

JERSEY / JUDGMENT

Cotrel -v- Christmas [2013]

JRC 101 (24 May 2013)

[2013] JRC 101

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judgment

the commissioner: 1. On 10 th May, 2013, I reserved my decision on the first defendant's application for costs arising out of the plaintiff's withdrawal of the proceedings she had taken out against him and the lifting of the interim injunctions imposed upon him. 2. The background to the civil proceedings lies in the criminal proceedings brought against the first defendant and others in which he was convicted on the 26 th July, 2012, of one count of fraudulently inducing the plaintiff to invest or loan money (£100,000) in property in Florida contrary to the Investors (Prevention of Fraud)(Jersey) Law 1967 . The facts in relation to those criminal proceedings are set out in the Court of Appeal judgment of 18 th April 2013 (

[2013] JCA 078). 3. Through inducements mainly on the part of the second defendant, the plaintiff invested some £531,000 in all in property in Florida between 2004 and 2006, which represented the lion's share of her investments, of which she has only recovered £2,166. 4. On 5 th October, 2012, the first defendant was sentenced to 15 months' imprisonment in relation to the one count against him. 5. On 11 th December, 2012, a saisie judiciaire was granted by the Royal Court under the provisions of the Proceeds of Crime (Jersey) Law 1999 in support of an application the Crown was bringing for the confiscation of the first defendant's assets, following conviction. The Crown had also given notice that it intended pursuing a claim for compensation in favour of the plaintiff against the first defendant in the sum of £100,000. That application had been listed before the Royal Court for Monday 8 th April, 2013. 6. On 2 nd April, 2013, the Attorney General wrote to the plaintiff informing her that there were now no longer sufficient grounds for the Crown to pursue an application for confiscation and the saisie was therefore likely to be discharged by the Royal Court on 8 th April, 2013:- ".... It will, therefore, not be possible for the saisie judiciaire to remain in place beyond next Monday and, if for any reason, the application for compensation were to be adjourned, there would be no legal restrictions which would prevent Mr Christmas from dealing with his assets in such a way which might affect his ability to satisfy a compensation order at a later date. My purpose in writing to you is to give you notice of this development so that you might consider taking your own private legal advice urgently." 7. The plaintiff took advice from Benest & Syvret, who acted

expeditiously in preparing an Order of Justice on behalf of the plaintiff in which she claimed £100,000 from the first and second defendants jointly and severally on the grounds of breach of contract arising out of the joint venture agreement they had entered into and on a number of alternative grounds. The Order of Justice sought interim injunctions over the assets of the first defendant. 8. Advocate Nina Benest presented the Order of Justice with a supporting affidavit sworn by her to Sir Christopher Pitchers, Commissioner, on 8 th April, 2013, but he declined to sign the same on an ex parte basis. It was accordingly served upon the first defendant that day for the purposes of an inter partes that afternoon. 9. Without going into detail over the events of that afternoon, the Court in this order firstly made a compensation order in favour of the plaintiff in the sum of £100,000 payable by the first defendant as to £60,000 within 28 days and £40,000 within 12 months (that order is now being appealed by the first defendant); secondly lifted the saisie and thirdly imposed interim injunctions which had the effect inter alia of freezing some £94,000 in the hands of the Viscount. 10. On 16 th April, 2013, the first defendant issued a summons seeking the cancellation of the interim injunctions on the grounds inter alia that the plaintiff had petitioned the Court for and obtained injunctions in circumstances where she had not firstly set out a good arguable case and secondly made full and frank disclosure to the Court as she was absolutely obliged to do. In the alternative, the first defendant sought a variation of the interim injunctions to enable him to bring his mortgage arrears into good order and to pay his reasonable legal fees in defending the plaintiff's action. 11. Skeleton arguments and bundles were filed and that summons came before the Court on 25 th April, 2013, when Advocate Benest appeared for the plaintiff. Mr Jones for the first defendant pointed out that she had sworn the affidavit lodged in support of the imposition of the interim injunctions and questioned whether it was appropriate for her to appear for the plaintiff. He referred the Court to paragraph 708(e) of the Code of Conduct of English Barristers , which provides that:- "A barrister must not adduce evidence obtained otherwise than from or through the client or devise facts which will assist in advancing a lay client's case." 12. It seemed to the Court that the affidavit sworn by Advocate Benest could not be regarded as purely procedural but constituted the substantive evidence upon which the interim injunctions were imposed and the circumstances in which that happened were now being challenged. The Court agreed, therefore, that it was inappropriate for her to represent the plaintiff and the matter had to be adjourned. The adjourned hearing took place on 10 th May, 2013, where the plaintiff was represented by Mr Clarke. 13. On the 8 th May, 2013, Mr Jones filed a further expanded skeleton argument which made reference to a report by Grant Thornton UK LLP dated 20 th April, 2011, which showed that on 9 th August, 2007, the plaintiff had subscribed for and was issued with 466,954 shares in Benessia Global Limited ("Benessia") which replaced, inter alia , the joint venture agreement, extinguishing any rights she had under it. It was submitted that the plaintiff could not therefore pursue a cause of action against the first defendant arising out of the joint venture agreement. 14. Although the efficacy of the Benessia transaction was something which Mr Clarke told the Court could have been investigated, in the light of these developments the plaintiff instructed Mr

Clarke to seek leave to withdraw the proceedings and lift the injunctions pursuant to Rule 6/13 of the Royal Court Rules 2004 . The Court gave leave, subject only to the issue of costs, which was heard before me alone. 15. I interpose to observe that having been convicted of fraudulently inducing the plaintiff to invest £100,000, it might be thought that civil liability would follow, but it was clear that the plaintiff's claim was going to be robustly defended by the first defendant requiring her to invest yet further no doubt substantial funds in financing it. Whatever the true reason, the plaintiff had decided to withdraw the proceedings. 16. Mr Jones referred me to the Court of Appeal decision in *Dick-v-Dick*

[1990] Notes - 2C, where it was held that a party who institutes proceedings against another, but subsequently withdraws them before they are due to be heard may properly be ordered to pay costs on an indemnity basis to compensate that other party. His instructions, however, had been to seek costs on the standard basis and this on the basis that the starting point in relation to costs is that they should follow the event. 17. Mr Clarke submitted that there should be no order as for costs. He referred me to the general principles on the awarding of costs as set out in *Watkins-v-Egglishaw*

[2002] JLR 1 , where it was made clear that the overriding objective in considering costs was to do justice between the parties. He referred in particular to the following extracted from the headnote to the case:- "e. It was, accordingly, open to the Court to have regard to any and all considerations that had a bearing on the overriding objective of doing justice, including (i) whether a defendant brought the action on his own head, and (ii) whether litigation had been conducted in a manner which enabled the parties involved to know where they stood at the earliest possible stage and at the lowest practical cost." 18. He informed me that the first defendant's affidavit of means disclosed little in terms of assets, but very considerable debts. He was unlikely on his release to be in a position to earn as well as he had previously and because the compensation order was not enforceable as a civil debt under the provisions of the Criminal Justice (Compensation Orders)(Jersey) Law 1994 , the plaintiff had little option but to seek to protect the compensation that had been ordered in her favour; that could only be done by pursuing the first defendant for civil debt. The first defendant had been invited by Pitchers, Commissioner, on the 8 th April, 2013, to give an undertaking that the funds held by the Viscount could be released to the plaintiff, which he declined to give. If he had given an undertaking that there would have been no need for the interim injunctions. 19. Furthermore, the first defendant had not raised the issue of the Benessia shares until the filing of the second skeleton argument, when he disclosed for the first time the extract from the Grant Thornton report. There was correspondence showing that Advocate Benest had sought sight of that report from Mr Jones on a number of occasions, the first such request being by email on 9 th April, 2013. If it had been disclosed when initially requested, it would have enabled the plaintiff to know where she stood at a much earlier stage. 20. In reply, Mr Jones submitted that the first defendant had a choice in law whether to pay the compensation or serve the default sentence and it was abusive, he said, for a gun to be held to his head by being told either give an undertaking or be subjected to injunctions. 21. It could not be said that the first

defendant had brought these proceedings on himself. The Crown had indicated as early as February 2013 that the confiscation order would not be pursued and yet it delayed the raising of the saisie until after the compensation order had been made. In his view, the civil proceedings had in effect been brought at the behest of the Crown and certainly with its assistance in order to plug a lacuna in the law which did not enable the plaintiff to pursue the compensation order as a civil debt. 22. As for the forensic report, he said there were a number of reports in existence and the report Advocate Benest was referring to in her correspondence was a different report to the one he had since disclosed. He was told he could not release the report he thought Advocate Benest was referring to because it was not the first defendant's report and disclosure could entail breaches of the Data Protection legislation. He himself had gaps in his knowledge in relation to this complicated background and had not been aware of the Benessia share issue, as he would most certainly have made reference to it in his earlier skeleton argument and draft answer filed for the first hearing. In any event, it was surely open to Advocate Benest he said to have asked for such reports directly from the Crown. It was clear from the transcripts of the trial that the plaintiff was well aware of the Benessia shares, as she makes reference to them. The question, he said, was whether the plaintiff could have found out about the Benessia shares by making reasonable inquiry, to which the answer had to be in the affirmative. 23. In terms of reasonable conduct, all his client had wanted from the outset was a variation to the injunctions to allow him to bring his mortgages into good order and this had been denied. He said that Pitchers, Commissioner, himself had indicated on 8th April, 2013, that such a variation would be reasonable. Decision 24. The plaintiff is elderly and has lost a large proportion of her investments. I am inevitably sympathetic to her predicament. 25. I surmise (although there is no evidence to this effect) that the plaintiff did not intend launching civil proceedings against the first defendant and that it was the letter from the Attorney General that was the catalyst for these civil proceedings being brought in considerable haste. 26. Although the interim injunctions were imposed after a short inter partes hearing, the authorities are clear that in applying for an ex parte injunction, which the plaintiff did, she was under a duty to disclose any matters which militated against the making of the orders in question and to identify all potential defences - see *Goldtron Limited-v-Most Investment Limited*

[2002] JLR 424 . In the *Goldtron* case, reference was made to this extract from the judgment of Bingham J in *Siporex Trade SA-v-Comdel Commodities Limited* (4)

[1986] 2 Lloyd's Report at 432:- "He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences." 27. The fact of the matter is that the significance of the Benessia shares should have been disclosed in Advocate Benest's affidavit in support of the plaintiff's application for the interim injunctions. It cannot be right to blame the first defendant for failing to bring that potential defence to the plaintiff's attention when the plaintiff was aware of it or should have been. 28. I agree

with Mr Jones that it cannot be said that the first defendant brought these proceedings upon himself by failing to give the undertaking offered to him on 8 th April, 2013, - an undertaking that related only to the interim injunctions. The proceedings as a whole have after all now been withdrawn. 29. The risk as to costs is one of the disciplines that applies to every plaintiff contemplating civil proceedings. I have to conclude that these proceedings were issued and interim injunctions obtained in haste, without proper investigation and as a result had to be withdrawn. The principle enunciated in *Watkins-v-Egglishaw* of doing justice between the parties must, in my view, mean doing justice in the context of the civil proceedings in which the cost orders are being sought, and not in some wider context. In the wider context the plaintiff has suffered a great injustice at the hands of the first and second defendants but in the context of these civil proceedings, it is the first defendant who has suffered an injustice through the bringing of proceedings which have now been withdrawn. 30. A useful starting point in civil proceedings as made clear in *Watkins-v-Egglishaw* is that costs should follow the event and in the context of these civil proceedings there can be no question that the first defendant is the winner and the plaintiff is the loser. The first defendant is not legally aided and justice in the context of these proceedings must mean that he should be awarded his costs. The first defendant would be entitled to pursue the plaintiff for costs on the indemnity basis as made clear in *Dick-v-Dick* , but the first defendant seeks only his costs on the standard basis and that is the order that I make. *Authorities Investors (Prevention of Fraud)(Jersey) Law 1967*. *Lewis Christmas Foot and Cameron-v-AG*

[2013] JCA 078 . *Proceeds of Crime (Jersey) Law 1999*. *Code of Conduct of English Barristers*. *Royal Court Rules 2004*. *Dick-v-Dick*

[1990] Notes - 2C. *Watkins-v-Egglishaw*

[2002] JLR 1 . *Criminal Justice (Compensation Orders)(Jersey) Law 1994*. *Goldtron Limited-v-Most Investment Limited*

[2002] JLR 424 . *Siporex Trade SA-v-Comdel Commodities Limited* (4) [1986] 2 Lloyd's Report at 432. Page Last Updated: 16 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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