

JERSEY / JUDGMENT

Hong Kong Foods Ltd and Gibbons -v- Robin Hood Curry and Ors [2017] JRC 116 (24 July 2017)

[2017] JRC 116

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[2017] JRC 116 [New search] [Help] Costs. [2017]JRC116 Royal Court (Samedi) 24 July 2017
Before : Sir Michael Birt, Commissioner, sitting alone. Between Hong Kong Foods Limited
First Plaintiff And Robert Alan Gibbons Second Plaintiff And Robin Hood Curry Limited
First Defendant And Barry Thirkell Second Defendant The Second Plaintiff appeared in
person and as [purported] Director of the First Plaintiff. Advocate C. Hall for the First and
Second Defendants. judgment on costs the commissioner: 1. I have before me an
application by the defendants for costs following the judgment of this Court published at
Hong Kong Foods Ltd and Gibbons-v-Robin Hood Curry and Thirkell

[2017] JRC 082 . I shall use the same defined terms as in the judgment. The outcome of the
judgment was that the plaintiffs' claim was dismissed in its entirety and judgment was
awarded to Robin Hood on its counterclaim against Hong Kong Foods in the sum of
£25,521. 2. The original hearing on costs was fixed for 28 th March. The defendants put in
written submissions for that hearing and appeared through Advocate Hall. The plaintiffs
did not appear nor did they put in any written submissions. At the hearing, I requested
further information from the defendants and directed that they should put in further
written submissions. I allowed time for the plaintiffs to respond to that submission. I have
considered the written submissions lodged by both sides since the hearing. 3. I have no
hesitation in holding that the defendants are entitled to their costs on at least the standard
basis in respect of both the claim and the counterclaim. They have been entirely
successful on both and are clearly the winning party. The costs are awarded jointly and
severally against Mr Gibbons and Hong Kong Foods. 4. The only issue on which the
defendants were unsuccessful was that of misrepresentation in relation to the
counterclaim. I have therefore considered whether, in accordance with the principle
stated in Re Elgindata Limited (No. 2)

[1993] 1 All ER 232 as approved in *Watkins v Egglshaw*

[2002] JLR 1, the defendants should be deprived of their costs on this limited issue. I have no hesitation in concluding that they should not. Although the law on misrepresentation is dealt with in some detail in the judgment, the time spent by the parties in dealing with the topic at trial was wholly insignificant and it would be quite wrong to deprive the defendants of any portion of their costs on this ground. 5. The real issue is whether the costs should be awarded on the indemnity basis rather than the standard basis. Advocate Hall argued that they should be and put forward the following arguments in support:- (i) As set out at paras 199 - 202 of the judgment, it transpired after the hearing of the case that Hong Kong Foods had been dissolved on 1 st October, 2014, for failing to file its annual returns and had not been in existence since then. This was obviously known to Mr Gibbons throughout the hearing but he did not see fit to inform the Court or the defendants and the entire hearing proceeded on the basis that Hong Kong Foods still existed. The defendants were therefore deprived, when deciding how to conduct the case and what terms of settlement might be appropriate, of the knowledge that Hong Kong Foods did not exist. It was unreasonable conduct on the part of Mr Gibbons. (ii) The plaintiffs had generally been dilatory in their conduct of the case. The proceedings were issued as long ago as December 2010 and had nearly been struck out in September 2014. The Master made it clear in his judgment of 29 th September, 2014, Hong Kong Foods and Another

[2014] JRC 187 that the plaintiffs had only just persuaded him that they should be allowed to continue with their claim. (iii) The plaintiffs had unreasonably refused to engage in mediation. The Master had encouraged it at para 48 of his judgment of 29 th September, 2014, and had further encouraged this at a hearing in November 2014 when, according to Advocate Hall's note, he had warned Mr Gibbons that an unreasonable refusal to mediate could have costs implications. The Master repeated the importance of mediation at a hearing in June 2015. The Master suggested a mediator and Advocate Hall made enquiries as to how much that mediator would charge. The costs of mediation were communicated to the plaintiffs but the plaintiffs refused to engage. In accordance with the decision in *Café de Lecq Limited v R A Rossborough (Insurance Brokers) Limited*

[2012] (2) JLR 155, an unreasonable refusal to engage in mediation could justify an award of costs on the indemnity basis. On 27 th October, Mr Gibbons wrote to the Master stating inter alia that 'mediation will be too difficult for me and indeed a waste of time'. (iv) The plaintiffs had repeatedly failed to comply with Court orders in relation to discovery, witness statements, evidence in support of losses etc. The defendants were forced on numerous occasions to notify the Court of such failures and to issue summonses, including some seeking unless orders. The costs of four of these applications were awarded on the indemnity basis. It was submitted that overall the defendants had been put to considerable extra expense because of these failures to comply with procedural

orders.

- (v) The plaintiffs had been unreasonable in connection with settlement discussions. Calderbank offers had been made by the defendants. By way of example on 22 nd December, 2015, the defendants had offered to pay the sum of £31,000 (less costs of £6,395.36 which had already been awarded against the defendants). Mr Gibbons rejected this by telephone on th October, 2016, saying he would accept nothing less than £220,000 to settle the dispute. Subsequently the defendants increased their offer but the plaintiffs never came down below £200,000. This was unreasonable to the extent that indemnity costs should be ordered. 6. In response, Mr Gibbons asserted that he had originally agreed to mediation shortly before the decision of the Master but this had not progressed through no fault of the plaintiffs. He agreed that he had later refused to agree to mediation but this was because Hong Kong Foods had no income or assets and he was unable as an individual to contribute to half the mediator's fees of some £6,000. It was not therefore a question of refusal to mediate, but more a question of being unable to finance mediation. 7. As to breaches of Court orders, he said that this was due to his fragile health and to the lack of finance as a result of which he had not been able to employ an advocate. 8. As to the striking off of Hong Kong Foods, he considered that this was not in itself detrimental to the defendants. Mr Thirkell had been made aware at an early stage in the proceedings that Hong Kong Foods had no funds. Furthermore the advocates for the defendants could always have checked on the status of the company. In addition the company could always be resurrected simply by payment of the outstanding annual returns and this would put any creditors of the company (including the defendants) back into the situation which they would have been had the company not been struck off. Decision 9. The principles in relation to indemnity costs are well established. A convenient summary is to be found in the decision of the Court of Appeal in *C v P-S*

[2010] JLR 645 where Beloff JA said this at para 11:- "... we do not accept that it is appropriate to impose such a restrictive approach on the discretion of the court to make an award of costs on the indemnity basis. The question will always be - is there something in the conduct of the action by one of the parties or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs, recognising there will usually be some degree of unreasonableness? We do not consider that there is a need for the claiming party to show a lack of moral probity or conduct deserving of moral condemnation, or malicious or vexatious conduct." 10. The Court of Appeal specifically approved the observation of Page, Commissioner in *Pell Frischmann Engineering Limited v Bow Valley Iran Limited*

[2007] JLR 479 where the Commissioner said at para 25:- "25. At the risk of over simplifying matters, the result of these English authorities may be said to be this: that the circumstances in which an award of indemnity costs may, as a matter of discretion, be ordered are less restrictive than they used to be; there must, *ex hypothesi*, still be something to take the case out of the ordinary, but the range of potentially relevant

considerations ... is considerable and need not involve any finding of a lack of moral probity; the test, in a word, is unreasonableness; the purpose of such an award is to achieve a fairer result for the party in whose favour it is made than would be the case if he were only able to recover costs on the standard basis; in the end, it is a question of what would be fair and reasonable in all the circumstances." 11. I have come very close to awarding costs on the indemnity basis but in the end have just been persuaded that it would not be right to do so. Referring to each of the grounds relied upon by Advocate Hall, I would comment as follows:- (i) In relation to the striking off of Hong Kong Foods, I entirely agree that this was highly unsatisfactory conduct on the part of Mr Gibbons and he most certainly should have informed the Court and the defendants that this had occurred. It was perfectly apparent that the entire case was being conducted by all other parties in the belief that the company still existed. Nevertheless, I have to ask myself whether this unsatisfactory conduct on his behalf has actually increased the costs or possibly led the defendants to take a stance which they would not otherwise have done. Advocate Hall very properly conceded that she was unable to point to any specific action or decision in this respect which might have been different had they known that Hong Kong Foods had ceased to exist. According to Mr Gibbons, he made it clear at all stages that Hong Kong Foods had no assets and accordingly it would not really have made any difference to the defendants whether they were being sued by and counterclaiming against a company which had no assets or one which had been struck off. (ii) I accept that the Master only just allowed the proceedings to continue because of earlier delays on the part of the plaintiffs. However, the fact is that he did allow the case to continue and of itself, I do not see why the delays by the plaintiffs should therefore lead to an award of indemnity costs. (iii) An unreasonable refusal to engage in mediation can certainly justify an award of costs on the indemnity basis, as the *Café de Lecq* case makes clear. However, Mr Gibbons has asserted that he could not afford the cost of the mediator. I have not been given any evidence to support this but it is consistent with what he said earlier about the fact that he has been forced to represent himself. If it was the genuine reason, I do not think it could be categorised as an unreasonable refusal to mediate and I am just persuaded to give him the benefit of the doubt. (iv) A repeated failure to comply with orders so that an opposing party is put to extra expense in having to bring the matter back to Court can undoubtedly be a reason for awarding indemnity costs. However, the Master has already addressed this aspect by making a number of awards of indemnity costs on an interim basis and accordingly I am not convinced it is necessary to make an overall costs order on the indemnity basis in order to deal with this extra expense. (v) As to the *Calderbank* offers, the fact that the plaintiffs refused offers which were better than the result which they achieved is of course a powerful argument in favour of awarding costs against them. But it does not necessarily lead to an award of indemnity costs unless the refusal can be categorised as acting unreasonably. I am not persuaded that the necessary level of unreasonable behaviour was reached by Mr Gibbons in this case. 12. In all the circumstances, I award costs in favour of both the defendants on the standard basis against Mr Gibbons and Hong Kong Foods jointly and severally save, of course, to the

extent that costs on the indemnity basis have already been ordered in favour of the defendants, which awards continue in force. 13. I also order that Mr Gibbons and Hong Kong Foods jointly and severally pay the costs incurred by the defendants in connection with the argument on costs on the standard basis. Whilst it is correct that the defendants have been unsuccessful in obtaining indemnity costs, I consider this to be an unusual case and that the fair outcome is that the plaintiffs should pay the costs of the costs application for the following reasons:- (i) A hearing on costs was required in any event because the plaintiffs failed to engage with the process either by agreeing to standard costs or by filing contentions or by attending the hearing. The defendants therefore had to incur costs in connection with the hearing in any event. (ii) The plaintiffs (through Mr Gibbons) brought the application for indemnity costs upon themselves as a result of their conduct. In the light of their conduct as summarised at paragraph 5 above, it would have been extremely surprising if any defendant had not applied for indemnity costs. In the circumstances, justice requires that the plaintiffs should be responsible for the costs incurred as a result. Authorities Hong Kong Foods Ltd and Gibbons-v-Robin Hood Curry and Thirkell

[2017] JRC 082 . Re Elgindata Limited (No. 2) [1993] 1 All ER 232. Watkins v Egglshaw

[2002] JLR 1 . Hong Kong Foods and Another

[2014] JRC 187 . Café de Lecq Limited v R A Rossborough (Insurance Brokers) Limited

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