

JERSEY / JUDGMENT

ROK Construction Limited v HJL Property Holdings Limited

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Costs - decision in respect of the costs of a summons brought by the plaintiff seeking to strike out the defendant's counterclaim or in the alternative seeking summary judgment in relation to its counterclaim [2018]JRC101 Royal Court (Samedi) 11 June 2018 Before : Advocate Matthew John Thompson, Master of the Royal Court Between ROK Construction Limited Plaintiff And HJL Property Holdings Limited Defendant Advocate C. Hall for the Plaintiff. Advocate D. S. Steenson for the Defendant. CONTENTS Paras 1.

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judgment

the MASTER: 1. This judgment represents my decision in respect of the costs of a summons brought by the plaintiff seeking to strike out the defendant's counterclaim or in the alternative seeking summary judgment in relation to its counterclaim.

Background

2. The background to the dispute concerns a site known as Le Jardin de la Rocque, La Mont de la Rocque, St Brelade ("the Le Jardin site"). Below the Jardin site is a separate site on which Hotel La Tour Limited ("HLT") had formally operate a hotel, ("the Hotel site"). The Hotel site at all material times was owned by Angel Fish Limited ("AFL"). It was common ground that each of the defendant, AFL and HLT were all owned by Mr Harry Lingard. 3. In February 2016 the plaintiff entered into a building works contract with AFL in relation to the Hotel site. 4. In February/March 2016 discussions took place between the plaintiff and the defendant in relation to work to be carried out by the plaintiff at the Le Jardin site. 5. On 11th

March, 2016 a rock fall occurred at the Hotel site. In late April 2016 AFL suggested that the plaintiff might be liable for the rock fall. 6. By an exchange of emails between 1st and 3rd August, 2016 the plaintiff was contracted by the defendant to carry out certain works at the Le Jardin site. 7. In September 2016, October 2016 and January 2017, valuations were sent to the defendant for works the plaintiff says had been carried out at the Jardin site. These valuations were said by the plaintiff to arrive out of the agreement reached between the plaintiff and the defendant in relation to works to be carried out by the plaintiff at the Le Jardin site. No monies have been paid by the defendant to the plaintiff in respect of the sums claimed by reference to the valuations. 8. A summons was therefore served by the plaintiff on the defendant on 4th September, 2017, with the matter being placed on the pending list. The plaintiff filed its particulars of claim on 6th October, 2017 and the defendant filed its answer and counterclaim on 1st December, 2017. While I refer in more detail to the answer below, in summary the answer disputed that part of the sums claimed were due and put the plaintiff to proof of the amount of its claims for work carried out as set out in the valuations. The counterclaim arose out of the rock fall referred to above and sought to set off losses caused by the rock fall against the plaintiff's claim. As what precisely was raised by the counterclaim formed part of the submissions of both counsel in relation to the question of costs, I refer in more detail later in this judgment to the defendant's pleading and the issues raised by it. A reply and answer to the counterclaim was filed on 2nd February, 2018. 9. On 28th February, 2017 the matter came before me for directions. The main issue explored at this hearing concerned a request for information filed on 29th January, 2018, by the plaintiff pursuant to Rule 6/15 of the Royal Court Rules 2004, as amended.

10. On 28th February, 2018 I ordered the defendant to provide its responses to the request for further information of the answer and counterclaim by 5:00 pm Friday, 9th March, 2018. This order only required the defendant to answer those requests it was willing to answer voluntarily by 9th March. I did not make an order that the defendant had to respond. However in the course of the hearing the detail of the requests made by the plaintiff were explored without any definitive ruling as part of deciding how long the defendant should have to decide how to respond to the requests. Accordingly, I gave informal indications about which of the requests I felt should be answered. In looking at the requests, the hearing also explored the nature of the defendant's counterclaim. It was clear from the counterclaim that there was a significant dispute concerning the Hotel site between Mr Lingard, AFL and/or HLT and the plaintiff in relation to its assertion that the plaintiff was responsible for the rock fall, noting that such a dispute also involved the consulting engineer and the architectural and design consultants. I therefore indicated that I regarded any counterclaim by the defendant against the plaintiff in respect of the Le Jardin site as being ancillary to any dispute between the plaintiff on the one hand and Mr Lingard/AFL/HLT on the other about the Hotel site which pointed to any counterclaim by the defendant in respect of losses claimed for the Le Jardin site being heard separately from the claim. This was not a ruling on my part but only a preliminary indication to assist the parties based on what I had read.

11. On 19th March, 2018, the defendant provided answers to certain of the requests for information. Further answers relating to the requests for information relating to paragraph 27 of the defendant's answer and counterclaim were ultimately provided by the defendant on 19th April, 2018.
12. On 5th April, 2018 Advocate Hall for the plaintiff wrote to Advocate Steenson for the defendant indicating that the defendant's counterclaim should be heard separately from the plaintiff's claim and stating that unless the counterclaim was abandoned a strike out summons would be issued.
13. On 13th April, 2018 Advocate Steenson replied indicating that he was taking instructions concerning whether the counterclaim should be dealt with in separate proceedings to the claim and that he would respond by Friday, 20th April, 2018. No response was provided by the defendant by 20th April, 2018.
14. On 25th April, 2018 the plaintiff applied for a date fix hearing to fix a date for the present summons which hearing was fixed for 22nd May, 2018.
15. In accordance with directions given by me relating to filing of evidence and skeleton arguments, the plaintiff filed its skeleton argument on 15th May, 2018. This followed an affidavit being filed on behalf of the plaintiff on 8th May, 2018, from Clarence Nicholas Michel an employee of the plaintiff.
16. The defendant's skeleton argument was filed on Friday, 18th May, 2018. Significantly, at paragraph 13 of its skeleton, the defendant stated:- "Although outside the ambit of the plaintiff's summons, the plaintiff (sic the defendant) is prepared, for pragmatic to apply reasons, to abandon its claim for set off and it will not press for the claim and counterclaim to be tried together".
17. On the final page of its skeleton argument the defendant also stated:- "Realistically, the defendant recognises that there is an obvious attraction in determining the plaintiff's claim in isolation from the other issues. The counterclaim would then be stayed, to be resurrected at the appropriate time in relation to litigation concerning the Hotel La Tour site".
18. At the hearing Advocate Steenson confirmed that, once adjudication of the plaintiff's claim had taken place, any sums found to be due would be payable by the defendant and that any counterclaim would be heard separately and in conjunction with any claim brought by Mr Lingard, AFL or HLTL against the plaintiff in respect of the Hotel site. Any claim in relation to the Hotel site might also include other defendants and in particular the consulting engineer and the architect.

19. In light of this clarification Advocate Hall accepted the concession and her instructions therefore were accordingly not to pursue the relief set out in her summons. This led to the sole issue between the parties as being what costs orders I should make in respect of the summons. In light of the concession and its acceptance, Advocate Hall asked for her costs on the standard basis. Advocate Steenson asked for his costs on the indemnity basis.

Submissions

20. Advocate Hall contended that her application had been successful. The real concern was that the hearing of any counterclaim should be separate from a hearing of the plaintiff's claim. The concession ultimately reflected what the plaintiff was seeking, as has been set out in her email of 5th April, 2018, referred to above, the affidavit of Mr Michel and her skeleton argument. She referred me in particular to paragraph 15 of Mr Michel's affidavit which stated: "Furthermore, I can confirm that at no time was it agreed or even stated that the payment for the works carried out at the Site would be subject to any set-off. Considering the Contract was entered into after the Rockslide had occurred we would not have agreed to such a term because we vehemently deny any responsibility for the Rockslide. We therefore entered into the Contract in good faith and expected payment for our work on conclusion of the agreed works."
21. At paragraph 34 of the plaintiff's skeleton Advocate Hall argued, by reference to the affidavit of Mr Michel, that:- "... it was clearly not the intention of the parties to allow any set-off and it would be inequitable to do so."
22. Advocate Steenson argued forcefully for his costs because what was sought by the summons was a strike out or alternatively summary judgment which applications were being abandoned. The concession his client had made was separate from and did not arise out of the summons. The summons also did not ask, as it could have done, for the counterclaim to be severed from the claim and heard separately. By conceding that the counterclaim should be heard separately, this was not a concession that the counterclaim should be struck out. The reason for the concession was expediency, as his client recognised that the counterclaim raised more complex issues and also related to what happened on the Hotel site. Pragmatically these issues should be dealt with separately from the plaintiff's claim in the present action.
23. As far as the plaintiff's summons was concerned, this was bound to fail because the defendant always had a right to make a claim in negligence against the plaintiff. The defendant therefore had a reasonable cause of action as the owner of the Le Jardin site against the plaintiff, not on the basis of the plaintiff being the retained contractor for the Le Jardin site, but on the basis of the plaintiff being the retained contractor on the Hotel site who had caused damage to the Le Jardin site because its actions allegedly caused the rock fall.

24. Where the plaintiff erred was to confuse the contractual relationship between the plaintiff, as the contractor retained on the Hotel site by AFL/HLT, from a separate claim in tort against the plaintiff that the defendant was entitled to bring, as owner of an adjoining site. The defendant's counterclaim was always clear that the plaintiff owed a duty of care in tort to the defendant as owner of the Le Jardin site (paragraph 25 of the answer and counterclaim). There was no claim in the answer and counterclaim brought by AFL or HLT. The reference to what had happened on the Hotel site and the relationship between the plaintiff and AFL/HLT was background only.
25. The defendant also had a right to bring a claim in voisinage or nuisance. Even if the latter claims were arguable, such claims, because they were arguable in law, were also ones that should not be struck out or should not lead to a summary judgment.
26. The defendant had not responded to the correspondence about a concession because by that stage the strike out summons had been issued.
27. Advocate Steenson accepted that the loss arising from the counterclaim had not been quantified. This was because it was a complex task to separate out losses in relation to the Le Jardin site from losses arising in relation to the Hotel site. The concession had not been made earlier because of the complexities of analysis in relation to loss which required input from experts.
28. Indemnity costs were asked for because the plaintiff had got the law fundamentally wrong in misunderstanding the nature of the counterclaim and had failed to appreciate that the defendant could always bring a claim in negligence. The strike out application was therefore based on a fundamentally flawed analysis, which was never going to prevail, and which therefore justified indemnity costs.
29. Advocate Hall in response started from the perspective of whether it was reasonable for the plaintiff to bring the application. The application was issued because there had been no response to the request to deal with the counterclaim separately and as part of any dispute in relation to the Hotel site.
30. In particular, the affidavit and her skeleton argument raised the issues that there was no right of set-off which was now conceded. The concession also only took place very late in the day when the defendant's skeleton argument was filed.
31. The defendant's counterclaim was complex and was very far from being ready to progress. This also pointed to separation of the claim from the defendant's counterclaim. Decision

32. The principles that should be considered when deciding what costs order to make were set out in the decision of Commissioner Page in *Watkins v Egglshaw* [2002] JLR 1 (approved in *Flynn v Reid* by the Court of Appeal at [2012] (2) JLR 226). At paragraph 7 of *Watkins* Commissioner Page stated as follows:- “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 as 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) (5) and *A.E.I. v. Phonographic Performance* (1).
 - (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) (3), 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.”
33. The passage in *Elgindata* set out at paragraph 7 *Watkins* was cited at paragraph 3 of *Watkins*. The relevant part is as follows:- “The principles are these.
- (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part

of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs."

34. In relation to the plaintiff, it is not therefore a question of whether or not Advocate Hall's application was reasonable. Rather, in deciding what costs order to make to do justice between the parties I also have to ask myself whether there is clearly a winning party. In considering this question, what the plaintiff asked for in its summons was to strike out the defendant's counterclaim. The relief sought in the summons, if it had been granted, would have prevented the defendant from bringing any counterclaim in any other proceedings, because the court would have ruled that no counterclaim could be brought. The primary application brought by the plaintiff was therefore to contend for a ruling that the court should not permit the defendant to bring a counterclaim at all.
35. In my judgment such an application was bound to fail because the defendant always had an arguable counterclaim in negligence against the plaintiff. That claim arose because of the defendant's ownership of the Le Jardin site and the plaintiff's works on the adjoining Hotel site. It was always going to be arguable that the plaintiff owed the defendant a duty of care for any works negligently carried out on the Hotel site which it is said caused damage to the le Jardin site. Resolution of whether or not a duty of care was owed and, if it was owed, whether any duty had been breached was always going to be a matter for trial. Pleading a counterclaim based on a duty of care being owed, breached and causing loss was never going to be a fanciful or improbable counterclaim capable of being struck out. In light of this conclusion, by reference to the remedy sought by the plaintiff in its summons, the plaintiff cannot be described as the winner because the primary relief sought in its summons would never have been granted. In such circumstances, it is not appropriate to make a costs order in favour of the plaintiff.
36. I mention also for the sake of completeness the alternative position advanced by the defendant that it had an arguable claim in Voisinage and Nuisance. I simply observe at this stage that such claims are more complex and might not necessarily be available to the defendant (see the discussion in the article Voisinage and Nuisance by Rebecca MacLeod Jersey & Guernsey Law Review – October 2009, page 274). Again my view is that, notwithstanding these difficulties, any resolution of them could only properly occur following a trial. Such allegations were not capable of being struck out or determined summarily.
37. Turning now to the position of the defendant, the defendant has made a significant concession. In the defendant's answer and counterclaim, the defendant pleaded a counterclaim and sought a stay of the plaintiff's claim pending resolution of claims in respect of the Hotel site. The defendant has now taken a very different position in that the defendant has now accepted that the plaintiff's claim in the present proceedings should be heard separately from any counterclaim the defendant might have against the plaintiff and that, if the plaintiff's claim is established, the plaintiff should then be paid for any monies

found to be due. The defendant has further accepted, albeit for reasons of pragmatism, that any counterclaim should be heard at the same time as any claim by Mr Lingard/AFL/HTL in respect of the rock fall at the Hotel site.

38. In my judgment, the concession on behalf of the defendant is significant. No one compelled the defendant to plead the counterclaim or to seek to stay determination of the plaintiff's claim until the counterclaim and any dispute relating to the Hotel site were determined. This counterclaim was a voluntary act on the part of the defendant. The defendant was further on notice since the previous hearing on 28th February, 2018, of the court's concern as to whether the counterclaim could be determined in these proceedings or whether it should be determined at the same time as any claims in respect of the Hotel site. While therefore the counterclaim has not been struck out and the defendant is free to pursue it in due course as part of other proceedings, the defendant has reversed its position in that it now no longer seeks to pursue its counterclaim or a stay in the present proceedings. This is despite having pursued such a counterclaim and asked for a stay since filing its answer to the particulars of claim on 1st December, 2017.
39. The defendant was further invited by the plaintiff to withdraw its counterclaim and indicated it would respond by 20th April, 2018. While the plaintiff used the word "abandon" in its email of 5th April, Advocate Steenson's reply of 13th April referred to this as "your query regarding the pursuit of our client's counterclaim in separate proceedings" and promised a response. This statement was before the present summons had been issued. However, the defendant did not respond and only made its position clear when it filed its skeleton argument on Friday, 18th May, 2018.
40. Furthermore, in my judgment, while I would not have struck out the counterclaim because the defendant has an arguable claim based on negligence, I would also not have allowed the counterclaim to proceed in the present proceedings. In my view the defendant was therefore correct to make the concession it did because there should only be one dispute in relation to what loss and damage was caused to the Hotel site and the Le Jardin site and who is responsible for it in respect of the rock fall.
41. The concession was correct because it is clear that a claim in respect of the Hotel site is at the heart of the dispute between Mr Lingard, AFL and HTL on the one hand and the plaintiff on the other. If the counterclaim in respect of the Le Jardin site had been allowed to continue in the present proceedings there would have been a real danger of inconsistent findings and overlap between the present proceedings and any proceedings in relation to the Hotel site (whether before the Royal Court or by way of arbitration). This can be seen from the present counterclaim itself, which pleads both the contractual duties owed by the plaintiff to AFL and HTL, and the beaches of those duties. This is more than pleading background circumstances. For the defendant to have established its counterclaim in negligence at trial, as pleaded in its counterclaim, would have required it to adduce evidence to prove to that the plaintiff was responsible for causing the rock fall on the Hotel site, and therefore as a consequence caused damage to the Le Jardin site. The defendant's pleading

also recognises that an apportionment of loss in respect of damage to the Hotel site and the Le Jardin site was required. Advocate Steenson fairly accepted at the hearing that such analysis was still being carried out. I referred to this also because it further indicates the difficulties that the defendant had in pursuing this counterclaim when it was clear that there was a much larger claim in respect of the Hotel site. The counterclaim in the present proceedings can therefore best be described as incidental to the main dispute relating to damage caused by the rock fall at the Hotel site.

42. Although the issue of staying the counterclaim was not expressly asked for by the plaintiff in its skeleton, it was an issue that was inevitably going to arise as a consequential order following on from a finding that the defendant had an arguable claim in negligence. The defendant was on notice that this issue was going to arise, both from concerns expressed by me at the hearing in February and from the plaintiff's correspondence, affidavit and skeleton argument.
43. The principles in *Watkins* allow me to have regard to any and all considerations that it may have any bearing on the overriding objective of doing justice and I have to take an overview of the case as a whole. The overview I have reached is that just, as it is not appropriate to make a costs order in the plaintiff's favour because its primary relief sought in its summons was never going to succeed, it is also not appropriate to make a costs order in the defendant's favour because the defendant conceded that it no longer wished to pursue its counterclaim in these proceedings or to seek a stay. Advocate Steenson argued for his client's costs because the plaintiff had "abandoned" the relief it was seeking in its summons. Equally however the defendant has "abandoned" pursuit of its counterclaim in the present proceedings and a stay, which it had previously maintained for 6 months. There will therefore no longer be a need for any party in the present claim to adduce evidence about the rock fall on the Hotel site and whether the plaintiff was responsible for the rock fall.
44. In conclusion, in exercising the discretion vested in me, I do not consider it appropriate to make any order in favour of any party. Therefore there will be no order as to costs in relation to the plaintiff's summons. This still leaves over the question of the plaintiff's costs of defending the counterclaim in the present proceedings which I have not been addressed on and therefore which falls outside the scope of this decision. Authorities *Royal Court Rules 2004*, as amended. *Watkins v Egglishaw* [2002] JLR 1. *Flynn v Reid* [2012] (2) JLR 226. *Jersey & Guernsey Law Review* – October 2009, page 274

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