Companies - Costs.

[2019]JRC008

ROYAL COURT
(Samedi)

29 January 2019

Before : T. J. Le Cocq, Esq., Deputy Bailiff, sitting alone.

Between	**Mr Oleg Sheyko**	**Plaintiff**
And	**Consolidated Minerals Limited**	**Defendant**
And	**Barclays Bank Plc Jersey Branch**	**Party Cited**

Advocate W. A. F. Redgrave for the Plaintiff.

Advocate N H MacDonald for the Defendant

JUDGMENT

THE DEPUTY BAILIFF:

1. By Order of Justice dated 17th July, 2018, Oleg Sheyko, ("the Plaintiff") commenced proceedings against Consolidated Minerals Limited ("the Defendant") for an injunction freezing the sum of US$10 million in the hands of the Defendant's bankers to preserve assets in the jurisdiction whilst the Plaintiff pursued the claim arising out of his employment with the Defendant. On 23rd August the Court sat to consider the Defendant's summons seeking a variation of the interim injunction and fortification by the Plaintiff of his undertaking in damages. The Court dismissed the Defendant's summons. The reasons are set out in the judgment of the Court delivered in connection with that application (Sheyko –v- Consolidated Minerals Limited [2018] JRC 236).

2. At the hearing of the summons to vary the interim injunction the Defendant also applied to discharge the injunction in the light of further information provided by the Plaintiff in an affidavit filed in connection with the summons which, so the Defendant asserted, pointed to a material lack of disclosure when the injunction was applied for. Consequently, so the Defendant then argued, the injunction should also be discharged forthwith. The Court dismissed that application as well.

3. The Defendant had at that time already fixed a date for a full application to discharge the injunction on the grounds of a failure on the part of the Plaintiff to make full and frank disclosure and that was scheduled to come before the Court on 3rd October, 2018. Shortly before the hearing of that application the Defendant withdrew the application for discharge and instead elected to pay the sum frozen by the interim injunction into Court. Accordingly on 3rd October the Court merely considered the terms of an order dealing with that payment in and ordered accordingly.

4. All that was at the time, therefore, left over for consideration were the costs of and incidental to the summons to vary the interim injunction and the costs arising out of the application to discharge that had been withdrawn.

5. This is my decision on those matters.

6. The position of the Defendant is that even though it has been unsuccessful in its application to vary the injunction, nonetheless the appropriate order was for costs to be in the cause. The Plaintiff, for his part, argues that the costs in connection with the failed application to vary and raise the interim injunction should be paid on an indemnity basis and the costs of withdrawal should on usual principles be paid by the Defendant to the Plaintiff on a standard basis.

7. The Defendant points first to the judgment of Mr Justice Neuberger (as he then was) in the case of Picnic at Ascot –v- Kalus Derigs [2001] FSR 2 at some length. As this authority has been adopted in Jersey I will refer to it at some length.

8. Firstly, the headnote states:

> ***"3. The claimants sought interlocutory relief against the defendants for infringement of design right and, against one of the defendants, breach of fiduciary duty. The claim form and application for injunctive relief were issued on September 14, 1999. At the first hearing on September 20, 1999 the defendants stated they would oppose the application, directions were given for the filing of evidence and the hearing was re-fixed for February 8 and 9, 2000. The defendants gave undertakings until the substantive hearing of the application. They filed their witness statements on October 18, 1999 and on the same day served a full defence. The claimants' evidence in reply was filed on November 15, 1999. On February 2, 2000, the defendants' solicitors notified the claimants' solicitors that the application would not be contested and that the undertakings would be continued to trial or further order. They proposed***

that the costs of the interlocutory proceedings be reserved to the trial judge. The claimants were content with the undertakings offered but required the defendants to pay the costs of the application. The matter was heard on the issue of costs only.

9. In the main body of the judgment, Neuberger J said:-

"5. The question than is: what approach should the court take to the question of costs in the case of an application for an interim injunction when that injunction is granted or when the defendants accede to the injunction being granted?

6. It seemed to me that the following guidance can be obtained from the cases to which I have been referred.

7. In a case without any other special factors, where a claimant obtains an interlocutory injunction on the basis of the balance of convenience, the court normally reserves the costs. While one can see an argument, particularly under the new regime, for saying that an order more favourable to the claimant should be made on the basis that the claimant has won the issue in respect of which the costs have been directly incurred – namely, whether an interlocutory injunction should be granted or not – it seems to me that the reasoning of the Court of Appeal in the so far unreported case of Desquenne et Giral U.K. Ltd – v- Richardson, November 23, 1999, indicates that an order reserving costs is appropriate.

8. In that case the judge at first instance had ordered the trial of a preliminary issue but had continued the interlocutory injunction until the hearing of the preliminary issue, despite the defendant's contention that the injunction – which had been granted without notice – should be discharged, on the basis of the balance of convenience. While accepting that the question of costs was a matter for the judge's discretion, Morritt LJ was of the view that the Court of Appeal was "entitled and indeed bound, to interfere with" that exercise of discretion. He said this:

"It is quite plain from the passage in the judge's judgment … that he granted or continued the injunction on the basis of the balance of convenience in order to hold the ring until the dispute between the parties could be properly decided at a trial. It is inconsistent with an order such as that, that there

should be successful or unsuccessful parties for the purposes of the rules either new or old."

…

9. One can see the force of that, particularly when one bears in mind that the balance of convenience will often be determined by reference to facts which may be contested, and the court may at trial conclude that it had been persuaded to grant an interlocutory injunction on the basis of assumed facts which turn out to be inaccurate, or even in the context of a claim which should never have been brought.

…

11. A defendant who accedes to the grant of an interlocutory injunction before the hearing should not, for that reason alone, normally be the subject of a more disadvantageous order for costs than if he had fought and lost. It would be, as I see it, illogical and contrary to the modern approach if a defendant were discouraged from agreeing to a sensible course by knowing that he was likely to be worse off in terms of costs than if he incurred the cost, time and effort in fighting. *[My emphasis]*

12. There will obviously be circumstances where it is right to depart from the general approach. Thus there may be cases where the balance of convenience is so clear, and the outcome of the hearing of the application for the interlocutory injunction should be so plain to the parties, that the court should conclude that an order should be made against the defendant for wasting time and money in fighting the issue (whether or not the defendant eventually concedes). [My emphasis]

…

15. On the other hand, if the court is faced with disputed facts, and believes the claimant's version of the facts is more likely to be accepted, it may be dangerous to take that into account in the claimant's favour when deciding what to do about costs. It is obviously conceivable that at trial the court's preliminary, even its strongly held, view as to the likely outcome of the dispute on fact may turn out to be wrong. It would be adding insult to injury if an unfavourable order for costs is made against the defendant, in addition to the

injunction being granted at the interlocutory stage, on the basis of a wrong (as it turned out) view of the facts by the court.

…"

10. These principles have been adopted by this Court. In Berry Trade Limited and Vitol Energy Bermuda Limited –v- Moussavi and others [2003] JRC 193, at paragraph 28 Birt, Deputy Bailiff (as he then was) said:-

"I turn, therefore, to consider whether the fourth defendant has a reasonably arguable defence. Mr MacRae has referred me to Picnic at Ascot –v- Kalus Derigs [2001] FSR 2, where Neuberger J held that, absent any special factors, where a claimant obtained an interlocutory injunction on the basis of the balance of convenience, the Court should normally reserve the costs. It would seem to me that similar principles should apply in the case of a mareva injunction where the defendant has not applied to set aside that aside that injunction."

11. I was referred to UPL Deutschland Limited –v- Agchemaccess Limited & ors [2016] EWHC 2135 (Ch) in which at paragraph 9 the Court said:-

"I first of all consider the question about which party has been successful in this matter and how that should be reflected, if at all, in relation to the order for costs. The difficulty here is that where a defendant has acceded to the relief sought it does not follow that if it had been contested the Court would have necessarily found for the Claimants. I do bear in mind as a starting point that the fact that a party accedes to relief is an indicator that the application was justified and would have succeeded, but it is no more than a useful starting point. There are reasons in an interlocutory application why a party might accede to relief, not least to save costs or to be seen as reasonable and co-operative. One also has to be wary about providing obstacles to compromise so that nobody would accede to an application because the court would infer success from the capitulation."

12. In Gee on Commercial Injunction (6th ed.) the learned author states at paragraph 20-043:-

"Under s.51(1) of the Senior Courts Act 1981, the court has "full power to determine by whom and to what extent … costs are to be paid."

Under CRP Pt 44 it is now common practice to make orders for costs which are immediately payable in contested interlocutory proceedings and for the court to make an order for interim payment pending a detailed assessment. It is also open to the court to make costs orders based on who has won on which issue and to reflect culpable conduct by a party in the course of the proceedings, or misconduct which has led to the justifiable need to see a search order or to pursue other expensive proceedings for an injunction or other interim remedy.

Even prior to the CPR costs orders were made taking into account culpability of a party or those for whom he was responsible."

13. The costs of both the applications to vary and the withdrawal of the application to discharge are of course with the discretion of the court. However, on the basis of the cases referred to above, the Defendant argues that until the Court was in a position to decide the full equities of the case, then it should reserve the position with regard to costs. The application had been made for a Mareva injunction which was granted in effect on the balance of convenience and the principle annunciated by Neuberger J in Picnic at Ascot and adopted by Birt, Deputy Bailiff in Berry Trade Limited is that those costs should be reserved.

14. In effect it is argued that if the substantive claim brought by the Plaintiff is ultimately dismissed then the interim injunction would have been wrongly obtained.

15. For his part the Plaintiff argues that on normal principles he should be entitled to his costs having successfully defended the application both to vary and discharge the injunction and being faced two days before a further hearing of an application to discharge (the date for which had been fixed for a number of weeks) with the withdrawal of that application. The Court should readily infer that that withdrawal was tantamount to the acceptance of inevitable defeat in connection with that application as indeed should have been apparent to the Defendant in the earlier application to vary and withdraw.

16. Moreover, the Plaintiff observes that in Picnic at Ascot the defendants were facing an application for an interim injunction which they indicated late in the day would not be contested. In that case the court was not in a position to form any view as to the likely outcome.

17. I note that in Picnic at Ascot in paragraphs 11 and 12, and with particular reference to the words to which I have given emphasis, the court is there considering a case where a defendant has acceded to the application for an interim injunction and also held that it may be right to depart

from the general approach where the Court might conclude that an order should be made against the defendant for wasting time and money in fighting an issue whether or not the defendant eventually concedes it.

18. I note also Neuberger J's qualification in paragraph 7 relating to *"special factors"* and indeed the adoption of the principles contained in Berry Trade Limited in circumstances "*where the defendant has not applied to set aside that injunction"*.

19. I am conscious that in the argument before me the parties did not have the benefit of the reasons for the refusal to vary or discharge the interim injunction on 23rd August, 2018. Those reasons are now available.

20. It is fair to say that the court was critical of the Defendant's affidavit evidence and did not feel that any allegation that there had been a want of disclosure on the part of the Plaintiff was justified. The Defendant also failed to establish to the court's satisfaction that it had no alternative means of meeting its debts and ordinary business expenditure such that the interim injunction needed to be varied in any way. Indeed in the concluding paragraphs 42 and 43 of the judgment we said:-

> ***"42. We do not accept that the Plaintiff was guilty of a material or significant non-disclosure to the Court. His characterisation of certain receipts of the company as approximately $30 million monthly was to a very great extent proved accurate by the figures he subsequently deployed.***
>
> ***43. We found the affidavits provided by the Defendant wanting. It did not contain any cash flows nor was it persuasive that the Defendant was unable to meet the payments that fell due."***

21. The Plaintiff had, accordingly, clearly been successful in defending a substantial challenge to the interim order that he obtained. Matters do not, however, rest there as before me exhibited to an affidavit is a letter from the ultimate parent company of the Defendant which makes it clear that the parent company agreed to provide the Defendant with financial support until 31st December, 2019. That letter is dated 27th June, 2018.

22. The interim injunction was granted on 17th July, 2018. The existence of the letter was not mentioned by the Plaintiff in his application and in a fourth affidavit dated 17th September, 2018, he confirms that he was unaware of the existence of the letter.

23. It seems to me to be unlikely that the Defendant was itself unaware of the existence of the letter but no reference is made to it in any of the affidavits filed in support of its application to discharge or vary the interim injunctions. Clearly had reference been made to that letter it would have substantially undermined the strengths of any application to discharge or vary. It suggests that the Defendant was not as it unequivocally stated, at risk of not being able to discharge its debts by reason of the interim injunction.

24. It seems to me that the Defendant's application to discharge the interim injunction on the basis of the Plaintiff's failure to make disclosure or vary it on the basis of the Defendant's need to discharge its debts from the injuncted money was destined for failure. That should have been apparent to the Defendant.

25. Furthermore the same could be said of the application to discharge that was withdrawn.

26. I do not demur from the principle that the costs of an interim injunction would normally be reserved where there has been no application to raise it and that in many circumstances that may well also be the appropriate order where there has been an unsuccessful challenge to raise or vary it.

27. In these circumstances, however, I consider it to be more appropriate to reflect the fact that the Defendant's application and the evidence it deployed and the evidence that it failed to deploy, was wasteful of time and costs in a manner that should be reflected by an order for costs in favour of the Plaintiff.

28. The question for me that remains, therefore, is whether those costs should be ordered on an indemnity basis insofar as it relates to the application to vary and discharge? Were it not for the letter from the parent company, it seems to me that the appropriate order would be for costs taxed on the standard basis. However, I consider the existence of the support letter was a material factor which should have made it clear to the Defendant that its application to vary and discharge had little prospect of success. At the very least that letter should have been deployed openly before the Court.

29. In the circumstances I order that the Plaintiffs costs of and incidental to the application to vary and discharge the interim injunction dealt with on 23rd August, 2018, and reflected in the judgment of this Court referred to above should be paid by the Defendant to the Plaintiff on an indemnity basis.

30. With regard to the costs incurred after that time in connection with the application to discharge the injunction which was withdrawn, in my judgement the appropriate order is that the Defendant should pay the Plaintiff's costs of and incidental to that application on a standard basis.

31. Similarly the Plaintiff should receive the costs of this application on the standard basis.

32. I have been asked to consider whether I should order a payment on account of costs. I am minded to do so. Those costs are assessed by the Plaintiff to include the costs of this hearing in the total sum of £139,824.62. From that, for the purposes of assessing an interim payment I deduct £10,000 estimated for the costs of today's hearing and I am minded to make an order for one half of the balance approximately. Accordingly I order that the Defendant make an interim payment on account of the Plaintiff's costs in the sum of £60,000 within 14 days of the date hereof. There shall be liberty to apply.

Authorities

Sheyko –v- Consolidated Minerals Limited [2018] JRC 236.

Picnic at Ascot –v- Kalus Derigs [2001] FSR 2.

Berry Trade Limited and Vitol Energy Bermuda Limited –v- Moussavi and others [2003] JRC 193.

UPL Deutschland Limited –v- Agchemaccess Limited & ors [2016] EWHC 2135 (Ch).