Costs - reasons.

[2019]JRC228

ROYAL COURT
(Samedi)

26 November 2019

Before : Advocate Matthew John Thompson, Master of the Royal Court.

Between	**Daniel John Pender**	**First Plaintiff**
And	**GGH (Jersey) Limited**	**First Defendant**
	Punter Southall Group Limited	**Second Defendant**
	Simon Anthony John Davis	**Third Defendant**
	Craven Street Capital Limited	**Fourth Defendant**
	RBS Pension Trustee Limited (as trustee for RBS Group Pension Fund)	**Fifth Defendant**
	Dan Knipe	**Sixth Defendant**
	Leadenhall Cimetta Insurance Linked Investments ICAV	**Seventh Defendant**
	Leadenhall Diversified Insurance Linked Investments Fund Plc	**Eighth Defendant**
	Leadenhall Life Insurance Linked Investments Fund Plc	**Ninth Defendant**
	Gryphon Group Holding Employee Benefit Trust	**Tenth Defendant**
	Peter Mann	**Eleventh Defendant**

Advocate J. D. Kelleher for the Plaintiff.

The First Defendant was excused from appearing.

Advocate J. M. Sheedy for the Second to Eleventh Defendants.

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JUDGMENT

THE MASTER:

Introduction

1. This judgment represents my reasons in relation to various applications for costs arising out of the present proceedings being discontinued against the fourth to eleventh defendants.

Background

2. The proceedings brought by the plaintiff are under Article 141 of the Companies (Jersey) Law 1991.

3. Article 141(1) provides as follows:-

> ***"A member of a company may apply to the court for an order under Article 143 on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least the member) or that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."***

4. In summary, the plaintiff complains about his dismissal as CEO, the dilution of his shareholdings, his removal as a director of the company and the confiscation of his ordinary shares due to the plaintiff being classified as a bad leaver.

5. Permission to serve the second to eleventh defendants outside the jurisdiction was granted by me on 22nd July, 2019, with an order for substituted service being made against the sixth defendant on 19th August, 2019.

6. All the defendants have placed the matter on the pending list.

7. By an act of court dated 13th September, 2019, the matter was adjourned by the Royal Court for a date to be fixed before me for directions.

8. This order was made as a result of Rule 6/40 of the Royal Court Rules 2004, as amended. Rule 6/40 (3) and (4) provide as follows:-

> ***"(3) Where the proceedings have been placed on the pending list, Rule 6/6 shall not apply, and the plaintiff must within 21 days apply to the Inferior Number for directions, although the Inferior Number may direct that such application be made to the Bailiff or to the Greffier.***
>
> ***(4) On the hearing of an application under paragraph (3) the Court shall give such directions as it thinks appropriate with respect to the following matters –***
>
> ***(a) service of the order of justice on any person, whether in connection with the time, date and place of a further hearing, or for any other purpose;***
>
> ***(b) whether, and if so by what means, the proceedings are to be advertised;***
>
> ***(c) the manner in which any evidence is to be adduced;***
>
> ***(d) any other matter affecting the procedure on the order of justice or in connection with the hearing and disposal of the proceedings; and***
>
> ***(e) such orders, if any, including a stay for any period, as the Court thinks fit, with a view to mediation or other alternative dispute resolution."***

9. The rationale for this rule is to enable the Royal Court to issue directions at an early stage for unfair prejudice applications, to determine how the dispute is to be determined including who is to be notified of the proceedings. This is to allow for effective case management of unfair prejudice proceedings.

10. This provision is based on similar but not identical provisions contained in the English Civil Procedure Rules found in the Companies (Unfair Prejudice Applications) Proceedings Rules 2009.

11. In relation to the joinder of the fourth to second to eleventh defendants, in the affidavit in support of the application for leave to serve proceedings out of the jurisdiction sworn by Ian Rutherford dated 17th June, 2019, a solicitor/advocate admitted in Scotland acting for the plaintiff, at paragraph 14 described all of the second to eleventh defendants as *"necessary and proper parties to this action"*. This appears to be a reference to Rule 7(s) of the Service of Process (Jersey) Rules 1994 which states as follows:-

> ***"the claim or application is brought under the terms of the Companies (Jersey) Law 1991, and the person to be served is a necessary or proper party thereto."***

12. Rule 7(s) was the rule pursuant to which I gave leave to serve the second to eleventh defendants out of the jurisdiction.

The issues

13. What was at the core of the present hearing was a dispute about the filing of answers and whether all the defendants should be required to file answers. The position of the plaintiff was that it was up to each defendant whether or not they wish to file an answer. Once those that elected to file an answer had done so, a directions hearing could take place.

14. The position of the defendants was that a directions hearing should take place before any answer was filed to resolve the issue raised by the fourth to eleventh defendants of whether they were necessary and proper parties to the proceedings.

15. On 19th September, 2019, a date fix hearing took place before my secretary to arrange the present summons for directions.

16. Also on 19th September, 2019, a date was fixed for a cross-summons issued by the fourth to eleventh defendants seeking they be disjoined from the proceedings under Rule 6/36(a) on the basis they were not necessary and/or proper parties to the proceedings.

17. On 27th September, 2019, Baker & Partners, advocates for the second to eleventh defendants informed Carey Olsen, advocates for the plaintiff, that the shares of the fifth to ninth defendants had been acquired by the second defendant and therefore the fifth to ninth defendants were no longer necessary or proper parties.

18. By a letter dated 4th October, 2019, Carey Olsen for the plaintiff confirmed that the first to ninth defendants should be removed as parties. They had also previously agreed that the tenth and eleventh defendants should be removed. The letter also stated:-

> *"Our client has no interest in pursuing what has become a redundant and academic argument about whether or not Defendants 4-9 were at the outset necessary and proper parties."*

19. The plaintiff also agreed to pay the costs of and occasioned by the cross-summons issued by the fourth to eleventh respondents on the standard basis.

20. By a letter dated 11th October, 2019, Baker & Partners informed the plaintiff that their costs totalled £29,620.50 for all of the defendants and therefore suggested that these be paid on a pro-rata basis in respect of the fourth to eleventh defendants i.e. the sum of £23,696.40.

21. The letter also stated:-

> *"However, the bulk of our costs is concerned with the preliminary steps in preparing an Answer."*

22. On 28th October, 2019, Baker & Partners made it clear that they were seeking costs on an indemnity basis and a pro-rata apportionment of all their costs.

23. The issues I therefore have to determine are:-

    (i) Whether costs should be paid on a standard or indemnity basis; and

    (ii) Whether any costs payable are the costs of the cross-summons or the costs of the action.

24. I will deal with each issue in turn.

Standard or Indemnity costs

25. The starting point for this issue requires consideration of why the fourth to eleventh defendants were convened. I was referred to a number of English authorities on this question but those authorities in my view do not demonstrate a consistent practice.

26. In Supreme Travels Ltd v Little Olympian Each Ways Ltd [1994] B.C.C. 947, in respect of an application to join a company which had never been a shareholder, Lindsay J. ruled that, while the English Court had power to join as a respondent an entity that had never been shareholder, the likelihood of it was so remote that it would be an abuse of process in the particular case to add such a company as a respondent. In reaching his decision he reviewed authorities prior to 1994.

27. As part of his analysis he referred to Company (No.007281 of 1986), Re 1987 B.C.C. 375 where Vinelott J. at page 380-381 said

> ***"A petition under sec. 459 is not analogous to litigation in which the issues raised affect only those against whom allegations are made by the plaintiff. A closer analogy is an administration action, where all beneficiaries having an interest in the relief sought should be made parties or *381 represented. The practice that has so far been followed in the Companies Court is to require: that all members of the company whose interests would have been affected by the misconduct alleged or who would be affected by an order made by the court under the very wide powers conferred by sec. 461 are to be made respondents to a petition or served with it.***
>
> ***In practice, this means that in the case of a small, private company every member ought to be joined."***

28. By contrast, in Re Pedersen (Thameside) Ltd [2018] B.C.C. 58 in determining whether or not to strike out the joinder of a minority shareholder to an unfair prejudice position, His Honour Judge Pelling QC in his conclusion at paragraph 20 stated:-

> ***"20. In summary, therefore, I am not satisfied that any relevant allegation has been pleaded against the Deceased. The only allegation pleaded is that he was allotted or had transferred to him shares in BHL. It is not alleged that the Deceased had control of either the Company or BHL. It is not alleged that the shares in BHL were transferred to him to compensate him for loss in***

value of his B class shares in the Company. It is not alleged that he was involved either directly or indirectly in the transfer of the Brentford Hotel opportunity from the Company to BHL or in assisting in such a transfer. There is no evidence, nor could there be, that the value of the Deceased's shareholding in BHL would come close to equating to the value of the petitioner's 45.7 per cent interest in the Company valued on the basis claimed by the petitioner. In all the circumstances, it is plain and obvious that the relief claimed against the Deceased's estate will never be granted. That being so, I consider that the reference to the second respondent in para.1 of the prayer to the petition and para.7 of the prayer to the Points of Claim should be struck out."

29. Between the Supreme case and Re Pedersen matters have moved on with the introduction of the Civil Procedure Rules in England in 1999 and in particular the introduction of the overriding objective requiring active case management. As to the approach which should be adopted in this jurisdiction, it is a matter for the plaintiff as to which parties he wishes to join to an unfair prejudice position. However, the observations of Judge Pelling in the Pedersen case are useful. In my judgment a shareholder should be joined as respondent where it is alleged they were involved in the conduct alleged to be unfairly prejudicial or where the remedy sought is likely to have a significant effect on a shareholder.

30. By contrast the position of shareholders with a very small or limited interest in a company and not alleged to be involved in any conduct said to be unfairly prejudicial may be different. That is not to say that they should not be made aware of the proceedings, but in my judgment consideration of that issue should usually occur at the first directions hearing. The court may also want to hear from such shareholders because they are independent, including consideration of whether a meeting of independent shareholders should take place to review the conduct complained of. It is also possible that such shareholders may have similar complaints to a plaintiff and therefore may wish to join in the proceedings to support the relief sought.

31. I do not therefore agree that the position set out by Vinelott J. in 1996 applies today namely that all shareholders of a company where an unfair prejudice application is presented should be convened. Rather my view is that the necessary parties are those either alleged to be involved in any conduct said to be unfairly prejudicial or those who would be significantly affected by any remedy granted. The position of other shareholders should in future be dealt with by them being notified of the proceedings so that any shareholder so notified can decide what position to adopt. Such a shareholder may also be notified because the court directs that a meeting of shareholders or a particular group or class of shareholders takes place to ascertain their views without the involvement of the protagonists to any dispute.

32. Advocate Kelleher suggested that the decision in Pedersen did not address who should be convened. In my judgment what Pedersen made clear was that, if it was plain and obvious that the relief sought would not be granted against a particular shareholder, the claim against that shareholder should be struck out. It therefore follows as a matter of logic that such a shareholder should not be joined as a defendant at the outset but should rather be notified and then should indicate whether or not it wishes to play a role in the proceedings.

33. I have also reached this conclusion because the overriding objective contained in Rule 1/6 which requires parties to assist the court to actively manage cases. In relation to applications under Article 141 of the Companies (Jersey) Law 1991, I consider that this obligation includes ensuring that the parties before the court are those alleged to be involved in unfairly prejudicial conduct or who are significantly affected by the relief sought.

34. I appreciate that in some cases a decision will have to be made and a plaintiff should not be criticised for taking a cautious approach where the position is not clear. However, what is required is an exercise of judgment by a plaintiff and advisers to evaluate who are the necessary defendants rather than just convening everyone who is a shareholder.

35. Insofar as a plaintiff, as in this case, seeks permission to serve a defendant outside the jurisdiction, the issue of which defendants a plaintiff proposes to convene should be explored as part of the application where there is a risk that the claim against a named defendant might later be struck out or where an alternative approach might be taken of putting that defendant on notice of the proceedings.

36. Applying the above approach to the present case, the plaintiff convened all shareholders without distinction. In my judgment that was a step too far because the fourth to eleventh respondents are in the category of shareholders where no criticism is made of their conduct and where the relief sought was not against them and was not, based on the pleaded case, likely to affect their minority interests. Those shareholders should simply have been given notice of the proceedings to enable them to decide whether they wished to take part or not.

37. While, however, I consider that costs orders should be made, this is on the standard basis only. I am not satisfied that this case is one which justifies indemnity costs applying the test C v PS [2010] JLR 645; Pell Frischmann v Bow Valley [2007] JLR 479 at paragraph 7. In particular, I am not satisfied there is anything to take this case out of the ordinary. The plaintiff when challenged about the fourth to eleventh respondents quickly made his position clear in that he did not expect answers from them and also relatively quickly released them as parties where they did not wish to take part in the proceedings. What has been achieved here is therefore the right outcome but by

a procedural route which I have found is not how unfair prejudice cases should be progressed in future.

The scope of the costs order

38. In a letter of 11th October, 2019, Baker & Partners sought their costs on a pro-rata basis by taking the total costs incurred and apportioning them between each of the defendants. This was because each of the defendants were jointly and severally liable to Baker & Partners for their costs.

39. However, where a costs order is made against a party, what that party is liable to pay are costs necessarily incurred by the party with the benefit of the costs order. The fact that the fourth to eleventh respondents may have agreed to pay the costs of Baker & Partners on a joint and several basis, even if some of those costs were for the benefit of other parties, does not mean that the plaintiff is required to meet those costs. What the plaintiff is required to meet are the costs only incurred in relation to Baker & Partners advising the fourth to eleventh respondents on the issues affecting them.

40. I accept however that areas where advice was required do go further than the offer made by the plaintiff which was for only costs of occasioned by the cross-summons. In dealing with the position of the fourth to eleventh defendants as parties, those parties needed advice on issues going beyond the cross-summons as follows:-

    (i) What the proceedings were about;

    (ii) How far the fourth to eleventh defendants had to take part in the proceedings;

    (iii) What steps had to be taken to procure their removal as parties and taking those steps;

    (iv) The consequences of the fourth to eleventh defendants remaining as parties;

    (v) Insofar as the fifth and tenth defendants were trustees, advising them on their responsibilities as trustees in relation to the proceedings brought;

(vi) Advising on the merits of a jurisdiction challenge by any of the fourth to eleventh defendants.

41. In my judgment, all these costs were necessarily incurred as a result of proceedings being served on the fourth to eleventh defendants and therefore they were entitled to recover these costs on the standard basis. By contrast, a proportion of the costs of preliminary steps in preparing an answer should not fall on the plaintiff where the position of the fourth to eleventh defendants was that they did not need to file an answer before any directions hearing and did not intend to file an answer generally.

42. If the quantum of costs payable cannot be agreed then the costs claimed will be assessed by the Assistant Judicial Greffier in the normal way. The Assistant Judicial Greffier will determine the reasonableness of the amount claimed for the categories of advice I have determined were justified.

43. In relation to the costs of the argument leading to this judgment, the fourth to eleventh defendants have in principle recovered more than the offer made by the plaintiff but they have neither recovered indemnity costs nor on the pro-rata basis contended for. I therefore concluded in respect of the costs argument before me, each party should bear their own costs.

44. Finally, in terms of the costs of and occasioned of the hearing before me, in relation to extending time for the filing of an answer I ordered plaintiff's costs in the cause.

Authorities

Companies (Jersey) Law 1991.

Royal Court Rules 2004, as amended.

English Civil Procedure Rules 2009.

Service of Process (Jersey) Rules 1994.

Supreme Travels Ltd v Little Olympian Each Ways Ltd [1994] B.C.C. 947.

Re 1987 B.C.C. 375.

Re Pedersen (Thameside) Ltd [2018] B.C.C. 58.

English Civil Procedure Rules 1999.

C v PS [2010] JLR 645.

Pell Frischmann v Bow Valley [2007] JLR 479