

JERSEY / JUDGMENT

MacFirbhisigh and Ching v CI Trustees and Executors & Ors

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Trust – reasons for ordering payment on account of costs in favour of the defendants.
[2016]JRC156 Royal Court (Samedi) 7 September 2016 Before : Advocate Matthew John Thompson, Master of the Royal Court Between Niall Iain MacFirbhisigh (as Curator of Barry Lionel Ching) First Plaintiff Barbara Mary Marvell Ching Second Plaintiff And C.I.Trustees and Executors Limited First Defendant And Steven Gidley Second Defendant And Gary Killmister Third Defendant And Kevin Manning Fourth Defendant Advocate J. Garrood for the Plaintiffs. Advocate C. J. Scholefield for the First and Third Defendants. CONTENTS OF THE JUDGMENT Paras 1.

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judgment

the master:

Introduction

1. This judgment represents my detailed written reasons for ordering a payment on account of costs in favour of the defendants.

Background

2. The plaintiffs' application arises out of an order for costs made by Commissioner Hunt in this matter reported at MacFirbhisigh and Ching v CI Trustees and Executors & Ors [2016] JRC 002A (the 'costs judgment') following the handing down of the substantive proceedings reported at MacFirbhisigh and Ching v CI Trustees and Others [2015] JRC 233 (the 'main judgment'). 3. In the costs judgment the defendants were awarded their costs on the indemnity basis. The act of court of 6th January, 2016, also stated:- "The award of such costs in the amount at which they are taxed pursuant to Rule 12/3 of the Royal Court Rules 2004, as amended, to be enforceable by the Viscount as a judgement debt without further order in

accordance with the provisions of that Rule.” 4. A copy of the act of court of 6th January, 2016, was delivered to the Public Registry for registration on 18th January, 2016. 5. On 1st April, 2016, the plaintiffs submitted its claim for costs for taxation in the sum of £406,927.99 plus disbursements of £58,917.79 totalling £465,845.78. 6. Objections were received from Carey Olsen for the plaintiffs by a letter dated 3rd May, 2015. 7. Due to the length of time the taxation process was going to take, by an email dated 20th June, 2016, Advocate Baxter sought a payment of £155,000 on account of costs being just under one third of the amount claimed. 8. By a letter of 29th June, 2016, Carey Olsen reply stated “We are instructed that our clients do not consent to any order providing for a payment on account of your clients’ costs. Further, you should note that the date hereof our clients are not possessed of sufficient liquid assets in order to comply with any order which might be made.” 9. In the same letter Advocate Garrood stated “...any such application should properly be made to the Royal Court.”

10. In an email dated 27th July, 2016, Advocate Garrood consented to the defendants’ application being heard before me rather than before the Royal Court. Parties’ Contentions
11. Advocate Scholefield indicated that there were three matters of principle I had to consider:-
(i) Should a successful party be paid; (ii) How much should a successful party be paid; and
(iii) How is an order of the court turned into cash?
12. He contended it was clear by reference to the decision of the Court of Appeal in *Crociani v Crociani* [2014] 1 JLR 503 that there was no basis not to pay the successful party an interim payment. The time for an appeal had long since passed. His clients were out of pocket and wanted to recover costs they had paid to his firm, his clients having successfully defended the claim. At present, while costs had been ordered to be a judgment debt by reference to the act of the court dated 6th January, 2016, that debt was contingent upon the taxation process being completed. There was no debt until either taxation was completed or an interim payment ordered.
13. While the court had to take a cautious approach, where indemnity costs are being ordered only around 10% of costs claimed would be disallowed on taxation and all he was asking for was around 50%. Therefore there was no danger of any over payment. Without any order, there was a risk of injustice to his clients because of the length of time a detailed taxation would inevitably take. It did not matter whether the interim payment was sought from the trial judge or at a later date. The principle in the case of *Crociani* was clear.
14. He accepted that a payment on account could have been asked for when submissions were made on costs, but that did not prevent making an order at this stage because the principle still applied that a successful party should not be kept out its money.
15. Advocate Garrood firstly contended that I could not vary the order made by Commissioner Hunt on 6th January,

2016. Commissioner Hunt had ordered that taxation should take place and it was not open to me to reopen that decision. The application could have been made at trial but was not. Commissioner Hunt as the trial judge would have been best placed to assess what an appropriate interim payment would be and to take a cautious approach. I was not in the same position because I had not been present at trial. I could not therefore form a realistic view as to what an interim payment should be or what was likely to be recoverable on a taxation and what is not. Any order would be in effect guesswork.
16. Even if the matter had been referred back to Commissioner Hunt he was now not in a position to assess a figure because of the time that had since passed. The matter therefore had to proceed to taxation.
17. Advocate Garrood also explained that the costs order could not be met because there were insufficient assets. By reference to the third affidavit of Mr MacFirbhisigh I was informed that the main asset was a property which was going to be sold against which there were already secured charges for loans were borrowed by the plaintiffs for legal funding in the round sum of £230,000. His firm which had been appointed on legal aid was also significantly out of pocket. There was nothing therefore to pay the defendants once existing secured creditors had been paid. Decision
18. I start by reference to whether or not I have power to order an interim payment. The principle of ordering payments on account for costs was considered in *Crociani v Crociani* [2014] 1 JLR 503 at paragraphs 16 to 20 as follows:- “16 In my view, the achievement of justice, to which all exercises of discretion under procedural rules aspire, would usually require that a party who is, pursuant to a court order, entitled to his costs, should be paid on account a percentage of the amount he is likely to recover on taxation calculated on a conservative basis to avoid any real risk of overpayment. [Emphasis added] 17 This conclusion is consistent with and supported by the jurisprudence in England and Wales at a time before the CPR contained its present presumption. 18 In *Mars UK Ltd. v. Teknowledge Ltd.* (8)-the first relevant decision-Jacob, J. identified the principle in this way ([1999] 2 Costs L.R. at 46–47): “I now turn to the second issue, whether or not there should be an order for interim payment. The first thing to do is to consider what the general rule should be, interim payment or not. There is no guidance given in the Rules other than that the court may order a payment on account. There is no guidance in the Practice Direction. So I approach the matter as a question of principle. Where a party has won and has got an order for costs the only reason that he does not get the money straightaway is because of the need for a detailed assessment. Nobody knows how much it should be. If the detailed assessment were carried out instantly he would get the order instantly. So the successful party is entitled to the money. In principle he ought to get it as soon as possible. It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount. A payment of some lesser amount which he will almost certainly collect is a closer approximation to justice. So I hold that where a party is successful the court should on a rough and ready basis also normally order an amount to be paid on account, the amount

being a lesser sum than the likely full amount.” [Emphasis added] His analysis is in effect adopted in the contemporary version of the CPR. 19 A similar practice has been accepted as appropriate in Jersey with the court exercising its discretion to order such payments (Centre Trustees (C.I.) Ltd.

- v. van Rooyen (3) ([2009]JRC133, at paras. 5, 6 and 9); Café de Lecq Ltd. v. R.A. Rossborough (Ins. Brokers) Ltd. (2) (2012 (2) JLR 155, at paras. 27–28, per Page, Commr.); Dalemont Ltd. v. Senatorov (5) ([2013]JRC209, at para. 27, per Bailhache, Deputy Bailiff); Marange Invs. (Pty.) Ltd. v. La Générale des Carrières et des Mines SARL (7) ([2013] JRC 119A, at paras. 51 and 54, per Clyde-Smith, Commr.); Crociani v. Crociani ([2013] JRC 250, at paras. 24–27, per Clyde-Smith, Commr.). Indeed, the statement of the underlying principle by Jacob, J. has been cited with approval (e.g. Centre Trustees ([2009] JRC 133, at para. 6) and Marange ([2013] JRC 119A, at para. 51)). 20 I accept that-
- (i) the fons et origo of those authorities is Centre Trustees; (ii) that decision, however, proceeded on the assumption that the Royal Court had an inherent jurisdiction to make such an order: the Commissioner stated ([2009] JRC 133, at para. 3) that “all three counsel accepted that the Court had an inherent jurisdiction” and so the point was not argued; and (iii) none of these authorities is binding on this court. Nonetheless, I note that three experienced first instance judges found nothing anomalous in determining both that the court enjoyed the power to order an interim costs payment and that normally it should do so, and, in any event, for reasons already articulated I would endorse their approach.”
19. I refer in particular to those parts of paragraphs 18 where the Court of Appeal cited the decision of Mars UK Limited v Teknowledge Limited [1999] 2 Costs L.R. 44 cited which I have emphasised. This is the approach I must follow.
20. I agree with Advocate Garrood that ordinarily such an application should be made to the trial judge and it will be the trial judge who is best placed to make an assessment of what payment on account should be made on a conservative basis to avoid any real risk of overpayment. The trial judge will have sat through the trial, will know what the issues were at the heart of the trial and how much work was required during the trial to argue those issues.
21. Equally, there may be reasons where a party is not ready to make the application even though it has a costs order in its favour (whether for standard or indemnity costs). That party may wish to wait and see whether or not there is an appeal. It may wish to still negotiate with the other party notwithstanding a successful judgment in its favour. If that is the position, but a party is considering seeking a payment on account of costs at a later date, it should inform the trial judge of such a possibility when the costs order is made, reserving a right to come back to the trial judge should it be necessary to do so.
22. The question I have to decide however is whether such practice prevents me from making an order as contended for by Advocate Garrood. In my judgment such practice it does not. The principle in Crociani at paragraph 16 that usually requires an order does not stop when

the costs order is made. A party is suffering ongoing injustice where it is being kept out of costs that it has paid to its own lawyer. The principle of a successful party receiving his money as soon as possible therefore justifies a payment on account of costs being made after the court has made a costs order in principle. While such orders are ordinarily made at the same time, the principle also allows an order to be made at a later date.

23. I have also reached the conclusion that the order made by Commissioner Hunt made on 6th January, 2016, does not prevent an order of a payment on account at a later date. The order of 6th January, 2016, simply sets in play the taxation process. It does not affect the principle set out in *Crociani* to which I have already referred. The order for costs does not therefore limit or prevent such an order being made. Any order of a payment on account is therefore an additional or supplemental order to the order for taxation of costs. It is not prevented by an order for taxation; nor is it inconsistent with such an order.
24. In relation to the criticism that I am not the trial judge, I am familiar with this matter having given two earlier judgments on interlocutory issues. In addition as Master, I deal with security for costs applications which involve assessment of costs on a rough and ready basis and assess costs summarily on some interlocutory applications. Furthermore, I consider I am entitled to draw on my past experience of assessing and estimating costs as an Advocate in private practice before becoming Master. All these matters mean that I have concluded that I possess sufficient relevant experience to form a view in this case despite not having been present at trial. If I had felt any doubt that I could not form a fair view, I would have referred the application to the trial judge who would have been able to form a view.
25. Finally, I was not persuaded at all that the passage of time or any delay in applying prevented a payment on account from being made either by the trial judge or by me because neither of us could make a fair assessment. To allow such an argument to have prevailed would have produced injustice as being contrary to the principle of ordering a payment on account and ignores the experience of judges in making costs orders.
26. As to whether I should make such an order, having decided that I have jurisdiction to do so, I am satisfied that in this case I should make such an order.
27. Firstly, it is clear that the parties were communicating about costs and the defendants were formulating that claim for costs after Commissioner Hunt's costs judgment. There is no unwarranted delay that has occurred which would justify refusing to make a payment on account at this stage.
28. Secondly, if I did not make such an order the defendants would be waiting for some further time for payment.

29. Thirdly, at present although the first and third defendants have registered the costs order in a judgment, there is no certain sum identified to allow the first to third defendants to claim as a secured creditor. Yet the plaintiffs' property is likely to be sold shortly. Without an order for a payment on account, monies borrowed towards payment of the plaintiffs' legal fees will be repaid in full with the defendants recovering nothing, if the property was sold before the taxation process was completed. I do not regard such a possible outcome as fair.
30. As far as the amount of a payment on account is concerned, the amount of costs claimed is £465,000 made up of £406,000 of time costs and the remainder in disbursements. At the hearing I was informed that the plaintiffs' legal costs were in the region of £400,000. Subsequent to the hearing before producing these detailed written reasons I was informed by the defendants based on curatorship accounts that the plaintiffs' legal costs were at least £620,000. This does not surprise me as generally from my experience the costs of a plaintiff at trial more often than not are higher than those of a defendant because of the obligations on a plaintiff to ensure the right material is brought before the court and to prove its case. This information has confirmed the decision I reached at the hearing that a payment on account of £230,000 representing 50% of the profit costs and 50% of the disbursements was not an unfair figure.
31. I arrived at this figure because clearly some of the costs of the defendants on an indemnity basis will not be recovered by reference to the objections put forward by the plaintiffs. This is firstly due to the number of fee earners involved where inevitably there will be some duplication which costs will not be recovered on an indemnity basis. Secondly, there is also a judgment for the Assistant Judicial Greffier to make on a taxation about what time spent is irrecoverable supervision of a more junior lawyer and what time is part of the work necessarily or reasonably required to prepare for a case. The same analysis applies to legal research. However, a reduction of 50% of the amount claimed in my judgment still leaves more than sufficient margin for any real risk of overpayment to be avoided.
32. The other reason for ordering a payment on account of £230,000 that it places the defendants in the same position as the lender of funds to the plaintiffs for legal fees. Both will have the benefit of security for the same amount which means that if the property is sold their recovery will be the same, even if it is not a full recovery. In this case this represents a just outcome between the parties.
33. In the course of argument the question of interest was also raised by me and whether I could address the delay in making the application by disallowing interest. However, I have not taken this approach because I am satisfied that no inappropriate delay has occurred. Some inappropriate conduct would be required to deprive a defendant of interest to which they are otherwise entitled where a costs order had been made in their favour.

34. For all these reasons I therefore ordered that the defendants should forthwith receive a payment on account in the sum of £230,000. Whether they will do so will depend when the property is sold. My order simply allows the first to third defendants to participate as a secured creditor in any sale.
35. I also ordered the defendants to recover the costs of and occasioned by the present application on the standard basis such costs to be summarily assessed. Authorities MacFirbhisigh and Ching v CI Trustees and Executors & Ors [2016] JRC 002A. MacFirbhisigh and Ching v CI Trustees and Others [2015] JRC 233. Crociani v Crociani [2014] (1) JLR 503. Mars UK Limited v Teknowledge Limited [1999] 2 Costs L.R. 44.

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