

JERSEY / JUDGMENT

Crociani -v- Crociani [2016]

JRC 195 (27 October 2016)

[2016] JRC 195

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judgment

the master:

Introduction

1. This judgment represents my detailed written reasons for permitting the plaintiffs to instruct a company known as Opus 2 to provide the following services for trial namely provision of electronic bundles, live transcription services and simultaneous translation services and ordering that the costs of the services shall be met as to one third by the plaintiffs, one third by the third and seventh defendants and one third by the first, second and fourth defendants.

Background

2. The general background to this dispute has been set out in a number of previous judgments either issued by me or by Commissioner Clyde-Smith. It is not necessary to set out the background for the purposes of this judgment. 3. What is pertinent is that trial dates have now been fixed for this dispute. The trial is due to start on Monday, 16 th January, 2017, and 12 weeks have been set aside. 4. It also right to record in relation to the present application that the principal protagonists at trial will be firstly the plaintiffs represented by Bedell Cristin, secondly the first, second and fourth defendants now all represented by Collas Crill and thirdly the third and seventh defendants represented by Baker and Partners. The fifth and sixth defendants are both currently without advice, although they have received Jersey legal representation in the past. The eighth defendant to date has not accepted the jurisdiction of the Royal Court. As matters presently stand, it seems unlikely that either the sixth or eighth defendants will be represented at trial. It is not clear whether the fifth defendant will be represented. To the extent she is represented, this is likely to be by Collas Crill as matters currently stand. The fifth defendant has also always aligned her position with that of the first defendant. 5. By the time the application came to be heard before me, the parties represented by Bedell Cristin, Collas Crill and Baker & Partners had agreed that the services of Opus 2 could be used. However, in the case of the first, second and fourth

defendants by a letter dated 10 th October, 2016, the position of the first, second and fourth defendants was that the engagement of Opus 2 was not opposed "subject to our clients not having to contribute to the costs". Advocate Santos-Costa was also instructed not to appear at the hearing the following day on 11 th October, 2016. Accordingly, while he had set out his clients' arguments in writing, when the matter came before me, he was present as a matter of courtesy as an officer of the Royal Court only. He did not make any submissions in respect of the application as it was not appropriate for him to do so, but he did answer certain specific points of principle put to him by me. 6. Advocate Robinson in support of the application had provided detailed material setting out how the services of Opus 2 were provided and the benefits that their services gave to all parties. Accordingly, by reference to this information he contended the benefits of the services to be provided were clear. In this case there were some 18,000 documents that had been disclosed by the parties relevant to this dispute. The benefits of all parties having access to these documents electronically (and disclosure had been provided electronically already) on one common document management system were clear. 7. These benefits were not just the saving of costs in terms of production of trial bundles compared to producing them in manual form. They also made the process of conducting the trial itself easier because all parties much more quickly could be directed to the relevant electronic document rather than manually. The transcript could also be linked to any document referred to. This assisted all parties in producing closing submissions as well as the Royal Court in preparing its judgment. It also assisted all parties in identifying relevant documents it wished to make use of in order to carry out cross-examination. 8. No reason had been advanced that was sustainable not to make use of this service. This was just a case of the first defendant being obstructive. 9. There was also no question that the first defendant could not afford to pay the one third share of the costs. She had spent literally millions of pounds in relation to this dispute. The present cost for the document management system was £43,000 each and a similar amount for transcription services. A detailed breakdown had been provided showing how these costs were calculated. 10. The application was not a pre-emptive costs application but a pro tem order. Ultimately who would bear these costs, it was accepted, was a matter for the trial judge following determination of the substantive dispute. If therefore the plaintiffs were unsuccessful the defendants would be entitled to recover any costs paid under the pro tem order presently sought by the plaintiffs. Likewise if the plaintiffs were successful they would be able to seek to recover their share of the costs from one or more of the defendants. 11. By reference to the case of *Riley v Pickersgill & Le Cornu*

[2002] JLR 196 to which I had referred the parties, the costs to be incurred were either costs of the action or at the very least costs incidental to the action. 12. The Court's ability to make the order was as part of its case management functions. If the Court could give permission for the parties to use an electronic document management system, transcription and translation services, it could also make orders relating to the costs of its services. Such orders were within the scope of Article 2(1) of the Civil Proceedings (Jersey) Law 1956 . 13. The decision was unlikely to set a precedent because in most cases the parties agreed to

use such services and to share costs on the pro tem basis sought for. 14. Advocate Robinson accepted that if there was a question of a party not being able to afford to share costs on a pro tem basis, that would be a relevant factor for the Court to consider, but such an issue did not arise in the present case. 15. Advocate Redgrave supported the application. 16. The written submissions filed on behalf of the first, second and fourth defendants argued that the responsibility for the production of trial bundles was that of the plaintiffs and there was no basis for the Court and no jurisdiction to make a pre-emptive costs order. 17. Advocate Santos-Costa's letter also argued that even if the Court had a discretion it should not do so because the plaintiffs obligation was to marshal documents in a manner that was concise and accessible for trial; any core bundle would only be some 30 lever arch files and the cost of producing documents would be much more limited. Concern was also expressed that what was being written here was a blank cheque. Decision 18. The decision I reached was firstly that in a dispute of this magnitude, it was appropriate to approve the use of electronic bundles, simultaneous transcription of proceedings and translation services through one service provider. By reference to the materials provided by the plaintiffs and my review of the website of Opus 2 in particular endorsements by Lady Justice Gloster, a former judge of our Court of Appeal, and other senior barristers acting as arbitrators, I was satisfied that the present system will be of significant benefit to the parties and the Court in relation to the conduct of this trial. In the absence of a system of this kind, if all parties and the Court were working on the basis of manually produced files only, I was also satisfied that the Court process at trial would be very much slower. It also does not make sense to require such an approach where discovery has all been provided in electronic form. All the present application does is transfer documentation which has been disclosed electronically onto a system that allows the parties to proceed to trial to use that same material in electronic bundles. 19. The use of electronic bundles is also not novel. The Court of Appeal in this jurisdiction already operates using electronic bundles for all appeals before it. It is also clear that in other jurisdictions electronic bundles have been used and have helped for trials to be run much more efficiently. 20. The present system is not just about saving the costs of the production of a trial bundle. It is about the overall conduct and management of the trial. That does not mean that there may not be some much more limited bundles in hard copy form, or individual advocates may not choose to have some hard copy documents to hand in relation to cross-examining witnesses or making submissions. However, that is the choice of counsel. The primary documents to be used and their identification will be through the electronic document system I have approved. 21. I was also satisfied that these costs are part of the costs of the action. At paragraph 11 of *Riley v Pickersgill & Le Cornu Master Wheeler* stated as follows:- "11 I am, of course, bound by the decision of the Court of Appeal whose judgment I accept entirely in any event. I accept, therefore, the submission of Advocate Robinson in this regard. He went on to argue that the insurance premium could not be claimed as part of the "costs of the action" as that expression should properly be interpreted as meaning the costs of work done or disbursements incurred in furtherance of the action. The premium was not such an expense but was extraneous to

the action, stemming not from the conduct of it but from a commercial decision taken by the plaintiff. It was not a cost of the action but rather an expense voluntarily incurred to assist in the funding of it in the event of the claim not succeeding. He went on to contend that, in any event, even if the words "and incidental to" had been included in the Order of July 26th, it still could not be construed in such a way as to cover this extraneous item of expenditure." 22. While in *Riley* the insurance premium was not part of the costs of the action, the position of the services provided by Opus 2 is very different. These services are clearly designed to further the action and to enable the trial to be conducted in a more efficient manner for the benefit of all parties concerned. I am therefore satisfied the fees of Opus 2 are part of the costs of the action. 23. The plaintiffs' initial summons was not qualified to make it clear that the order sought was only on a pro tem basis and that the allocation of these costs would ultimately have to be decided by the trial judge following the resolution of the substantive dispute. This point was however clarified. This was an important clarification because otherwise I was concerned that I was being asked to make a pre-emptive costs order which I doubted I had jurisdiction to do. This clarification by Advocate Robinson however satisfied me that the costs order I was being asked to make was simply consequent upon the approval of the use of the services by Opus 2 and accordingly was part of the case management powers vested in the master as delegate of the Judicial Greffier and accordingly fell within Article 2(1) Civil Proceedings (Jersey) Law 1956, as amended. 24. Likewise in this case it was not necessary for me to be concerned about the ability of the first defendant who has met the costs of the first, second and fourth defendants' to-date as far as I am aware, to meet these costs. The letter filed by Advocate Santos-Costa did not indicate that the first defendant could not meet these costs. Indeed, given the amount of costs paid to date by her to her former advisers, and the value of the assets at stake, no such question arises. It is a matter for another day if a party contends, supported by appropriate evidence that it could not afford to meet a pro tem order. 25. For all these reasons I granted the application. 26. In relation to the costs of the application, I ordered these to be paid on the standard basis, notwithstanding the plaintiffs' application for indemnity costs. This is because, while I was of the view that the first, second and fourth defendants should have consented to the application, as far as I am aware the issue was not one that had previously considered by the Royal Court. Accordingly on this occasion the first, second and fourth defendants were justified in posing the question as to whether or not the Court could make such an order. As this question was one that was properly, albeit unsuccessfully, raised, I did not consider it appropriate to punish the first, second and fourth defendants with an indemnity costs order in relation to the application when their objection was one that as a matter of principle was properly raised. That question of principle having now been resolved, the same stance might not be taken on any future application. Authorities *Riley v Pickersgill & Le Cornu*

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