

JERSEY / JUDGMENT

Coutts v Frith [2003] JRC 176 (13 October 2003)

[2003] JRC 176

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judgment

Deputy bailiff: 1. This is an appeal by the Plaintiffs against a decision of the Master on 10th July, 2003 that the Plaintiffs should pay the Defendants' costs arising from the claim in tort in the Order of Justice; such costs to include its costs in connection with the Third Party notice which had been issued by the Defendants against a Third Party in connection with the claim in tort. 2. The background is as follows. The Plaintiffs are trustees of two settlements. They allege that they retained the Defendants, namely Ernst & Young, as their tax advisors. They allege that the Defendants failed to advise them properly as a result of which a significant tax liability has arisen. The Defendants deny these claims. 3. On 1st February, 1999, the Plaintiffs launched proceedings against the Defendants in respect of their advice and the alleged consequential tax problem. Although not as clearly pleaded as it might have been, the Order of Justice brought claims both in contract (for failing to act in accordance with the implied term of reasonable care and skill) and in tort (for negligence). 4. In their amended answer filed in August, 1999, the Defendants denied liability and asserted that the claim in tort was prescribed; see in particular paragraphs 2, 6.8, 6.9 and 6.22 para 2 of the answer. 5. The Defendants also stated in their amended answer that if, contrary to their contention, they were liable to the Plaintiffs, they were entitled to a contribution or indemnity from certain Third Parties. One of these Third Parties was a firm of English solicitors called Clintons, who the Defendant said were retained to advise the trustees on English tax matters. 6. Clintons amongst others were joined as Third Parties pursuant to an Order of the Greffier on 18th August, 1999. The Act of the Greffier stated that matters had proceeded by consent with both the Plaintiffs and the Defendants being represented by their advocates. 7. Although the issue of prescription had been flagged up by the Defendants in their answer, as I have described, the parties seem to have been distracted by various procedural wrangles over discovery and other matters. It was only on 6th May, 2003 that Clintons gave notice that they intended to seek to strike out the Defendants' Third Party claim against them on the basis that, as the tort claim of the Plaintiffs against the Defendants was prescribed, there was no basis for the Defendants to seek any contribution or indemnity from Clintons. 8. The Defendants then wrote to the Plaintiffs on 10th June asking them to confirm that the Plaintiffs were claiming in tort and to agree that that claim was prescribed. By a response dated 11th June, the Plaintiffs confirmed both of these matters. 9. Accordingly, when the matter came before the Master on 10

th July, it had by then been agreed that the Plaintiffs' claim in tort contained in the Order of Justice, should be struck out as should the Third Party claim of the Defendants against Clintons because that Third Party claim related only to the claim in tort against the Defendants. 10. The parties did, however, argue the question of costs. The Master ordered the Defendants to pay Clintons' costs in relation to the Third Party claim. However he ordered the Plaintiffs to pay the Defendants' costs in connection with the tort claim, such costs to include the Defendants' costs in relation to the Third Party claim and such costs as the Defendants would have to pay Clintons in relation to that Third Party claim. 11. The Plaintiffs now appeal against that part of the Master's Order which ordered them to pay the Defendants' costs in relation to the Third Party proceedings, including the costs of Clintons. They say that the Defendants should be left to bear their own costs in relation to the Third Party proceedings or, at the very least, should be left to bear the costs that they have been ordered to pay Clintons. 12. On an appeal to this Court from an Order of the Master, the Court can consider the matter de novo and reach its own decision, whilst of course, giving due weight to the Master's reasons for his decision. This approach is equally applicable on appeals against orders for costs, see *B -v- R* (29 th January 2002) Jersey Unreported; [2002/27]. 13. In relation to costs, the parties are agreed that the Court has a general discretion to make such order as between the plaintiffs, defendant and third parties as it may think fit and this includes ordering a plaintiff to pay to a defendant any costs which the defendant has been ordered to pay a third party, if it thinks that such costs ought fairly to be borne by the Plaintiff: see *Johnson -v- Ribbins*

[1977] 1 WLR 1458. 14. In its skeleton argument the Plaintiffs submitted, however, that before a plaintiff could be ordered to pay the costs of third party proceedings commenced by a defendant against a third party, the Court must be satisfied that the plaintiff rendered the third party proceedings inevitable by bringing his claim; in other words, there was a threshold which a defendant had to cross before a plaintiff could be ordered to pay the costs of third party proceedings. 15. The skeleton argument cited two cases as establishing that proposition; namely *Thomas -v- Times Book Company Limited*

[1966] WLR 911 and *SA Ancien Maison Marcel Bauche -v- Woodhouse, Drake & Carey (Sugar) Ltd & Ors*

[1982] 2 Lloyd's Law Rep 516. But at the hearing Mr Grace accepted that these two cases were not purporting to lay down any statement of principle that inevitability was required before a plaintiff could be ordered to pay the costs incurred by a defendant in third party proceedings. He accepted that the Court retained a general discretion as to costs in the usual way and that a convenient expression of the approach was indeed that set out in the passage in *Johnson -v- Ribbins* to which I have already referred. 16. In my judgement Mr Grace was quite correct to adopt that approach. The overriding test remains 'what is fair between the parties?' In assessing what is fair, the Court will, no doubt, consider how reasonable it was for the defendant to issue third party proceedings in order to protect himself in the event of the plaintiff's claims against him succeeding. If it was inevitable that a defendant would issue third party proceedings, that is clearly a very strong finding

that such defendant acted reasonably, but there is no requirement for the plaintiff's claim to have rendered it inevitable that third party proceedings should be issued. The test is one of what is fair and reasonable. 17. The costs of the Third Party proceedings in this case are apparently quite substantial because they have lasted some four years and have involved a number of procedural skirmishes. Mr Grace accepts that the Plaintiffs must bear a proportion of the blame in that they brought the proceedings in tort, which have now been withdrawn, but he submits that it is unfair to make the Plaintiffs pay one hundred percent of the Defendants' costs in connection with the Third Party claims and Clintons' own costs, which the Defendants have been ordered to pay. He says the Defendants did not need to join Clintons. Having raised the issue of prescription, they should have brought the issue to a head by applying to strike out that part of the claim or by applying for a trial of the prescription issue as a preliminary issue. But they did nothing. They just sat back and let costs accumulate. Nothing had changed by May, 2003 when Clintons belatedly applied to strike out the Third Party claim on the basis that any tort claim against the Defendants was time barred. 18. Furthermore the Defendants did not simply commit acts of omission by failing to deal with the issue. They committed at least one act of commission, namely joining Clintons as Third Party. Mr Grace submitted that this took their conduct into a different league and rendered it more fair that the Defendants should bear some of the costs of the Third Party proceedings. 19. Furthermore the main claim was in contract. The Court should take into account that the tort claim was very much ancillary to the contractual claim; that was no doubt why the matter had not been focused on earlier. He further submitted that it was not acceptable in the present day for defendants to run up costs in this way having regard to the type of admonition which can be found in the Court of Appeal's judgement in the Esteem case

[2000] JLR N-41. 20. Having carefully considered Mr Grace's submissions, I am in no doubt that the Master reached the right decision. I so find for the following

reasons:

- (i) The Plaintiffs chose to bring the claim in tort. Furthermore they maintained this claim even though the Defendants had raised the issue of prescription in their answer. As Mr Grace rightly said, nothing had changed between August, 1999 and June, 2003 when the Plaintiffs conceded that the tort claim was indeed prescribed. In effect they had maintained an unarguable claim for nearly four years despite being put on notice in 1999 that the Defendants considered the claim to be unfounded because it was prescribed. Prime responsibility for a plaintiff maintaining an unarguable claim for nearly four years must rest with a plaintiff rather than a defendant who has flagged up the issue but not applied to strike it out. In my judgement there was nothing to stop the Plaintiffs conceding the point at an early stage or themselves applying for a trial of the preliminary issue if they were not willing to concede it at that stage. (ii) In my judgment it was perfectly reasonable for the Defendants to convene Clintons as Third Party. The Defendants contended that the tort claim was prescribed but this was not conceded by the Plaintiffs. It therefore seems to me perfectly

reasonable for the Defendants to have acted cautiously so as to protect themselves in the event that they were found to be wrong on the prescription argument. They protected themselves by joining in a firm which they alleged had been responsible for giving the tax advice in question to the Plaintiffs. (iii) It goes further than this because the Plaintiffs consented to Clintons being joined as Third Party in August, 1999. They cannot therefore be heard now to say that it was unreasonable for the Defendants to join Clintons. Furthermore they knew that the joining of Clintons arose only out of the claim in tort because there was some correspondence about this matter at the time. Mr Grace submitted that the consent of the Plaintiffs was primarily directed at joining other Third Parties, including, in particular, the Plaintiffs themselves. But the Act is unambiguous and the Plaintiffs cannot now go behind it having raised no objection to its accuracy at any time since August, 1999. Nor do I accept the distinction that Mr Grace sought to draw between acts of commission and acts of omission. Even if I did, I would agree with Mr Wilson that the Plaintiffs committed two acts of commission, namely bringing and maintaining the claim in tort in the first place, and consenting to the joining of Clintons as Third Party. (iv) Standing back, whose fault do I consider it to be that what is now accepted to be an unarguable claim in tort (because it is prescribed) has remained before the Court for nearly four years, so that the Third Party proceedings have also remained in being during this time? I can see the argument that it would have been helpful if the Defendants or the Third Party had brought the issue to a head earlier but, as Mr Wilson submitted, the Court of Appeal has been critical on occasion of prescription being taken as a preliminary issue. But I have no doubt that the fault lies with the Plaintiffs. They brought the claim in the first place and they did not withdraw it for nearly four years despite the Defendants making it clear, from a very early stage, that they considered the claim to be unfounded because it was prescribed. 21. I therefore consider it quite fair that the Plaintiffs should pay the Defendants' costs in relation to the Third Party proceedings including the costs which the Defendants have been ordered to pay Clintons. 22. I therefore dismiss the appeal. Although there was no notice of a cross appeal, Mr Wilson sought to apply to vary the Master's decision that the costs should be on a standard basis rather than an indemnity basis. I have to say that it is not clear he is entitled to do this, but in any event I would not be willing to do so in this case. I note the decision in *Dick -v- Dick* (6th August, 1990), Jersey Unreported, but each case must be judged on its own facts. I do not read the Court of Appeal as saying that in every case in which a plaintiff withdraws a claim, it follows automatically that costs must be ordered on an indemnity basis. 23. It would have been open to the Defendants to have brought the prescriptive issue to a head by issuing proceedings although I am quite satisfied that that is not a ground for depriving them of costs in relation to the Third Party proceedings. I do think it is a factor to bear in mind in deciding whether they should be entitled to indemnity costs. In all the circumstances I think standard costs meets the justice of the case. Authorities *B -v- R* (29 January, 2002) Jersey Unreported; [2002/27] *Johnson -v- Ribbins* [1977] 1 WLR 1458 S. A. *Ancien Maison Marcel Bauche -v- Woodhouse, Drake, & Carey (Sugar) Ltd & Ors* [1982] 2 Lloyds Rep 516 *Thomas -v- Times Book Company Limited* [1966] WLR 911 *Dick -v- Dick* (6th August, 1990), Jersey Unreported *In re Esteem Settlement* [2000] JLR N-41 Page Last Updated: 22 Jun 2016 BAILII:

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