JERSEY / JUDGMENT

Bagus v Kastening [2010] JRC 169 (22 September 2010)

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judgment

the bailiff: 1. On 5th August 2010 I delivered judgment dismissing the plaintiff's appeal against the Master's refusal to grant leave for the plaintiff to re-amend its Order of Justice. At the hearing, Advocate James applied for an order for costs on an indemnity basis against the plaintiff on the grounds summarised in a written submission which he had filed shortly before judgment was delivered. Advocate Blakeley responded that, although he did not oppose an order for costs on the standard basis, he wished to oppose the application for indemnity costs and required time to consider the arguments put forward by Advocate James. 2. It was agreed that Advocate Blakeley would file a written response on the points and that Advocate James should have the right to file a written reply to Advocate Blakeley's document. This has duly occurred. It was further agreed that I would deal with the matter on the papers and that there would be no oral hearing. 3. The approach of the court to awarding indemnity costs was conveniently summarised by Page Commissioner in Pell Frischmann v Bow Valley

[2007] JLR 479 at paras 25 and 27:- "25 At the risk of oversimplifying matters, the result of these English authorities may be said to be this: that the circumstances in which an award of indemnity costs may, as a matter of discretion, be ordered are less restrictive than they used to be; there must, ex hypothesi, still be something to take the case out of the ordinary, but the range of potentially relevant considerations, as described by Millett, J. (later Lord Millett) in Macmillan Inc. v. Bishopsgate Inv. Trust, is considerable and need not involve any finding of a lack of moral probity; the test, in a word, is unreasonableness; the purpose of such an award is to achieve a fairer result for the party in whose favour it is made than would be the case if he were only able to recover costs on the standard basis; in the end, it is a question of what would be fair and reasonable in all the circumstances. ... 27 In this jurisdiction, the Court of Appeal in Jefferson Seal (in 1998) was plainly minded to follow the practice of the English courts as reflected in the cases referred to by Collins, J. A.; and, while Jersey has not adopted anything equivalent to the English Civil Procedure Rules which feature strongly in the post-1998 cases, I can think of no reason why the general approach adopted in those cases should not be followed in the Royal Court and every reason why it should be." 4. Advocate James argued that the plaintiff has been guilty

> of unreasonableness in the way it has conducted this litigation. He pointed out that the court had found that the proposed amended Order of Justice suffered from exactly the same deficiencies as the original Order of Justice did four years ago, that there were no new facts to justify the re-introduction of the claim and that the plaintiff had been guilty of dilatory conduct which had resulted in the issue of prescription arising, with considerable extra costs being incurred as a result. 5. The history of the proceedings was summarised at paras 13 - 15 of the main

judgment.

In briefest summary, the plaintiff filed its original Order of Justice in July 2006, some nine years after the LH Group was placed en désastre . As one of the heads of claim, there was a claim in knowing receipt. The defendant asked for further and better particulars of the alleged state of knowledge on the part of the defendant in relation to the breach of fiduciary duty. In his written submission Advocate Blakeley says that, at that time, the plaintiff did not have sufficient information to give full particulars and that is why it withdrew the claim of knowing receipt at that stage. 6. As set out in the main judgment, the action then proceeded on a different basis with an order for trial of a preliminary issue. In January 2008, during a hearing before the Master, the plaintiff indicated that it might be seeking leave to re-amend its Order of Justice to include once again a claim for knowing receipt but nothing further was done at that stage. The summons was not issued until 23rd December 2008. 7. On the hearing of the summons, the Master held that the proposed re-amended Order of Justice still did not properly plead the claim in knowing receipt and, at paragraphs 47 - 56 of the main judgment, I found to like effect. 8. Advocate Blakeley argued that it was reasonable for him to seek to re-introduce the claim in knowing receipt because he and his client had become aware of new information in November 2007 as a result of seeing for the first time an affidavit dated 20th August 2007 sworn by the defendant. 9. I do not accept this submission. Before the proceedings were issued, the plaintiff was in possession of a file note made by an official of Standard concerning a meeting between officials of Standard and the defendant on 13th January 1998. The writer of the file note had recorded the defendant as saying:- "I asked WK about the loan of USD1.5 million to Karl-Heinz Rehkopf and he advised that this was paid directly to him and he showed me a copy of the draft paying this together with accrued interest. He arranged for it to be paid directly to himself as it was due for payment after Lavy Hancocks was declared en désastre and therefore did not want to mix any additional funds with those currently frozen. He was worried that any potential creditors of Beaufort Properties Limited or those who may have a claim against funds misappropriated in favour of those companies could approach him with regard to the repayment of these sums..." 10. I have carefully considered the affidavit sworn by the defendant on 20th August 2007. Although it gives more detail about some aspects of the matter, the only observation it makes about the defendant's state of knowledge at the time he arranged to repay the loan to himself was that he thought that, if the monies were returned to Beaufort, they might somehow mistakenly be swallowed up in the liquidation of the LH Group. The affidavit therefore did not assist the plaintiff on this topic and gave no new information to justify reintroducing the claim of knowing receipt. Interestingly, the

wording of the paragraph 11F of the draft re-amended Order of Justice picks up the wording of the file note (rather than the affidavit) in terms of the defendant's concern that persons who may have had funds misappropriated in favour of Beaufort might pursue him for repayment. Advocate Blakeley argued that it was only on receipt of the affidavit that he knew for the first time that the defendant did not dispute the contents of the file note but that does not amount to a material new fact. The plaintiff was clearly entitled to bring a claim based upon the contents of the file note. 11. In my judgment, the plaintiff has behaved unreasonably in connection with the litigation and this appeal such that the fair and proper result is to make an award of costs on an indemnity basis so as to prevent the defendant being unnecessarily out of pocket. I would summarise my reasons as follows:- (i) The plaintiff produced a pleading in 2006 alleging knowing receipt. That pleading did not plead proper details of the required state of knowledge to support a claim in knowing receipt. (ii) When particulars as to the state of knowledge were requested, the plaintiff dropped the allegation of knowing receipt because it was unable to provide the necessary particulars. (iii) Thereafter the litigation was conducted by both parties on the assumption that there was no claim in knowing receipt, only one in restitution. Enquiries were made as to foreign law and the trial of a preliminary issue was ordered. (iv) The plaintiff sought to re-introduce a claim in knowing receipt in December 2008. The plaintiff had not acquired any relevant new information in the interim period. (v) As found by the Master (and myself on appeal), the proposed re-amended pleadings still fail to deal properly with the issue of the required state of knowledge. (vi) The delay in re-introducing the claim of knowing receipt has meant that an issue as to prescription has arisen in the intervening period. The majority of the hearing was taken up with this issue which would not have arisen (and therefore the costs would not have been incurred) had the plaintiff not dropped the knowing receipt allegation and then sought to re-introduce it despite the lack of any new information. (vii) I consider that the appeal against the Master's decision was a very speculative one, given that the defendant only had to achieve the modest threshold of showing that there was an arguable case on prescription. Given the state of the law, it was always unlikely that the plaintiff would be able to show that there was not even an arguable case. 12. In all the circumstances, I consider that it would not be fair and reasonable if the defendant were only to recover costs on the standard basis, thereby leaving him substantially out of pocket. I conclude that the costs in relation to the appeal were incurred because of unreasonable conduct on behalf of the plaintiff. I therefore order the plaintiff to pay the costs of the appeal on the indemnity basis. 13. I should add that Advocate James submitted that I should re-visit the costs order made by the Master, which was an order on the standard basis. However, given that the appeal was unsuccessful, I do not think it would be correct for me to overturn the Master's decision on the costs of the hearing before him. I confine my order therefore to the costs of and incidental to the appeal. Authorities Pell Frischmann v Bow Valley

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