

JERSEY / JUDGMENT

I -v- J [2016] JRC 162 (12 September 2016)

[2016] JRC 162

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

judgment

the deputy bailiff:

Introduction

1. By its judgment of 11 th July, 2016, this Court found in favour of the Plaintiff and against the Defendant and awarded the Plaintiff the sum that she had claimed, £50,000, with interest, dating from June 2011 until the date of payment at the Court rate. 2. This judgment deals with the question of costs both of the proceedings in general and the costs of a separate application brought by the Plaintiff to amend her Order of Justice ("the amendment application"). The Court refused leave to amend the proceedings and set out its reasons for doing so in its judgment of 2 nd October, 2015, leaving the costs of that application over for determination at the same time as the costs of the main proceedings. The Law 3. There is no dispute as to the law that is applicable. The award of costs involves the exercise of my discretion pursuant to Article 2(1) of the Civil Proceedings (Jersey) Law 1956 which is in the following terms:- "Subject to the provisions of this part and to rules of court made under the Royal Court (Jersey) Law 1948, the costs of and incidental to all proceedings in the Royal Court shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid." 4. In terms of the Court's overall approach to the award of costs, I can do little better than quote from the judgment of the Court of Appeal in *Flynn v Reid*

[2012] JCA 169 where the Court, at paragraph 13, states:- "13. In *Watkins and another v- Egglshaw and four others*

[2002] JLR 1 ("*Watkins*") Commissioner Page set out the principles which, in his view, ought to guide the Court in the exercise of its discretion when considering the issue of costs:- "7. The principles that should guide the court in the exercise of its discretion in this area appear to me, therefore, to be as follows, stating them as shortly and simply as possible: (a) The court's overriding objective in considering costs is, as in everything else, to do justice between the parties. (b) In many cases, that objective will be fulfilled by making an award of costs in favour of the "winning" party, where a "winner" is readily apparent. In any event, the "follow the event" rule can still be a useful starting point. (c) It is a mistake,

however, to strain overmuch to try to label one party as the "winner" and one is the "loser" when the complexity or other circumstances of the litigation do not readily lend themselves to analysis in these terms. (d) The discretion as laid down in art. 2 of the Civil Proceedings (Jersey) Law 1956 is a wide one and ought not to be treated as fettered by any particular supposed rule or practice, other than that the discretion should be exercised judicially and broadly in accordance with the guiding principles referred to in *In re Elgindata* (No. 2) and *A. E. I. -v- Phonographic Performance*. (e) It is, accordingly, open to the court to have regard to any and all considerations that may have any bearing on the overriding objective of doing justice. Its task is to take an overview of the case as a whole (*Bank of Credit & Commerce Intl. -v- Ali* (No. 4), per Lightman, J). The new Civil Procedure Rules governing civil litigation in the English courts provide that the court "must have regard to all the circumstances" and then go on to spell out certain matters that such circumstances include, the "conduct of all the parties" being one and "whether a party has succeeded on part of his case, even if he has not been wholly successful" another (Civil Procedure Rules, para. 44.3(4)). To a large extent, however, the particular matters mentioned do no more than state the obvious and it is unnecessary to import them verbatim, in any formal way, into the practice of the Royal Court. (f) It is implicit in this that, even though a party would otherwise be regarded as having been "successful", justice may require that costs should not automatically follow the event. 8. Among the factors to which a court may have regard, two in particular should be mentioned at this point. The first is conveniently expressed in the passage of the judgment of Judge, L. J. in *Ford -v- G. K. R. Construction Ltd.* (with which Lord Woolf, M. R. and Pill, L. J. agreed), in which he said ([2000] 1 W. L. R. 1400): "Civil litigation is now developing into a system designed to enable the parties involved to know where they stand in reality at the earliest possible stage, and at the lowest practicable cost, so that they may make informed decisions about their prospects and the sensible conduct of their cases. Among other factors the judge exercising his discretion about costs should consider is whether one side or the other has, or has not, conducted litigation with those principles in mind." After referring to the trial judge's reasons for making the order, he continued (*ibid.*, at 1402): "Indeed his judgment has served to underline the importance, rightly and increasingly, to be attached to civil litigation being conducted openly between the parties with the real issues between them efficiently and quickly identified and investigated.....". The case in question was one in which the trial judge had, quite properly in the opinion of the English Court of Appeal, awarded a successful plaintiff the entirety of her costs notwithstanding that she had failed to beat the payment in, but the principle was plainly intended to be of more general application. 9. Secondly, it may also be appropriate for a court to have regard to the fact (if such be the case) that a defendant has to a greater or lesser extent brought the action on his own head. Authority for the proposition that this can be a legitimate factor to take into account is to be found in a clutch of decisions of the English Court of Appeal in the late nineteenth and early twentieth centuries which include, among others: *Angus -v- Clifford*, *Bostock -v- Ramsey Urban Council* and *Ritter -v- Godfrey* (8). In each of these cases the court recognised that, in exercising a discretion in relation to

costs, a court was not confined to looking at the conduct of the parties during the course of the litigation itself but was entitled to have regard also to the earlier circumstances. Although it is now necessary to treat older authorities on costs with caution, the general point made in those cases is, in my view, still a perfectly valid one. A relatively recent application of the point can, for example, be found in the decision of the English Court of Appeal in *Walker -v- Daniels* (11), in which the successful appellants were refused their costs because, in the words of Lord Woolf, M. R., they had "brought the appeal on themselves as a result of the way the matter was conducted in the court below". Such an approach in civil cases would also be broadly consistent with that of the Royal Court in criminal proceedings: *Romeril -v- Att. Gen.* He referred again to these principles in *Pell Frischmann Engineering Limited -v Bow Valley Iran Limited*

[2007] JLR 479 ("*Pell Frischmann*"). I take this opportunity in the Court of Appeal to endorse these observations." 5. Further, in considering an argument that a party, whilst successful overall, did not succeed on certain issues, the Court said, at paragraph 27, this:- "27. A party's lack of success on some issues entitles a court to make a deduction but does not oblige it to do so. The Deputy Bailiff recognised that the evidence relied on was common to all issues - "much the same on the grounds" - but while he stated there was a significant increase in the length or cost of the proceedings "... attributable to the research, preparation and argument upon those grounds", in his later observations he also noted that the Court was "faced with novel claims of law" and that the arguments advanced by the Appellant, both those that succeeded and those that did not, were not separate, but rather different ways of addressing the same central question - what claim in respect of the property did the Appellant have? *Contrast Olcott -v- Mark Amy Ltd*

[1998] JLR 62 where 10 out of 11 days were spent on issues which the party failed, from whose award of costs no discount was made, and which this Court identified as discrete from that on which alone that party succeeded, observing that it was correct in such circumstances to make no discount from the award. In my view therefore no deduction is warranted." 6. With those principles in mind I therefore turn to consider the arguments of the parties. The case before the Court 7. There is no dispute between the parties that, in this case, there is a clear overall winner. The Plaintiff sought relief which comprised in its entirety the payment to her by the Defendant of £50,000 and that is what she achieved. Accordingly she is the clear winner. 8. It is convenient at this point, however, to make certain observations about the nature of the claim. The main thrust of the Plaintiff's claim was to the effect that she was with the Defendant an equal beneficial owner of a company through which the Defendant's garage business was conducted and which owned the home which she shared with the Defendant. Her case, in essence, was that it was all agreed between herself and the Defendant that the business would be an equal partnership and that she would share in that partnership. She pointed to the fact that she held 50% of the shares in the company as evidence in support of her claim. When the relationship between the Plaintiff and the Defendant came to an end there were negotiations between them as a result of which the Plaintiff agreed to take a significantly

reduced figure, namely £50,000 in return for her share in the company and her beneficial interest in the company in general. She identified the contribution that she had made to the business but claimed that her contribution to the business overall was primarily her contribution to family life and her responsibility for looking after the children. In addition to her primary claim, the Plaintiff also set out an alternative claim for setting aside the transfer of a share that she transferred to the Defendant on the grounds of mistake or misrepresentation. 9. The Defendant for his part denied that the Plaintiff had a 50% interest in the company and maintained that she held her share as his nominee. He pointed to a copy of a nominee agreement, the original having been lost, which apparently had the Plaintiff's signature on it and was witnessed by an accountant, Mr Sully. He denied that the payment of £50,000, or any other sum, had ever been agreed between himself and the Plaintiff. 10. The Plaintiff disputed her signature on the copy nominee agreement and as a result, some not insignificant part of the hearing dealt with the evidence from handwriting experts and the evidence from Mr Sully as to whether the agreement had been signed and from other witnesses tendered by the Defendant to give evidence as to her role within the company. 11. In its judgment the Court found, on a balance of probabilities, that the Plaintiff did not have an agreement with the Defendant that she would beneficially own 50% of the company and she did not do so. She held her share as the Defendant's nominee and her signature on the nominee agreement was genuine. The Court formed the view that she had forgotten that she had signed it. 12. The Court went on to find, however, that there was an agreement nonetheless between the Plaintiff and the Defendant that the Defendant would pay her £50,000 and ultimately her claim to be entitled in contract to that sum was vindicated. 13. During the course of the proceedings, shortly before the trial, the Plaintiff applied to amend her Order of Justice by adding an additional cause of action seeking the return of certain valuable personal possessions from the Defendant. The Court declined to allow her to amend her Order of Justice to include this claim for reasons set out in the judgment referred to above. The Plaintiff's submissions 14. The Plaintiff argues firstly that there is a clear winner and that this is not a case where justice requires that the cost should not automatically follow the event. Although the Plaintiff had not been successful in her claim for direct interest in the business, she had nonetheless been successful in her claim in contract for the sum that she had always claimed. The witnesses brought forward by the Defendant were largely irrelevant, even to her main claim, because they could not have known what had been privately agreed between the Plaintiff and the Defendant. The matter of the nominee agreement had been introduced by the Defendant and therefore it had been perfectly proper for the Plaintiff to have resisted it. 15. Further, and importantly, there had been Calderbank offers which the Plaintiff had comfortably beaten. This is not a case where the Court need depart from the starting point that costs should follow the event and there is no evidence that the Plaintiff conducted her litigation either unreasonably or improperly. Although she was unsuccessful on the point relating to her signature on the nominee agreement, it was not unreasonable for her to explore and pursue that point. 16. On the question of her failed application to amend her Order of Justice the Plaintiff says that the

Defendant brought the matter upon himself but in any event the costs were not substantial and the hearing took place during pre-trial review. The submissions of the Defendant 17. The Defendant, for his part, says that the Court should have regard to the fact that the Plaintiff was unsuccessful in her claim to be a beneficial owner of the business and to hold the shares beneficially. It is argued that a very substantial part of the preparatory work, including calling witnesses as to the Plaintiff role within the business and in support of the nominee agreement related to the Plaintiff's claim to be entitled to 50% of the business. Had she not made that allegation then much of that preparatory work would be unnecessary. 18. The Calderbank offers that were made would have been successful but for the Plaintiff's lawyer's insistence that their costs be paid in a certain sum that was unacceptable to the Defendant. The Defendant required the Plaintiff's lawyer's costs to be capped with those of the Defendant's lawyers. 19. As to the application to amend, the Defendant did not accept that he had brought it on himself. Notwithstanding what correspondence may have existed between the Plaintiff and the Defendant his position was that he was perfectly prepared to return any items that belonged to the Plaintiff if he could find them but he could not. There had been correspondence about the claim for some time but the application to amend was made late. Decision 20. A number of cases were put before me in which the Court had exercised its discretion by apportioning costs or by allowing only the recovery of a certain percentage of costs. Those cases turned, to my mind, on their own facts and are not indicative of what I should do but merely what I could do in order to achieve the overall purpose of justice between the parties. 21. In my judgment it is neither helpful nor fruitful to overcomplicate matters by a detailed analysis of how the issues had been argued, how much time had been spent on each issue, and in respect of which factual allegation a party had succeeded or failed and thereafter a determination as to how much the time with the Court was taken up with those allegations. I do not believe that such an analysis would be useful in many cases. 22. In my view a case such as this, which ultimately is a claim in contract for monetary entitlement, should be looked at in the round unless there are persuasive reasons why a more detailed analysis should be carried out. 23. I do not doubt that some portion of the time spent by the Court was spent dealing with specific factual allegations upon which the Plaintiff did not ultimately succeed but essentially she succeeded in the main thrust of her case which was establishing that there was a contract between her and the Defendant for the payment of £50,000. 24. Furthermore, and in my view significantly, there were Calderbank offers made by the Defendant which were comfortably beaten by the Plaintiff. In fact those Calderbank offers may be seen as quite low given that they appeared to include a payment of costs for which the Defendant was already liable by an order of the Royal Court. 25. I did not need to go into the detail of the Calderbank offers nor whether an offer would have been accepted but for an insistence of the payment of a certain sum by way of costs. I have no basis to take the view that that requirement was unreasonable or unmerited in the circumstances and nor does there appear to have been on the part of the Defendant an attempt to negotiate on that point. Even if those factors had been present, however, the simple fact is that the Plaintiff beat the best offer made by the Defendant. 26. In my view,

this is a matter in which costs should follow the event and accordingly I order that the costs of the Plaintiff of the main case should be paid by the Defendant to the Plaintiff on the standard basis to be taxed if not agreed. 27. On the matter of the application to amend, whilst it did take place as part of the pre-trial process, it seems to be something that I should view as a distinct matter. The costs of that application were left over to be resolved at this hearing but in my view this was a case in which an application was made very late in the day and was in part refused by the Court for that reason. Whilst I do not say that the Plaintiff was unreasonable to attempt to bring the application I see no reason why the Defendant should suffer the costs of that application and accordingly the amount payable by the Defendant to the Plaintiff by way of costs of the main proceedings should be reduced by a sum that reflects the costs that would be payable by the Plaintiff to the Defendant of and incidental to the unsuccessful application to amend upon the standard basis to be taxed if not agreed. Authorities Civil Proceedings (Jersey) Law 1956. Flynn v Reid

[2012] JCA 169 . Page Last Updated: 28 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2016/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/i-v-j-2016-jrc-162-12-september-2016>

Prepared on 23 October 2026 · Esheria