

JERSEY / JUDGMENT

Corbin v Dorynek and Anor

[2022] JRC 085 (08 April 2022)

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[2022] JRC 85,

[2022] JRC 085 [New search] [Help] Costs [2022]JRC085 Royal Court (Samedi) 8 April 2022
Before : Sir Michael Birt, Commissioner, sitting alone 2019/168 Between Giles Robert Piers Corbin Plaintiff And Michal Bartolomiej Dorynek First Defendant And Tyson Werner Hermann Flath Second Defendant 2019/178 Between Tyson Werner Hermann Flath Plaintiff And Michal Bartolomiej Dorynek Defendant Advocate D. J. Benest and Advocate J. N. Heywood for Mr Corbin Advocate C. Hall for Mr Dorynek Advocate S. A. Franckel for Mr Flath COSTS judgment the commissioner: 1. This judgment deals with the issue of costs following the judgment of the Court dated 16 th February 2022, Corbin v Dorynek

[2022] JRC 047 ("the Judgment"). 2. In the Judgment, the Court found both Mr Dorynek and Mr Flath to be liable to Mr Corbin for the injuries which he suffered in the collision in St Brelade's Bay on 9 th July 2017, with responsibility being allocated as to 60% to Mr Dorynek and 40% to Mr Flath. At the same time, the Judgment found Mr Dorynek liable to Mr Flath for his claim in respect of injuries which he had suffered in the collision, with a finding of 40% contributory negligence on the part of Mr Flath. 3. The parties have filed written submissions on costs and I have dealt with the matter on the papers. Defined terms in the Judgment have the same meaning where used herein. Common ground 4. There is a reasonable measure of agreement between the parties. Thus: (i) All parties agree that Mr Corbin should be awarded his costs against Mr Dorynek and Mr Flath and that these should be apportioned in accordance with the finding in the Judgment, namely Mr Dorynek should pay 60% of those costs and Mr Flath should pay 40%. (ii) It is agreed between Mr Corbin and Mr Flath that the 40% costs order against him should be on the standard basis. (iii) Mr Corbin made an application at the outset of the hearing that the reports of Mr Pike should be admitted in evidence ("the Pike application"). This was the subject of a separate judgment dated 2 nd March 2022, Corbin v Dorynek and Anor

[2022] JRC 057 , which rejected the application. It is agreed by both Mr Corbin and Mr Flath (Mr Dorynek having played no part in the Pike application) that Mr Corbin should pay Mr Flath's costs in connection with the Pike application on the standard basis. Disputed matters 5. The following matters are in dispute: (i) Mr Corbin submits that his 60% costs award against Mr Dorynek should be on the indemnity basis rather than the standard basis ("the indemnity costs issue"). (ii) Mr Flath argues that he should be awarded the costs of his action against Mr Dorynek and that this should also be on the indemnity basis ("Mr Flath's costs"). (iii) Mr Flath says that there should be no order as to costs in respect of an application by Mr Corbin during the hearing to amend his Order of Justice ("the amendment costs"). I shall consider each of these in turn. (i) The indemnity costs issue 6. The test for awarding costs on an indemnity basis rather than the standard basis is well-established. I do not need to cite from the authorities, which are well known to me, but simply note that I was referred to and have considered *C v P-S*

[2010] JLR 645 ; *Pell Frischmann Engineering Limited v Bow Valley Iran Limited*

[2007] JLR 479 ; *Sir Bob Murray CBE v Camerons Limited*

[2022] JRC 016 ; *MacFibhsigh v CI Trustees and Executors Limited*

[2016] (1) JLR Note 1,

[2016] JRC 002A ; *Hodges v Trenouth-Wood*

[2021] JRC 179 . 7. In summary, in order to justify an award on an indemnity basis, there must be something in the conduct of the proceedings by one of the parties or the circumstance of the case which takes the case out of the norm in a way which justifies an order for indemnity costs, recognising that there will usually be some degree of unreasonableness. However, unreasonableness is not a finding which automatically triggers an award of indemnity costs. There may be different degrees of unreasonableness and the significance of any unreasonable conduct may vary from case to case. Ultimately, it is a question of what would be fair and just in the circumstances of the case. 8. In his pleadings, Mr Dorynek denied liability to Mr Corbin and alleged contributory negligence on the part of Mr Corbin. This was despite that fact that Mr Dorynek had pleaded guilty in February 2019 to an offence of operating the Speedboat without due care or attention or without reasonable consideration for other people, contrary to Regulation 9(2) of the Harbours (Inshore Safety) (Jersey) Regulations 2012 . Mr Dorynek only conceded liability to Mr Corbin and withdrew the allegation of contributory negligence in his skeleton argument filed days before the beginning of the hearing on 4 October 2021. 9. Mr Corbin submits that this was unreasonable conduct on the part of Mr Dorynek. In the light of his guilty plea in the criminal proceedings, it was fanciful for him to maintain his denial of civil liability to Mr Corbin and his allegation of contributory negligence. 10. Mr Corbin submits that Mr Dorynek's pleaded case has caused work and, as a result, cost money. Mr Corbin was forced to prepare his case against Mr Dorynek and had to instruct experts to opine on Mr Dorynek's acts and omissions. The trial had to be prepared for on the basis that it

would be necessary to establish Mr Dorynek's liability and refute his allegations of contributory negligence. 11. I accept that Mr Dorynek's conduct of the case could be said to be unreasonable. Advocate Hall, on behalf of Mr Dorynek, submitted that issues of causation had to be investigated, but I do not find that to be a convincing argument. It was perfectly obvious from the outset that Mr Corbin's injuries were as a result of the collision and the collision was, wholly or in part, the result of Mr Dorynek's admitted (in the criminal proceedings) lack of due care and attention by failing to keep a proper lookout when helming the Speedboat. In my judgment, the reasonable conduct of the case would have been for Mr Dorynek to have admitted liability at an early stage but then claim that Mr Flath was also responsible for the collision. This was, of course, the position of Mr Dorynek once his admission of liability was made in the skeleton argument. 12. If this had been a claim by a plaintiff against a single defendant in circumstances where the defendant denied liability despite having pleaded guilty in criminal proceedings to operating his vessel without due care and attention, I would have had considerable sympathy with the suggestion that indemnity costs should be awarded. In those circumstances, the plaintiff's costs of seeking to prove the case against the defendant would have been incurred directly as a result of the defendant's unreasonable denial of liability. 13. However, that is not the position here because there were two defendants. A key issue was therefore always going to be that of apportionment (assuming liability against each defendant was established). In those circumstances, it was always going to be necessary for Mr Corbin to obtain expert evidence which addressed the conduct of both Mr Dorynek and Mr Flath in order to assess their respective responsibility and therefore the issue of apportionment. It seems to me that this would have been the case even if Mr Dorynek had admitted liability somewhat earlier, given Mr Flath's continued denial of liability. 14. Thus, whilst I accept that there may have been a few costs which Mr Corbin incurred which he would not have done if there had been an earlier admission of liability by Mr Dorynek, I consider that the vast majority of his costs, including those of the experts and the costs of the lawyers in preparing the case, would have been much the same, assuming Mr Flath's continued denial of liability, because of the need to assess the respective responsibilities of Mr Dorynek and Mr Flath for the purposes of apportionment. Furthermore, whilst it is true that Mr Dorynek had pleaded guilty in the criminal proceedings, I do not consider that, viewed in the round, there is such a distinction between the conduct of the defence of Mr Dorynek and that of Mr Flath as to justify an award of indemnity costs against one but not the other. I have to say that it became clear to the Court at an early stage that Mr Flath's denial of liability was somewhat optimistic and that the real issue was likely to be one of apportionment between the defendants having regard to their relative degrees of responsibility for the collision. Accordingly, notwithstanding my view that Mr Dorynek's failure to admit liability to Mr Corbin at an earlier stage could be regarded as being unreasonable, I do not consider that, on the special facts of this case, it was unreasonable to such an extent that indemnity costs should be awarded. If I ask myself whether it would be a fair and just outcome to award indemnity costs against Mr Dorynek but only standard costs against Mr Flath, my answer

is that it would not. 15. The award of 60% of Mr Corbin's costs against Mr Dorynek will therefore be on the standard basis, not on the indemnity basis. (ii) Mr Flath's costs 16. In my judgment, the award of costs in respect of Mr Flath's claim against Mr Dorynek should mirror that in respect of Mr Corbin's claim. Mr Flath has succeeded in his claim against Mr Dorynek but has been found to be contributorily negligent to the extent of 40%. In my view, the fair award is that he should receive 60% of his costs in relation to his claim from Mr Dorynek. For similar reasons to those stated above, I do not consider that Mr Dorynek's defence of Mr Flath's claim has been such that costs should be on the indemnity basis. I therefore make an award that Mr Dorynek should pay 60% of the Mr Flath's costs incurred solely in respect of his claim on the standard basis. 17. I have emphasised the word 'solely'. The vast majority of Mr Flath's costs are likely to have been incurred in the defence of Mr Corbin's claim. As part and parcel of that defence, it will have been necessary for Mr Flath to investigate the conduct of both himself and Mr Dorynek and to obtain expert reports etc. on the conduct of both helmsmen. The issues raised by Mr Flath's claim against Mr Dorynek were identical to those raised in Mr Corbin's claim and any costs incurred by Mr Flath in connection with defending Mr Corbin's claim cannot be recovered from Mr Dorynek under the heading of Mr Flath's claim against Mr Dorynek. In my view, all of the costs of preparing for and conducting the hearing were incurred in connection with Mr Flath's defence of Mr Corbin's claim. The whole hearing was conducted on the implicit assumption that the outcome on apportionment of Mr Corbin's claim would determine the level of contributory negligence by Mr Flath in respect of his own claim. As at present advised, I cannot think of any costs of Mr Flath which can be said to arise solely out of his claim against Mr Dorynek rather than his defence of Mr Corbin's claim, other than the cost of the pleadings in his claim against Mr Dorynek. 18. However, I emphasise that this is not determinative. I have not heard any argument on the detail and it will be a matter for the Greffier on taxation to determine which costs Mr Flath can recover from Mr Dorynek, as being the costs of his claim against Mr Dorynek, pursuant to the order I am making. However, I emphasise that the test for the Greffier is whether such costs have been incurred solely as a result of Mr Flath's claim against Mr Dorynek, in which event Mr Flath is entitled to recover 60%. (iii) The amendment costs 19. During the course of the hearing, Mr Corbin made an application for leave to amend his Order of Justice. That application was not opposed by Mr Flath. Mr Flath does not seek any costs in respect of that application but submits that it would be wrong that he should have to pay for Mr Corbin's costs in preparing and bringing that application. 20. I agree, and Advocate Benest did not seek to argue to the contrary. Whilst, in the context of this case, they will be minimal, I nevertheless order that there would be no order as to costs in respect of Mr Corbin's application for leave to amend his Order of Justice. The result of that will be that in so far as Mr Corbin's advocates incurred costs in preparing for and making the application to amend, those costs will not be recoverable from Mr Flath (or indeed Mr Dorynek). Summary 21. In summary, I make the following orders: (i) Mr Dorynek to pay 60% of Mr Corbin's costs on the standard basis. (ii) Mr Flath to pay 40% of Mr Corbin's costs on the standard basis. (iii) Mr Dorynek to pay 60% of Mr Flath's costs in so far as such

costs are solely referable to the proceedings brought by Mr Flath against Mr Dorynek (Court File 2019/178). (iv) Mr Corbin to pay the costs of Mr Flath in respect of the Pike application on the standard basis. (v) There will be no order as to costs in respect of Mr Corbin's amendment to his Order of Justice. 22. As to the costs of these costs applications, following circulation of the above paragraphs of this judgment in the usual way, Advocate Benest submitted that they should be dealt with in the same way as the main hearing, i.e. Mr Corbin should receive his costs on the standard basis as to 60% from Mr Dorynek and 40% from Mr Flath. 23. However, as Advocate Hall pointed out, the main issue in the costs applications was whether costs against Mr Dorynek should be on the indemnity basis and on that issue, Mr Dorynek had been successful. He should not therefore have to pay 60% of Mr Corbin's costs on that issue. Similarly, Advocate Franckel submitted that Mr Flath had not disputed the costs orders sought against him by Mr Corbin and it would therefore be wrong that he should have to pay 40% of Mr Corbin's costs in respect of the costs applications. 24. In many, if not most, cases, the costs of any costs application or hearing can properly be regarded as incidental to the main hearing and therefore covered by the costs order made in respect of the main hearing. But that is not always the case and, in my view, the points made by Advocate Hall and Advocate Franckel have force in the particular circumstances of this case. 25. In my judgment, as they both suggest, the fair order in this case is that there should be no order as to costs in respect of these costs applications, with the consequence that each party will bear his own costs. Authorities Corbin v Dorynek

[2022] JRC 047 . Corbin v Dorynek and Anor

[2022] JRC 057 . C v P-S

[2010] JLR 645 . Pell Frischmann Engineering Limited v Bow Valley Iran Limited

[2007] JLR 479 . Sir Bob Murray CBE v Camerons Limited

[2022] JRC 016 . MacFirbhsigh v CI Trustees and Executors Limited [2016]

(1) JLR Note 1. MacFirbhsigh v CI Trustees and Executors Limited

[2016] JRC 002A . Hodges v Trenouth-Wood

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