[2021 Gib LR 486]

CRUZ, JACOBSON and MARTINEZ v. ENTERPRISE INSURANCE COMPANY PLC

COURT OF APPEAL (Kay, P., Elias and Davis, JJ.A.): October 5th, 2021

2021/GCA/007

Civil Procedure—costs—costs of amendment—common practice that amending party ordered to pay costs of amended against party—justice in individual case may require different order

A liquidator brought an action against former directors of a company alleging breaches of duty.

The claim as originally pleaded was based on the directors' non-dishonest breach of fiduciary and common law duties. The liquidator applied to expand the scope of the claim in various ways including a claim of dishonest breach of fiduciary duty. Some amendments were allowed but others were refused. In respect of the costs of the hearing of the application to amend, the judge concluded that there was no clear winner and no easy split between the parties. The judge ordered that costs should be in the case in relation to the hearing. In respect of the costs of and caused by the amendments, the judge concluded that the defendants (including the present appellants) were entitled to the costs of and caused by the amendment, including the consequential amendments of the defences. The judge refused to make a further cost order in favour of the defendants in relation to consequential disclosure, preferring to grant the defendants liberty to apply following completion of disclosure.

There were two grounds of appeal: (i) that the judge erred in law in that he failed to exercise his discretion in accordance with applicable general principle that those who obtain permission to amend were ordered to pay the other parties' costs of and occasioned by the amendment; and (ii) that he erred in law when applying the correct principles under CPR 44.2 for other reasons. CPR 44.2 provided:

"(1) The court has discretion as to—

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs—

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
(b) the court may make a different order."

Held, dismissing the appeal:

(1) The basic legal principle was that the costs of and incidental to all proceedings were a matter of judicial discretion. By the Senior Courts Act 1981, s.51, which applied in Gibraltar by reason of s.12 of the Supreme Court Act, that discretion was subject to, *inter alia*, rules of court. The relevant English rule, CPR 44.2, applied in Gibraltar by reason of r.50 of the Gibraltar Supreme Court Rules. In practice, the costs order most commonly made following a grant of permission to amend was that the amending party had to pay the costs of the amended against party, in the sense of the costs of and caused by the amendment, and that these would include the costs of preparing for and attending the hearing and the costs of consequential amendments. It was perhaps more accurate to refer to this as the common practice rather than the general rule. It would not be appropriate where, after consideration of all the circumstances of a case, justice required a different order (paras. 9–13).

(2) In respect of ground 1, the judge did not fall into legal error when concluding that justice in this case called for something other than the conventional order. The judge appreciated that there was a conventional form of order, from which he departed. He considered the following circumstances to require the departure: (i) this was a heavily contested amendment application which raised numerous serious issues in relation to which the parties each had successes and failures; (ii) the appellants had failed in their submission that the proposed amendments alleging dishonesty amounted to an abuse of process; and (iii) the appellants' wholesale challenge, resulting in a vast number of authorities and witness statements, increased costs considerably and unnecessarily. The conventional order was not the rule the benefit of which could only be lost if opposition to proposed amendments was unreasonable. There was good reason why the approach should be case sensitive. In the present case, the court was satisfied that the judge's approach was valid (paras. 15–19).

(3) Once it was accepted that the judge did not err in law in the manner suggested in ground 1, ground 2 became no more than a complaint about his exercise of discretion. The judge was in the best position to assess the case. The question at this stage was not whether this court would have made the same costs order but whether the judge's order strayed outside the range of permissible orders. The court was satisfied that it did not (paras. 21–22).

Cases cited:

(1) *Don Benyatov* v. *Credit Suisse Secs. (Europe)*, [2020] EWHC 3328 (QB), referred to.

(2) *Lejonvarn* v. *Burgess*, [2020] EWCA Civ 114; [2020] 4 W.L.R. 43; [2020] 4 All E.R. 461; [2020] Costs L.R. 45; [2020] BLR 198, applied.
(3) *Tanfern Ltd.* v. *Cameron-Macdonald*, [2000] 1 W.L.R. 1311; [2000] 2 All E.R. 801; [2000] 2 Costs L.R. 260; [2001] C.P. Rep. 8, referred to.
(4) *Taylor* v. *Burton*, [2014] EWCA Civ 21; [2014] 3 Costs LO 337, considered.

Legislation construed:
Civil Procedure Rules, r.44.2: The relevant terms of this rule are set out at para. 9.

P. Caruana, *Q.C.* with *C. Allan* (instructed by Peter Caruana & Co.) for the appellants;
C. Simpson with *S. Triay* (instructed by Triay Lawyers) for the respondent.

1 **KAY, P.:** This is an interlocutory appeal. The context is an action by the liquidator of Enterprise Insurance Co. plc against former directors of that company alleging various breaches of duty. The trial of the action is listed to commence in January 2022. Particulars of claim dated January 25th, 2018 were served on January 29th, 2018. For some time after that the proceedings were stayed by consent. After the expiry of the stay, defences were filed on July 25th, 2018. On November 29th, 2018, the liquidator filed an 81-page reply. Following skirmishes concerning the appropriateness of the reply, the liquidator produced draft amended particulars of claim in March 2019 and, after further correspondence, eventually issued an application notice dated May 31st, 2019, seeking permission to amend the original particulars of claim in accordance with new draft amended particulars of claim which represented a further refinement of the draft that had been circulated in March.

2 The contents of these pleadings were described by the judge on the hearing of the application to amend in the following terms:

> "The claim as originally pleaded against the Defendants was based on directors' non-dishonest breach of their fiduciary and common law duties . . . The amendments sought to expand the scope of the claim in various ways . . . This includes a claim of dishonest breach of fiduciary duties by the directors and an allegation that EIC was insolvent or of doubtful solvency at specified dates. The alleged dishonest breach of fiduciary duty does not arise from a single event but from a compendium of matters which it is alleged, when viewed cumulatively, give rise to an inference of dishonesty. Some of these particulars had previously been pleaded in support of the claim for non-dishonest breach of fiduciary duty."

3 The application notice came before Restano, J. for a five-day hearing which commenced on November 18th, 2019. Judgment was handed down on January 29th, 2020. Some amendments were allowed but others were refused. The judge also rejected a submission that some of the proposed amendments amounted to an abuse of process. Just as the amendment application had been strongly contested, so were the ensuing issues as to costs.

4 In an extempore ruling made on the same day as the handing down of the reserved judgment on amendment, the judge dealt with the issues in two stages. As regards the costs of the hearing, he concluded:

> "In all these circumstances it is my judgment that there is no clear winner and there is no easy split between the parties and in those circumstances I order that costs should be in the case in relation to the hearing including the costs of today."

5 Turning to the costs of and caused by the amendments, he concluded that the defendants, including the present appellants, were entitled to the costs of and caused by the amendment, including the consequential amendments of the defences. However, he refused to make a further cost order in favour of the defendants in relation to consequential disclosure, preferring to grant the defendants liberty to apply on that issue following the completion of disclosure. The present appeal for which the judge granted permission is now pursued only by James Jacobson and Paul Martinez. One of the other defendants has now settled with the liquidator, the others have not sought to challenge the judge's costs order.

6 There are two grounds of appeal: (1) that the judge erred in law in that he failed to exercise his discretion in accordance with "applicable general principles," and (2) that he erred in law when "applying the correct principles under CPR 44.2 for other reasons."

7 At the outset it is appropriate to remind ourselves of the limited role of an appellate court in relation to costs appeals. The approach is long established and was succinctly summarized by Coulson, L.J. in *Lejonvarn* v. *Burgess* (2) where, having reviewed the authorities, he said ([2020] EWCA Civ 114, at para. 50):

> "There are therefore only two ways in which this court may interfere with a costs decision. The first is if there has been an error in law. The second, which is generally much harder to establish, is based on the submission that the discretion was exercised in a manner which led to an unjust or perverse result."

8 In relation to an appellate review of an exercise of discretion we are enjoined only to interfere where a judge's exercise of discretion has "exceeded the generous ambit within which reasonable agreement is

possible" (*Tanfern* v. *Cameron-McDonald* (3) ([2000] 1 W.L.R. 1311, at para. 32, *per* Brooke, L.J.)).

The legal principles in relation to costs

9 The basic legal principle is the costs of and incidental to all proceedings are a matter of judicial discretion. By the Senior Courts Act 1981, s.51, which applies in Gibraltar by reason of s.12 of the Supreme Court Act, that discretion is subject to, *inter alia*, rules of court. Again the relevant English rule, CPR 44.2, applies in Gibraltar by reason of r.50 of the Gibraltar Supreme Court Rules. It provides:

"(1) The court has discretion as to—

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs—

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order."

10 In addition, Practice Direction 44, para. 4.2, lists a number of costs orders which the courts "commonly make" in pre-trial proceedings and describes their effects, including "costs of and caused by." The example given relates to amendment hearings. However it is a descriptive and not a prescriptive provision. It is not concerned with requiring such orders to be made but simply with the effects of such orders when they have been made. In practice, the costs order most commonly made following a grant of permission to amend is that the amending party has to pay the costs of the amended against party, in the sense of costs of and caused by the amendment, and that these will include the costs of preparing for and attending the hearing and the costs of consequential amendments.

11 This approach is referred to in the White Book, para. 17.3.10, in the following terms: "Applicants who obtain permission to amend are often ordered to pay the other parties' costs of and caused by the application."

12 That passage cites *Taylor* v. *Burton* (4), where Rimer, L.J. said that counsel had ([2014] EWCA Civ 21, at para. 30)—

"reminded us that the general rule is that those who obtain permission to amend are ordered to pay the other parties' costs of and occasioned by the amendment. He referred us to paragraph 17.3.10 in the notes to Volume 1 of Civil Procedure, which records that such orders are 'often' made; and to paragraph 8.5 of The Costs Practice Direction,

> which records that such orders are 'commonly' made. Both references reflect judicial practice with which anyone with experience of contentious litigation will be familiar."

13 It is perhaps more accurate to refer to this as the common practice rather than the general rule. It will not be appropriate where, after consideration of all the circumstances of a particular case, justice requires a different order. This is more likely to occur in an untypical case.

14 I turn to the grounds of appeal.

Ground 1

15 The legal error sought to be identified in Ground 1 is essentially that the judge was wrong to depart from the approach described in *Taylor* v. *Burton.* In my judgment, there is no doubt that the judge appreciated that there is indeed a conventional form of order from which he was departing. He referred to "what is usually the rule in these cases." It seems to me that the following were "circumstances of the case" which he considered to be such as to require that departure. *First*, this was a heavily contested amendment application which raised numerous serious issues in relation to which the parties each had their successes and failures. *Secondly*, the appellants had failed in their submission that the proposed amendments alleging dishonesty amounted to an abuse of process. The judge said:

> "The abuse argument which was one feature of the challenge was nonetheless an important and overarching one in relation to the dishonesty issue which was one which took up a lot of the court's time in this hearing and one which the liquidator no doubt had to take very seriously given the very serious nature of the allegation being made against him."

16 *Thirdly*, and again in the words of the judge:

> "Similarly, the Defendants' wholesale challenge resulting in a vast number of authorities and witness statements which were often directed at the merits which also served to increase costs considerably and unnecessarily and there was also, although it is true to say that the Defendants did agree to a certain number of amendments, there were many more which could well have been agreed."

17 Throughout his written and oral submissions, Sir Peter Caruana, Q.C., for the appellants, sought to characterize the conventional order as "the rule" the benefit of which could only be lost by his clients if it were established that their opposition to the proposed amendments was "unreasonable." It seems to me that that contends for a more normative regime than is provided by CPR 44.2. As I related earlier, the *White Book*, under the heading "Costs on Amendments", citing *Taylor* v. *Burton*, simply

states: "Applicants who obtain permission to amend are often ordered to pay the other parties' costs of and cause by the application."

18 There is a good reason why the approach should be case sensitive. If the structure of costs determination took the form of a "rule" which clearly benefitted an amended against party with only a narrow exception, it would encourage what the judge in the present case referred to as a "free pass" mentality, whereby an amended against party might feel uninhibited in the extent of his opposition to the proposed amendments. An approach which encourages wide-ranging mini trials over many days involving thousands of pages of documents does not live easily with the overriding objective of civil procedure which is to deal with cases justly and at proportionate cost.

19 In my judgment, the judge did not fall into legal error when concluding that justice in this case called for something other than the conventional order. I have described the factors which weighed upon his decision. I do not consider them to be errant. He was in the advantageous position of having listened to five days of submissions and had produced a 60-page judgment on the amendment application which neither party seems to criticize. I am entirely satisfied that his approach was valid. In some respects, the decision of the judge resembled that of the Deputy High Court Judge in *Don Benyatov* v. *Credit Suisse* (1), although in that case the judge, wrongly in my view, had approached his task through the prism of "rule" and "exception."

20 I recognize that, in some respects, an order reserving the costs rather than a cost in the case order might have had some benefits. It is clear that the judge had considered that possibility, which had been an alternative submission on behalf of the liquidator. However, it is eschewed by the appellants whose interest, as explained by Sir Peter, is in an order which would enable them to recover a substantial sum ahead of the trial with a view to financing their legal representation at it.

Ground 2

21 Once it is accepted that the judge did not err in law in the manner suggested in ground 1, ground 2 becomes no more than a complaint about his exercise of discretion. Sir Peter submits that the judge went astray because his stated view as to the parties' respective degrees of success was unduly favourable to the liquidator; that he did not sufficiently distinguish between the various defendants; that he overemphasized the significance of the abuse of process issue; and that he took no or insufficient notice of the fact that, since the appellants had successfully resisted the dishonesty amendments, there will not be a determination at trial and so the appellants should have the costs of these in any event.

22 The judge was in the best position to assess these matters. As to the fourth issue, by the same reasoning, the liquidator should have recovered the costs of the abuse of process argument on which he was similarly successful. As the judge recognized, that might have justified an order which awarded costs on an issues basis, but it was not wrong for him to choose the alternative of costs in the cause. The question at this stage is not whether this court would have made the same costs order; it is whether the order of the judge strayed outside the range of permissible orders. For my part, I am confident that it was not.

Conclusion

23 It follows that for the reasons that I have explained I would dismiss this appeal.

24 **ELIAS, J.A.:** I agree.

25 **DAVIS, J.A.:** I also agree.

Appeal dismissed.