

JERSEY / JUDGMENT

Cornish and Cornish v Brelade Bay Limited [2018] JRC 154 (28 August 2018)

[2018] JRC 154

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judgment

the bailiff: 1. This is an application for costs and for indemnity costs by Brelade Bay Limited and in relation to the application to set aside the caveat obtained by Mr and Mrs Cornish. 2. Advocate Garrood for the Respondent points out that he has been successful having the caveats set aside and that costs should follow the event and Advocate Santos-Costa had hoped that I would make an order for costs in the cause because his clients are expecting to issue an Order of Justice shortly but there is no cause in place as yet and he has rightly accepted in those circumstances that it is not possible to make the order he had been contemplating. I therefore proceed on the basis that costs should indeed follow the event and I will make an order for costs in favour of the Respondent. 3. As to the questions as to whether it should be standard costs or indemnity costs I am applying the established principles of Pell Frishchmann Engineering Limited v Bow Valley Iran Limited

[2007] JLR 479 ; Pell Frishchmann v Bow Valley

[2008] JCA 172 ; C v P-S

[2010] JLR 645 ; Café de Lecq v Rossborough

[2012] JRC 154 ; Dalemont Ltd v Senatorov [2013 (2) JLR Note 35] and Leeds v Weston

[2012] JCA 088 . 4. I do not think there has been any deceit or malicious or vexatious or underhand behaviour from the Applicants and Advocate Garrood indeed, confirmed that that was not his position. 5. The question for me is whether there is anything which takes this case out of the ordinary and in those circumstances I would want to say immediately that I do understand Advocate Santos-Costa's point that the application for a caveat was about protection for his clients in circumstances were they faced, as they have it considerable difficulties in terms of recovering proper damages for defects in the construction of a very expensively constructed property. 6. Nonetheless, I am going to award indemnity costs in this case for these reasons:- (i) There has been material non-disclosure. It was suggested by Advocate Garrood that in every case were an injunction or caveat is not reimposed following a material non-disclosure there should be indemnity costs because the Court has found there has been unreasonable conduct. I am not sure

that I am willing to go quite so far as that today because it is not a matter in which I have heard full argument but I certainly do think that material non-disclosure is a relevant point in the context of considering all the circumstances which apply to whether or not indemnity costs should be ordered and the fact that the caveat has not been reimposed is another part of those overall considerations. (ii) But more particularly in this case, there was a breach of the rule that a note be made by Counsel of any ex parte hearing. I accept entirely, as I did in the Court's judgment (*Cornish and Cornish v Brelade Bay Limited* JRC 153) that this was simply overlooked by Advocate Santos-Costa in there was not any illicit purpose in that, but the fact is that when Advocate Santos-Costa appeared before me, in Chambers there was considerable exchange between us about the extent to which a claimant for a caveat who had an illiquid claim was able to obtain that caveat. (iii) I would have expected a note of that discussion to be made available to the Respondents so that they can properly prepare for and argue that point before me when they applied to set aside the caveat, but we did not have any of that argument because Advocate Garrood was not aware that that was something that was going through my mind. And it is particularly relevant to this case because it links directly to the uncertainty as to the extent of the protection which the Applicants are entitled to ask for and that is a matter which is canvassed in the points at paragraphs 6.1 to 6.3 of the skeleton argument which for the purposes of the published judgment are these:- (a) There was a material non-disclosure by the Applicants saying the Court was not informed of the existence for latent defect policy even if there was a possibility that the policy was not effective. (b) The fact that a substantial payment had been made by the Respondent to the Applicants for late completion should have been disclosed. (c) There is material non-disclosure to admit the fact that there was an outstanding claim by the Respondent against the Applicants for the sum of £300,000 in terms of the balance of monies due under the building contract. 7. So, those uncertainties who had quite apart from the other uncertainty which was the cost of the remedial works go directly to this argument as to whether or not the caveat which is applied for ex parte ought to be available for a person who has an unliquidated claim. 8. I think it is also relevant for the purposes of the other reason for setting aside the caveat in the first place that there was not a discussion in advance between the parties as to what might have been agreed by way of protection for the Applicants position. 9. There is no evidence of anything which suggests that, that discussion should have taken place and in those circumstances the costs incurred in relation to the application to set aside the caveat in my judgment ought not to have been necessary because there should have been efforts to find a proper amount of protection in advance. And I note that, that discussion is going to take place in about 10 days' time and it is right that it should. 10. Finally, I have asked for making an order that there should be a payment on account. I order the Applicants to pay the Respondent 50% of its costs by way of a payment on account in the sum of £8,220 to be paid within one month. *Authorities Pell Frishchmann Engineering Limited v Bow Valley Iran Limited*

[2007] JLR 479 *Pell Frishchmann v Bow Valley*

[2008] JCA 172 C v P-S

[2010] JLR 645 Café de Lecq v Rossborough

[2012] JRC 154 Dalemont Ltd v Senatorov [2013 (2) JLR Note 35] Leeds v Weston

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