Neutral Citation Number: [2023] CA (Bda) 27 Civ

Civil Appeal No. 8 of 2022

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS CIVIL JURISDICTION (COMMERCIAL COURT)
BEFORE THE HON. CHIEF JUSTICE
CASE NUMBER 2017: No. 293

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
and
JUSTICE OF APPEAL SIR ANTHONY SMELLIE

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Between:

CREDIT SUISSE LIFE (BERMUDA) LIMITED

Appellant

-v-

(1) BIDZINA IVANISHVILI
(2) EKATERINE KHVEDELIDZE
(3) TSOTNE IVANISHIVILI
(an infant, by his mother and next friend, Ekaterine Khvedelidze)
(4) GVANTSA IVANISHVILI
(5) BERA IVANISHVILI
(6) MEADOWSWEET ASSETS LIMITED
(7) SANDCAY INVESTMENTS LIMITED

Respondents

Lord Falconer KC, Steven Thompson KC, Peter Dunlop and Izabella Arnold of Walkers (Bermuda) Limited, for the Appellant

Richard Morgan KC, Louise Hutton KC, Sarah-Jane Hurrion and Henry Komansky of Hurrion & Associates Ltd, for the Respondents

Hearing date(s): Application determined on the papers
Date of Ruling: 8 December 2023

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RULING ON COSTS

BELL JA:

Background

1. The court gave its judgment ("the Judgment") in this matter on 23 June 2023, in which it dismissed the appeal. However, in relation to the claim made by the Respondents in the first instance proceedings identified in the judgment as the Misrepresentation Claim (in this ruling I will use the defined terms used in the Judgment), we allowed the appeal made by the Appellant on grounds 4,5 and 6 of the Notice of Appeal. We then noted that we expected that there would have been very significant costs spent on this issue, such that some reduction in costs might be appropriate, on the basis of the principles set out in the case of *First Atlantic Commerce v The Bank of Bermuda* [2009] CA Bda 5 Civ., which gave effect in this jurisdiction to the principles laid down in the case of *In re Elgindata (No 2)* [1992] 1 WLR 1207. In *Elgindata*, it was held that where superfluous issues were raised unnecessarily, the successful party's recoverable costs could be proportionately reduced. The claims raised by the Misrepresentation Claim effectively duplicated the other claims made in the proceedings, such that if the Plaintiffs succeeded in those other claims, as they did at first instance, the Misrepresentation Claim added nothing. In the event, while they succeeded at first instance, the Respondents failed on that claim in this Court. The issues raised by the Misrepresentation Claim involved complex questions of law and fact, and required extensive expert evidence.

2. We accordingly invited submissions from the parties on the issue, and these were received in the form of submissions from the Appellant (undated but apparently filed on 7 July 2023, although the Respondents' submissions referred to their filing date as being 14 July 2023) and from the Respondents dated 21 July 2023.

3. Although Walkers, the Bermuda attorneys acting for the Appellant, referred in their letter to the Court dated 30 October 2023 to the parties' understanding that the Registry would fix a date for argument on all outstanding matters (that is to say, a stay, leave to appeal to the Privy Council and costs), that was not the Court's understanding. We were and remain of the view that the issue of costs could and should be determined on the papers, as we indicated when handing down the Judgment. We will therefore proceed on the basis of the submissions filed in July.

The Appellant's submissions

4. The Appellant's submissions referred to the guiding principles of the costs regime set out in Order 62 rule 3 of the Rules of the Supreme Court 1985, and having referred to the *First Atlantic* case, set out the relevant principles as expressed by Nourse LJ in *Elgindata*. I will not repeat those or set out the details of the subsequent English cases where the *Elgindata* principles have been adopted. However, I would refer to the words of Nourse LJ in *Elgindata*, where he recognised that, on an appeal, the only fair basis for depriving the successful party of the costs to which he would otherwise be entitled was to ask how much time had been taken up dealing only with the allegations on which that party had failed. Nourse LJ recognised that in doing so, the calculation would necessarily be more "rough and ready" than one made by the judge (I suspect that the judge's calculation would similarly be "rough and ready") but carried on to say that the court must "do the best we can."

5. I pause to note that the Appellant then proceeded to conduct the exercise envisaged by Nourse LJ, whereas the Respondents took an entirely different approach, to which I will come in due course.

6. The Appellant conducted the exercise in relation to the Misrepresentation Claim separately in respect of both the first instance and appellate proceedings. As to the former, the Appellant submitted that the Respondents' costs should be reduced by 15%, and as to the latter suggested a reduction of 35%.

7. The exercise conducted by the Appellant seems to me to have been both methodically and fairly undertaken. It recognised that the Misrepresentation Claim had been brought by late amendments,

involved substantial and complicated issues of private international law, and with Georgian and Swiss law experts being instructed, resulting in substantial reports, and involving two days of the trial. The Appellant conducted a comparison of those parts of the first instance judgment and the parties' opening and closing submissions which had been spent on the Misrepresentation Claim, when compared with the other causes of action. It seems to me that this is precisely the sort of rough and ready exercise which Nourse LJ would have had in mind as part of this Court doing "the best we can". The final figure of 15% proposed by the Appellant does not seem unreasonable in the circumstances.

8. As to the appellate proceedings, the Appellant identified the three main issues on the appeal as the contract claim, the fiduciary duty claim and the Misrepresentation Claim. It noted that the Respondents had put in a Respondents' Notice and said that the issues in the Misrepresentation Claim were the most legally complex and gave rise to by far the largest proportion of the cited authorities. That seems to me to be correct. It submitted that the proportion of the parties' arguments on appeal reflected an approximately one third to two thirds division between misrepresentation and the rest of the grounds. It compared the extent of the number of pages in the parties' skeletons, and finally noted the proportion of the findings section of the Judgment dealing with the Misrepresentation Claim, before concluding that the facts and matters referenced amply justified a reduction of 35% of the Respondents' costs of the appeal. Again, that figure of 35% does not seem unreasonable to me, subject of course to any challenge to the Appellant's figures that the Respondents may have made.

The Respondents' submissions

9. As indicated, the Respondents' submissions took a different approach. In respect of the first instance costs, they maintained that they were undoubtedly the successful party at first instance, and said that since the judgment at first instance had not been disturbed on appeal, this Court should not disturb the Chief Justice's costs order. That argument, with respect, misses the *Elgindata* point. Appellate courts customarily vary a costs order made at first instance where they have reached a different conclusion on the merits of the appeal. That is no more nor less the case where an appellant has raised arguments on appeal which fail. This is the third of Nourse LJ's

statements of the relevant principles that the general rule (in relation to costs following the event) 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 part of his costs." (emphasis added).

10. The Respondents continued by arguing that the Misrepresentation Claim should not be treated as a separate and distinct claim, but a separate basis for putting the successful party's only claim, based on the fact that the Respondents' money had been misappropriated, misused or stolen by Mr Lescaudron, while acting as the Appellant's agent. That statement ignores the reality that any claim to recover such moneys must still be based on a recognisable and established cause of action.

11. The Respondents' next argument was that the Appellant had created "an artificial information vacuum" by deliberately breaching its disclosure obligations. The Appellant's failures in this regard were well documented by the Chief Justice in his judgment. But they cannot be said to support the pursuit of a claim which had little prospect of success, and which added significantly to the scope and costs of the trial. The Respondents said that the Misrepresentation Claim was raised "for good reason". Simply put, that is not right, as the Judgment found.

12. And the Respondents' next argument was that the Appellant was not entitled to a reduction in costs based on *Elgindata* principles because its conduct of the trial was woeful. That argument does not of course apply to the costs of the appeal. It is a different issue.

13. The Respondents did not then choose to address the detail on which the Appellant had relied.

14. The Respondents next turned to the appellate costs, making much the same points. They repeated that the Appellant's conduct throughout this litigation strongly militates against exercising any discretion in the Appellant's favour. In this regard the Respondents referred to the Appellant's abusive arguments, particularly relating to that advanced " by way of ambush", no doubt a reference to the "New Argument", discussed further below.

15. As can be seen from the Judgment, we found that argument to be an abuse of process (paragraphs 135 and 136). It seems to me that this aspect of matters properly goes towards the issue of indemnity costs, which the Respondents seek in their notice of motion dated 6 July 2023 and their submissions filed the following day. As to the appropriate reduction on *Elgindata* principles, the Respondents simply say that if the Court is minded to exercise its discretion in this regard, the amount of that reduction will be a matter for the Court.

Finding based on *Elgindata* principles

16. It does seem to me that the pursuit of the Misrepresentation Claim falls squarely within the *Elgindata* principles, and that a reduction in the costs to which the Respondents would otherwise be entitled is appropriate. And as indicated above, I view the exercise undertaken by the Appellant as having been both methodically and fairly undertaken. In the circumstances, I would order a reduction of the first instance costs in an amount of 15% and of the appeal costs in an amount of 35%.

Indemnity costs

17. The Respondents, having succeeded in that regard below, now apply for indemnity costs in respect of the costs of the appeal only, so that the Appellant's conduct in relation to the first instance proceedings is not relevant. Nevertheless, the Respondents' submissions do make repeated references to the Appellant's conduct of the trial. In relation to the appeal, the thrust of the Respondents' complaints lay in relation to the New Argument, which, as the Respondents pointed out, effectively meant that the entire first instance trial would have to be repeated, at great expense not just to the parties, but also to the Bermudian taxpayer.

18. As to the relevant test, the Respondents referred to this Court's decision in the *St John's Trust Company* case [2022] CA (Bda) 18 Civ §20-38, the test being that indemnity costs may be ordered when the nature of the conduct of the litigation can be said to be "out of the norm". It is no doubt relevant to remember that the effect of an order for indemnity costs no longer has the consequences it once did. The effect is no more than to reverse the burden of proof, upon a

taxation of costs, as to the reasonableness of a particular costs item – see footnote 3 to paragraph 21 of the *St John's Trust Company* case.

19. The Respondents then proceeded to set out their complaints in relation to the manner in which the New Argument had been raised initially, and then pursued. In setting these out I will exclude those complaints relating to the first instance proceedings.

20. The first complaint was that the manner in which the New Argument was raised (without any application to amend its grounds of appeal, or its skeleton) was clearly designed to ambush the Respondents. I would agree with that characterisation. Next was the Appellant's failure to put anything in writing in relation to the New Argument until directed by the Court to do so. The Respondents also complained that the Appellant had continued to file further submissions in relation to the New Argument without permission. Then there was the complaint that with the New Argument, the Appellant repeated the conduct for which it had been criticised at trial, namely the failure to adduce evidence from highly relevant witnesses. It should, said the Respondents, have sought permission to adduce the necessary evidence in support of the New Argument at trial. Similarly, the Appellant sought to make a concession on behalf of the Bank (in relation to reliance on limitation) without providing any evidence that it had authority to bind the Bank.

21. The next complaint was that the Appellant had not been open with the Court (or the Respondents) regarding the likely impact of its New Argument on quantum. It simply said that the Bank might have substantive defences to some or all of the claims. The way that the Respondents put it was that the Appellant must have had some idea as to what defences would be available to the Bank and were intended to be run by it. The Respondents surmised that this was part of the Appellant's and the Bank's plan to argue in due course that the Appellant's claims against the Bank were in fact worthless as a matter of Swiss law.

22. In relation to the Appellant's arguments, I will deal with these with reference only to the New Argument, as indicated above. The Appellant started by saying that there was no basis for suggesting that the New Argument caused any more than a *de minimis* amount of additional cost,

and it was wrong in principle to treat it as justification for an indemnity costs order covering the entire appeal. With respect, that rather misses the point. It is the conduct of the litigation, not its financial consequences, which calls for an indemnity costs order. The Appellant submitted that the New Argument was a piece of analysis offered in support of its existing case on contractual construction. It is in this regard that I see a need to look at how the New Argument was first advanced – or at least how the Court understood it to have been and to consider that in light of the Appellant's offered rationale.

23. As appears from paragraph 135 of the Judgment, what Lord Falconer submitted on behalf of the Appellant was that the Policies required the Appellant to pursue claims against the Bank, the value of which would be governed by Swiss law. The effect of such a submission was that there would be no sensible reason to argue the appeal; the proceedings which the New Argument envisaged needed to take place first. The obvious question was why the Appellant had for a long period of time failed to take such a step, when Lord Falconer expressly accepted that it had an obligation to do so. Astonishingly, Lord Falconer could not answer that question. That inability is even more surprising when Lord Falconer had told the Court at the outset that he was now taking instructions from the Bank's general counsel. Quite how the proposed proceedings were to be conducted by general counsel acting for both sides was not explained.

24. What the above demonstrates is that the whole rationale behind the New Argument does not appear to have been fully thought through. But that does not make the concept of the New Argument any more attractive. It was a blatant attempt to torpedo the argument on the appeal, raised without any prior warning or normal professional courtesy, and was no more and no less than a calculated attempt to nullify the purpose of the appeal before us. I do not regard the raising of the New Argument as anything other than a cynical attempt to derail the appeal.

25. The Appellant next sought to explain the New Argument with reference to a passage in the Chief Justice's judgment where he referenced the Appellant's failure to pursue its claim against the Bank, as it (now) accepted it had an obligation to do. But the Appellant did not at any time explain its failure in this regard; it had had more than enough time to take action, and yet could not explain to this Court the reason for its failure to do so.

26. Next, the Appellant placed reliance on the fact that the New Argument had been advanced in respect of one only of the Appellant's eight grounds of appeal. That argument seeks to minimise the effect of the New Argument, if successful. It would have been as described in paragraph 24 above. To argue that the New Argument affected only one ground of appeal is not a real world approach. It was designed to impact the whole appeal.

27. Next, the Appellant sought to refute the suggestion that by raising the New Argument without advance notice during oral submissions was an effort to ambush the Respondents, saying the complaint was both unwarranted and incorrect. It argued that the New Argument had been developed as part of the normal preparation for an appeal, even saying that the New Argument entailed the acceptance of the proposition for which the Respondents had contended at first instance, that there would be no remedy available to them unless their case on the construction of the Policy Contracts was accepted and that the New Argument sought to address that concern. That response of the Appellant did not answer the Respondents' complaint.

28. Then the Appellant referred to the fact that by the time of the appeal in December 2022, Mr Ivanishvili, Sandcay and Meadowsweet were well advanced in the preparation of proceedings against the Bank in Switzerland. But that was no doubt because of the Appellant's failure to pursue the claims which it belatedly recognised that it had against the Bank, but which it had still not acted upon.

29. The Appellant next sought to meet the Respondents' point that it had purported to give an assurance on behalf of the Bank in relation to limitation, saying that the Respondents had misunderstood the position. Paragraph 136 of our judgment indicates that the Court had the same understanding as to how the Appellant had put this matter as did the Respondents. The manner in which this is now put by the Appellant is confusing. Suffice to say that the Appellant has not answered the Respondents' complaints. The assertion that Lord Falconer was taking instructions from the Bank's new general counsel indicates no more than that the said general counsel had conduct of the Appellant's litigation. It does not indicate that Lord Falconer was authorised to give undertakings on behalf of the Bank.

Finding in regard to indemnity costs

30. In our judgment we made it clear that we regarded the raising of the New Argument as abusive, and the paragraphs above demonstrate that. But the question in relation to an award of indemnity costs is whether the conduct of the litigation on the appeal was clearly "out of the norm". And while I disapproved of the manner in which the New Argument had been raised, and particularly the lack of professional courtesy involved, the reality is that the New Argument covered only a small proportion of the costs of the appeal. It was transparently untenable from the outset and was so described practically *in limine*, by the Court. In those circumstances it does not seem to me appropriate to treat the conduct of the appeal as a whole as being "out of the norm". I would therefore order that the costs of the appeal be taxed on the standard basis.

31. It should be emphasised that this ruling on indemnity costs does not affect the first instance ruling awarding the costs of the trial on the indemnity basis, since the Appellant did not seek to challenge that order, which I would consider to have been appropriately made in any event.

32. Accordingly I would order that:

(i) the Appellant shall pay the Respondents 65% of their costs of the appeal to be taxed on the standard basis, if not agreed;

(ii) interest shall run on the costs payable pursuant to (ii) above at the statutory rate from 23 June 2023 until payment;

(iii) the order of the Chief Justice of 29 March 2022 shall be varied so as to provide that the Defendant is to pay 85% of the Plaintiffs' costs of the action.

SMELLIE JA

33. I agree.

CLARKE P

34. I, also, agree.