave of the Chief Justice against his ruling on costs, in which he decided that each party should pay its own costs. It is the appellant's contention that the Chief Justice failed to accord proper weight to the unreasonable conduct of the respondent, and also to the relative degree of success of the parties, and also he was plainly wrong.

2 Mr. Vasquez, Q.C., who appeared on behalf of the appellant, made it clear that the case of the respondent was a bombastic one, and contained allegations of wilful and continuous breaches. He said that his client was a retail outlet which should not have been subjected to legal harassment. He submitted that the order that should have been made was that the defendant, who is now the appellant in this case, should have its costs, or at least half of its costs.

3 I come to the background facts which are set out in the full judgment. In summary, this was a dispute between the landlord of the International Commercial Centre, just off Casemates Square, and the tenant. In 1989, the parties negotiated a lease of a number of commercial units. The result was a lease over a substantial area of the ground floor in which the appellant operated a BHS franchise. The parties agreed to incorporate into the lease a right of way for members of the public from the Irish Town entrance into the rest of the centre through premises demised to the appellant. The part of the lease which was in dispute was contained in cl. 3(c). It reads:

> "The lessee hereby agrees and undertakes to the company that . . . the lessee will comply at all times with the following requirements:
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> . . .
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> 3. Provide access to all members of the public to the Commercial Units from the Mall on every weekday that is to say from Mondays to Fridays until 7.00 p.m. in the evenings and on Saturdays between the times of 9.30 a.m. and 2.00 p.m. in the afternoon (excluding Bank Holidays and public holidays)."

4 On Saturday, August 23rd, a member of the public accidentally drove a mobile utility vehicle into the automatic sliding doors of the Irish Town entrance, which damaged them so they could only open with the application of force to a maximum width of 20 inches. The respondent applied for injunctive relief requiring the opening of the doors. They were re-opened on Friday, August 29th, 2008—the day when the application was to be heard. That application was stayed.

5 The judge, at trial, accepted evidence that the suppliers of the doors—who were in La Linea—were requested to come and repair the doors, but that because of pressure of work and staff holidays, they did not attend until the Friday. Because Monday was a bank holiday, the doors were inoperable for 3½ days.

6 It was the respondent's case that the closure of the doors between those dates constituted a breach of the agreement and it was entitled to specific performance or an injunction and/or damages in lieu thereof. In support of the request for equitable relief, it relied upon other historic closures. The judge recorded these as—

(a) On December 12th, 1990, the appellant closed one of the doors which required the respondent to instruct its lawyers.

(b) On December 16th, 1997, the appellant closed the doors for 50 days alleging it was impossible to open them as the glass had broken and a door had blown off its hinges. Again, correspondence between the lawyers ensued.

(c) On January 29th, 2002, the appellant closed the doors in order to carry out refurbishment works. According to the respondent it was reminded of its obligations and it re-opened the doors.

(d) On January 14th, 2006, they were again closed. This led to the respondent seeking injunctive relief from the Supreme Court which was granted on January 16th, 2006.

7 The appellant gave evidence seeking to put those closures in context, and the judge recorded that, in relation to the December 1990 incident, its case was that—at the time—there was a double door, consisting of two centrally opening hinged glass doors of 90 cm. each, and that as a result of the strong Levanter winds the swing doors would open violently, and the closure of one of the two swing doors was a preventative measure taken by the store manager. One door through which the public could gain access was left open. He also referred to the Christmas shopping period.

8 The judge went on to consider the incident in December 1997. That, he said, came about because strong gusts of wind not only smashed the glass panels of both doors but also knocked them off their hinges. Temporary repairs had to be undertaken and the doors were closed until

their eventual replacement, in February 1998, with automatic sliding doors.

9 The judge relied upon the evidence of the managing director of the appellant who had no recollection of any refurbishment in January 2002. However, he did refer to a letter from Bari to IFL dated January 29th, 2002, requiring IFL to open the doors the next day—which corroborated the respondent's case on that incident.

10 The judge held that the January 2006 closure generated more heat. By a letter dated January 6th, 2006, Mr. Nicholas Russo informed the respondent that the store was to be refurbished from January 14th through to January 30th, 2006, and of his intention to close the right of way during that period. There followed correspondence. The matter came before the court on January 16th, 2006, when the then Chief Justice, Schofield, C.J., granted injunctive relief restraining IFL until the trial of the action, or further order from closing the doors during the times stipulated in cl. 3(c).

11 There was a dispute as to the construction of cl. 3(c) which I have read. The dispute appears to have related to the scope of the term to be implied. The judge considered the way that such clauses should be interpreted. In particular he looked at the principles to apply when deciding the term or terms that should be implied. In this respect it would seem odd that there could be breaches of it when it was impossible or dangerous to open the doors. He concluded:

> "15 In my judgment, the language of cl. 3(c) is clear and unambiguous, and although, admittedly, it places an onerous obligation upon IFL, it is an obligation which is apparent from the language of the clause. Moreover, it is consistent with the factual background in that in the context of the layout of the ICC the need to provide public access through IFL's premises to other businesses operating from neighbouring units serves a substantial commercial purpose.
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> 16 It is however, an obligation that, whilst very strict, cannot be absolute. The agreement is silent as to what is to happen when maintaining the doors open or use of the right of way results in an unacceptable risk to members of the public. In my judgment, it is evident that use by members of the public of the right of way has to be consistent with it being safe for such use. Therefore, in the event that for reasons outside IFL's control, use of the passage is unsafe, it does not have an obligation to keep the doors open. I accept Mrs. Otton's evidence in relation to the strong gusts of wind, and the resulting hazard to customers (or individuals merely using the right of way) and those are precisely the type of circumstances when closure of the doors would not constitute a breach of the agreement."

He went on to consider the period between August 23rd–29th, and said:

> "17 It is clear that IFL could not have prevented the mobile utility vehicle from impacting and damaging the doors. I am also of the view that IFL took reasonable steps to have the doors repaired and have access through the passageway restored. However, in my view, whether or not there was a breach is not about the sufficiency of the steps taken. The doors were closed and access thereby denied. It may have been financially onerous, but IFL could, for example, have removed the doors and thereby continued to honour its contractual obligations. Allowing the obstruction to remain amounted to a breach of cl. 3(c)."

12 Mr. Vasquez submitted that his client never flouted the agreement, but the judge held that there had been a breach. His decision must have been based upon the construction of the agreement, and in particular, what term was to be implied. The judge came to consider what remedy was applicable. He said:

> "18 Bari's case is that it cannot tolerate continual breaches of cl. 3(c), and what it seeks is to ensure that IFL complies with its contractual obligations. It therefore seeks an order requiring specific performance and/or an injunction requiring IFL to comply with its contractual obligations. In my view, this is a case which could potentially involve ongoing long-term supervision by the court, and there is no basis to depart from the general rule that specific performance will not be granted if it will involve constant supervision by the court. As regards injunctive relief, I am of the view that cl. 3(c) creates positive obligations and therefore, but for the reasons I have given, the appropriate remedy would be specific performance rather than an injunction.
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> 19 In any event, in my judgment, the breach, which is the subject-matter of this action, and the allegations in relation to the historic breaches do not evidence an intention by IFL to breach the cl. 3(c). Moreover, the 3 hours and 30 minutes which the doors were closed over a period of almost 3 years up to October 2012 is so *de minimis* that the grant of equitable relief would be oppressive on IFL and disproportionate.
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> 20 Although in the alternative to equitable relief Bari seeks damages, these have not been quantified or particularized. However, having established that IFL breached cl. 3(c), Bari is entitled to nominal damages. These I fix at £2."

13 Having handed down his judgment, the judge heard submissions as to costs, which we were informed lasted about half an hour. His ruling was in these terms:

> "Costs must follow the overall justice of the case, and I need to adopt a common sense approach as to who has been the successful party. The claim can certainly be categorized as relating to a minor technical breach of contract, and whilst others may not have pursued it, I cannot properly describe it as trivial. The claimant wanted a determination of the interpretation of the clause, and he got it, and in large measure it fell somewhere between the positions advanced by either party. The claimant failed in its request for equitable relief and only obtained nominal damages but it cannot be said that the trial was a fruitless exercise, given that my determination will now inform the conduct of the parties in relation to that clause, and the upshot is that I remain where I started. It is an unusual case where, for my part, I cannot properly identify a winner or loser and in those circumstances, each party is to bear its own costs."

He then gave leave to appeal.

14 It should be noted that in that ruling he categorized the dispute as containing a minor technical breach of contract, but he specifically held that it was not trivial. He referred to the fact that the claimant wanted a determination of the interpretation of the clause, and that that was achieved. His decision on interpretation fell somewhere between the positions advanced by each of the parties. His decision essentially concerned the ambit of the term to be implied. The judge held that the claim for equitable relief would not be allowed, and that the only relief that he had granted was damages. He concluded that he could not decide whether there was a winner or a loser.

15 Mr. Vasquez submitted, with considerable skill, that the judge had misdirected himself when exercising his discretion. In particular he had failed to accord proper weight to the unreasonable conduct of the respondent and the relative degrees of success of the parties. His submission was that the judge had got it plainly wrong.

16 Both parties, in their skeleton arguments, have accepted that the costs are in the discretion of the judge. However, that discretion has to be exercised in accordance with certain general principles to which we were referred. It is normal that the loser pays the winner's costs. The judge must have had regard to all the circumstances of the case, including the conduct of the parties and their relative success.

17 Mr. Vasquez drew to our attention parts of the correspondence, and he submitted that this was a case where the parties had fallen out, and here the conduct of the respondent had been unfounded and oppressive.

18 It is well settled that an appeal to this court on costs should only succeed where there has been a clear breach of the discretion. We were

referred to the well-known case of *Alltrans Express Ltd.* v. *CVA Holdings Ltd.* (1). Stevenson, L.J. said ([1984] 1 W.L.R. at 399):

> "We must be very careful not to interfere with the judge's exercise of the discretion which has been entrusted to him. We can only do so if he has erred in law or in principle, or if he has taken into account some matter which he should not have taken into account or has left out of account some matter which he should have taken into account; or—and this is an extension of the law which is now I think well recognized—if the Court of Appeal is of opinion that his decision is plainly wrong and therefore must have been reached by a faulty assessment of the weights of the different factors which he has had to take into account."

19 The judge in this case did look at the relative degrees of success and the conduct of the parties. The case for the appellant was that he failed to accord proper weight to the unreasonable conduct of the respondent and the relative degrees of success. As I understand the submission, the judge got it plainly wrong.

20 The respondent, in its skeleton argument, submitted that the judge's ruling could not be faulted, and certainly was not plainly wrong. It was submitted that it was justified in bringing the action in respect of many breaches of the agreement. That, of course, was denied, with the result that the judge had to construe the agreement and find, as a fact, that it had been breached. The question of what—if any—terms should be implied was considered by the judge, and the judge came to the conclusion that there had been a breach, despite evidence that the appellant had sought to remedy the breach.

21 The respondent did not have damages as its primary object. For the respondent, the opening of the doors was not a trivial matter. It submitted that it did not just lose the case. It did obtain a final determination of the rights of the parties. In particular, it drew attention to the passage in the judge's judgment to which I have referred, in which he held there had been a breach despite the fact that the remedy had been financially onerous, and in those circumstances, nominal damages were applicable.

22 The respondent was not happy with the order that was made that there should be no order as to costs, but submitted in the skeleton argument that there was no error of principle nor could it be said to be clearly wrong.

23 I turn back to the judgment. The judge decided in the respondent's favour—

(a) that there was an obligation to maintain access;

(b) that there had a breach; and

(c) the implication of a term or terms meant that, in certain circumstances, closure did not constitute a breach, but in other circumstances it did.

24 In the appellant's favour, the judge concluded that injunctive relief was not appropriate in the circumstances of the case, no damages had been identified, and there was not a continuous breach of the obligations.

25 The appellant accepted that the defence had not completely succeeded as it had to, having regard to para. 17 of the judgment. However, it submitted that, in reality, it won on construction, and, further, the judge had held that it was only a limited case.

26 Against that background, I turn to the grounds of appeal. It is said the judge erred in his ruling that the defendant's breach of contract was not a technical matter. The appellant submitted that in context it was trivial and that the bringing of these proceedings lasting 2½ days was unreasonable, unjustified and contrary to the overriding objective. It was not a case that should have been pursued.

27 The respondent submitted that it was correct and justified. The impetus for bringing the claim was the history. From the outset, the appellant had denied any breach, which left the respondent no option but to come to the court to clarify the position. The closure of the door was not a trivial matter for other tenants. It was there to establish the rights and extents of the agreement; it submitted that it did, and the judge had found in its favour that the obligation was onerous. He also found that the agreement had been broken, which was a finding contrary to the submissions of the appellant.

28 The view taken by the judge was one to which he was entitled to come after hearing the case. He sat through 2½ days of the case, he heard all the evidence and it seems that he was taken to some of the correspondence. He was in the best position to decide what the costs order should be. In my view, it would be wrong for this court to interfere with the exercise of his discretion. It is not a case where I can say the judge was clearly wrong.

29 The next ground of appeal was that the respondent was the loser. It did not obtain an injunction, or specific performance, or any substantial alternative. True, that was so, but the respondent says in its skeleton that it required a lasting solution to a festering sore. That was achieved by the construction of the agreement. The suggestion that there had been no breach because of the implied term was rejected. The judge in particular pointed to the way the parties should behave in the future. In particular he found, on the true construction of cl. 3, the closure of the doors could only be carried out in limited circumstances.

30 In my view, the fact that no injunction was achieved—nor other relief such as specific performance and substantial damages—did not mean that

the judge was wrong to conclude in his ruling that he could not properly identify a winner or a loser. That being so, it would be wrong for this court to interfere with the exercise of his discretion.

31 It was also said that the judge was wrong to conclude, in his judgment, that the interpretation of the clause fell somewhere between the positions advanced by the parties. The actual degree to which it fell can be disputed, but the respondent, on the ambit of the implied term, did have some success. Again, this is a point on which it would be wrong for this court to interfere with the judge's discretion.

32 This was a case in which considerable heat was generated, and the judge was entitled to look at the question of costs on the basis of the submissions made before him. The submission was that the claimant should pay all the costs of the defendant, and this was a case which was totally unreasonable, bombastic and should never have been brought.

33 The judge clearly did not accept that, and he was in the best position to decide where justice lay. I would not interfere with his ruling. I would dismiss this appeal.

34 **POTTER, J.A.** concurred.

35 **KENNEDY, P.:** I also agree. I confess that I was impressed by the arguments advanced by Mr. Vasquez when he took us to correspondence and to the pleadings, showing that there were extravagant allegations made in both, which it would seem should never have been made. Those allegations required time and expense to investigate, they occupied time in court, and they all completely failed. That said, I have reminded myself of the passage in the judgment of Stevenson, L.J., and for the reasons set out in that passage, and in the judgment of Aldous, J.A., I too would dismiss this appeal.

Appeal dismissed.
