Case 8
Global Energy Horizons Corporation

v

Gray

[2021] Costs LR 133

Neutral Citation Number: [2021] EWCA Civ 123
Court of Appeal (Civil Division)
5 February 2021

Before:
David Richards, Henderson and Rose LJJ

Keywords:
Part 36 offers, trial costs

Headnote

On appeal from the judgment of the trial judge on costs, the issue for the court was whether the judge had been right to regard the outcome as a draw, in circumstances where the defendant in a claim for breach of fiduciary duty had been ordered to account to the claimant for over £3.6m, but the claim had been for significantly more.

Held. The judge below had been wrong to regard the outcome as a draw. Although less had been recovered than the original claim, that had not detracted from the fact that the claimant had been the winner. Moreover, where a defendant was faced with an exorbitant claim which he wished to defend vigorously, but was vulnerable to a finding that he would be liable for a much smaller amount, Part 36 provided a clear process by which he could protect his position. If he failed to do that and did not make a payment

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into court, the loser would be in a weaker position in arguing that he should not have to pay the winner's costs. Appeal allowed.

Cases Cited

Day v *Day* [2006] EWCA Civ 415
Johnsey Estates v *Secretary of State for the Environment* [2001] EWCA Civ 53
Sheffield v *Sheffield and Others* [2018] EWHC 2360 (Ch)
Widlake v *BAA Ltd* [2010] 3 Costs LR 353; [2009] EWCA Civ 1256

Judgment

1. **David Richards, Henderson and Rose LJJ:** We handed down judgment in this appeal on 9 December 2020: [2020] EWCA Civ 1668 ("the Main Judgment"). We adopt the same abbreviations in this judgment as we used there. At [487] of the Main Judgment we referred to the further grounds of GEHC's appeal relating to costs that it had not been possible to consider in the course of the appeal hearing. In the event, a further short hearing was required to deal with only one of those issues, namely the paragraph in the order of Arnold J dated 4 October 2019 directing that there should be no order as to the costs of the Enquiry Hearing before Asplin J.

2. The order made on October 4 followed the 3 October 2019 Ruling described at [102] of the Main Judgment ("the Costs Ruling"). In the Costs Ruling, Arnold J set out the reasons why Asplin J had reserved the costs at the end of the Enquiry Phase, as expressed in her ruling on 28 July 2015. She had been unable to arrive at a valuation of the Business Assets and she recognised that the question of their value was "at the very heart" of the dispute. If she had been able to conclude that their value was very small, that was a matter that she would have taken into consideration as relevant to costs. She went on: "Of course that has to be balanced against the very way in which the inquiry was run and dealt with on behalf of Mr Gray and the evidence that was before the court". She concluded that she was not prejudging

the outcome of that exercise of discretion or what the conclusion would have been.

3. Arnold J said in the Costs Ruling that the starting point for the costs of the Enquiry Trial was that, in accordance with CPR rule 44.2(2)(a), the unsuccessful party will be ordered to pay the costs of the successful party. He rejected the "headline submissions" that he had received from the parties whereby, on the one hand, GEHC argued that since Mr Gray had been held liable to account to them for over £3.6 million, it was the successful party and, on the other hand, Mr Gray had pointed out that GEHC's claim against him at its highest had been for an amount just under £227.8 million of which it had recovered only 1.6%. He considered that he needed to adopt "a more granular approach". He described the five separate claims that GEHC had relied on against Mr Gray, as set out in the 9th witness statement of Mr Elliss, solicitor for Mr Gray. Of those, two had been abandoned before or during the trial; one (the claim to the management fees) had resulted in GEHC recovering about 7% of the total it had claimed; one (the claim to the Business Assets) had been held to have nil value; and the fifth (the claim to the Klamath Falls settlement monies) had resulted in an award of $3 million out of the $5.1 million claimed. He said that neither party could be said to have been successful and "the overall result was that both parties lost heavily". Standing back, he concluded that the result was "a score draw" and that the correct starting point was that each party should bear its own costs.

4. Arnold J then turned to the other factors referred to in CPR 44.2(4). Mr Gray relied on three offers he had made to settle the case but the judge concluded that none of those undermined his provisional conclusion. As to Mr Gray's conduct, he noted that after giving the Liability Judgment, Vos J had warned Mr Gray of the potential consequences if he did not give a true account. Mr Gray had not heeded that warning as was apparent from the Enquiry Judgment. That did not, however, lead Arnold J to conclude that there should be any different order. He recorded GEHC's contention that it had been necessary for it to pursue its claims, having regard to the fact that Mr Gray was a defaulting fiduciary who had made no satisfactory monetary offer. GEHC had been forced to come to court to achieve the order it did achieve. Arnold J dismissed this point saying "That is of course true so far as it goes, but it does not outweigh the other factors to which I have already referred": [25]. He also rejected Mr Gray's

complaints about alleged misconduct on the part of GEHC and its expert witness. He confirmed therefore that the right order was that each side should bear its own costs.

5. Mr de Mestre appearing for GEHC before us accepted that this court is reluctant to interfere with the exercise of the first instance judge's discretion as to costs. He cited the judgment of Ward LJ in *Day* v *Day* [2006] EWCA Civ 415 where no order for costs had been made by the trial judge on the basis that neither side in a bitter family dispute had won what they had claimed. Ward LJ (with whom Sir Martin Nourse agreed) restated the general rule that an appellate court should not interfere with the judge's exercise of discretion merely because they take the view that they would have exercised that discretion differently. He cited a passage from the judgment of Chadwick LJ in *Johnsey Estates* v *Secretary of State for the Environment* [2001] EWCA Civ 53, stating that an appellate court must recognise the advantage that the trial judge enjoys as a result of his or her "feel" for the case. The court should only interfere if the judge below erred in principle, took matters into account which should have been left out of account, left matters out of account that should have been taken into account, or reached a conclusion which was so plainly wrong that it could be described as perverse. The court in *Day* held that the trial judge had been wrong to describe the result as a draw simply because neither side had got everything they wanted. There was no doubt that the defendant was "the person who has to put his hand in his pocket and pay up the money that is in dispute". It had been a victory for the claimant and she had been entitled to her costs. Mr de Mestre also referred to the judgment of Master Clark in *Sheffield* v *Sheffield and Others* [2018] EWHC 2360 (Ch) where she said at [31] that when accounts and inquiries are rendered necessary by a breach of trust, then the defaulting trustee will be ordered to pay the costs of the claim. She cited a passage to that effect in *Lewin on Trusts*. Mr Levey appearing for Mr Gray countered that the authorities in the footnotes to the relevant passage in Lewin did not in fact support that proposition as a general rule.

6. In the event we have not found it necessary to rely on any special principle or starting point more complicated than CPR rule 44 in order to dispose of this dispute. The only proviso we would make to what was said in *Day* was that this case is unusual in that Arnold J had not presided over the Enquiry Hearing and so does not have that

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advantage over us. Indeed, in terms of which court has the better "feel" for the case, it may well be that we had to undertake a much more detailed analysis of the ins and outs of the Enquiry Hearing, the findings made by Asplin J and the basis for those findings in order to come to our conclusions on Grounds 6 and 9 of Mr Gray's appeal than Arnold J needed to carry out in order to determine the valuation issues before him: see Section VIII of the Main Judgment.

7. We have concluded that the decision that there be no order as to the costs of the Enquiry Phase cannot stand for the following reasons.

8. First, we do not agree that the issue should be approached on the basis that neither side was successful. GEHC won because it obtained an order that Mr Gray pay it over £3 million. That is a significant sum of money albeit it is much less than GEHC was hoping for. Where a defendant is faced with an exorbitant claim which he wishes to defend vigorously but where he is vulnerable to a finding that he is liable for a much smaller amount, there is a clear process provided by CPR Part 36 which he can follow to protect his position. Mr Levey submitted that there was nothing that Mr Gray could have done to stop the juggernaut of GEHC's attack on him. We do not accept that a trial of the complexity of the Enquiry Hearing was inevitable, but in any event, if Mr Gray had made an early payment into court of a proportion of the management fees and the Klamath Falls settlement monies he would be in a much stronger position now to dispute his liability to pay GEHC's costs.

9. Mr Levey also referred to *Widlake* v *BAA Ltd* [2010] 3 Costs LR 353 which concerned a claimant in a personal injuries case who had exaggerated the severity and duration of the pain to her back and had concealed a pre-existing back problem from her expert witness. She was awarded a sum of damages which was larger than the payment into court made by the defendant but substantially smaller than the amount she had claimed. The trial judge had ordered the claimant to pay the defendant's costs of the action. That was overturned by this court which determined that there should be no order as to costs. Mr Levey argued that the court had regarded that as the appropriate outcome even though Ms Widlake had "won", because the exaggeration of her claim had led to the case becoming heavily contested litigation whereas it might have settled if she had been more honest and realistic as to the quantum of her claim. We do not consider that *Widlake* v *BAA* assists Mr Gray. Although this court did

not condemn Ms Widlake's conduct as strongly as the trial judge had, there is no doubt that it was her "gross exaggeration" of her injuries that led the court to make no order as to costs, in the sense that it was unreasonable for her to pursue the allegation as to the severity of her condition; as Ward LJ said "The claimant's dishonesty must be penalised". The court also took into account that the defendant had been put to expense arising out of the fact that the case was being unreasonably conducted. Ward LJ sounded a note of caution to judges too ready to punish a claimant for exaggerating their claim:

> "Defendants are, therefore, used to having to cope with false or exaggerated claims. Defendants have a means of protecting themselves. Part 36 is that shield."

10. We do not know the basis for GEHC's original valuation of its claim. We cannot infer from the result of the Valuation Hearing that its valuation of the Business Assets was the result of some deliberate and reprehensible exaggeration on their part and had been without any justification. This is not a case where a claimant needs to be punished for dishonesty by being deprived of its costs.

11. Secondly, we consider that Arnold J was wrong to dismiss the point made by GEHC that it had been necessary for it to pursue its claims against Mr Gray as a defaulting fiduciary, given that he had put forward a thoroughly dishonest account which had been rejected as such by Asplin J. We consider that this factor should have weighed much more heavily in favour of awarding GEHC its costs. That was an error of principle rather than simply a decision within the judge's discretion as to what weight to give to that factor. Following the Liability Trial and the Vos Order, Mr Gray was well aware that he was under a duty as a fiduciary to give a true account of the benefits he had received. He denied that he was liable to account for any of the assets that he disclosed as having been received by him. He could have given an honest account describing the evolution of his interests in the Business Assets. He could still have contested the proportion of the management fees for which he was liable, or the value of the Business Assets or the extent to which he was liable to account for other monies. Instead, as Asplin J held and as we have confirmed in the Main Judgment, he and the witnesses he called presented a false case to the court denying the existence of the 2010 agreement and claiming also that he had divested himself of any interest in the Business Assets.

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We agree with Mr de Mestre that GEHC's falsification of Mr Gray's account was fully vindicated by the Enquiry Judgment because the account was indeed false. The shape of the proceedings would have been very different and much less costly if Mr Gray had fairly and properly described his dealings with the Business Assets. In so far as that part of the Enquiry Hearing was, as Arnold J described it, "an entire waste of money" it was a waste that was caused by Mr Gray's conduct not by GEHC's.

12. We do not regard Asplin J's decision to reserve costs at the end of the Enquiry Phase as providing strong support for regarding the valuation of the Business Assets as the determining factor in exercising the discretion to award costs. She was careful to say that it was a matter that she would have taken into consideration but that she was not prejudging the outcome of that exercise of discretion.

13. We therefore set aside Arnold J's order and consider afresh the appropriate order as to costs. We start from the position that, in our judgment, GEHC was the clear winner of the Enquiry Phase of the proceedings both because it was awarded a substantial sum of money at the end of the day and because it succeeded in showing, at great cost in time and money, that Mr Gray's account in response to the Vos Order had been false in many serious respects.

14. We do not consider that the fact that GEHC recovered only a small fraction of the amount compared to its initial claim outweighs that fact. It is true as Mr Levey submits that much of the Enquiry Hearing was spent on establishing Mr Gray's ownership of assets that ultimately proved to be valueless. But that does not take away from the fact that it was Mr Gray's false account of his dealings with the Business Assets that put in issue the existence as well as the value of any liability he had in that respect. The initial valuations appear, as we have said, to have been bona fide and Mr Gray could have protected his position on costs by making a realistic offer to settle in accordance with CPR Part 36. As to the management fees, and the Klamath Falls Settlement, Mr Gray cannot claim much credit for having disclosed the existence of these sums in his first affidavit since their existence must have been well known to those working for GEHC. Mr Gray did not accept that he was liable to account for any of those monies, putting forward arguments which Asplin J rejected that the technology in which the Heerema Fund invested had little connection with the original Acquisition Strategy: see [148] onwards of the Enquiry

Judgment. He also made a claim for a substantial equitable allowance of £8 million which would have more than swallowed up the sums for which he was required to account but which was rejected by Asplin J: see [222] of the Main Judgment.

15. Arnold J considered the offers to settle that Mr Gray had made at [17]–[21]. We agree with his assessment that the only relevant offer was the third offer made by a non-party, Celloteck, on 1 April 2015 to transfer its 15% shareholding in Petrosound to GEHC for nil consideration. This appears to have been put forward as offering it the equivalent of Mr Gray's 51% share in that Celloteck direct interest plus his 51% interest in the 15% share held by the VIYM Executives, although whether the interest being offered was really comparable to those may be a matter for debate. GEHC rejected that offer and made a counteroffer that it would accept £16 million plus costs in settlement of the Enquiry. That counteroffer was rejected by Mr Gray. We do not consider that the offer from Celloteck should affect the allocation of costs. It was not clear from the offer whether it was made on the basis that, if accepted, that should bring the whole proceedings to an end, including the claim to the management fees and Klamath Falls Settlement monies or whether it was intended only to remove from the hearing the dispute about the Business Assets.

16. Finally Mr Gray raises in his written submissions the funding arrangements which have been put in place by GEHC and which have been the subject of other litigation arising from this dispute. We do not consider those issues to be relevant to the matters we have to decide.

17. We therefore substitute for the judge's order an order that Mr Gray pay GEHC's costs of the Enquiry Phase. This is subject to one reservation. Arnold J ordered that GEHC pay Mr Gray's costs of the Valuation Hearing because Mr Gray had succeeded in establishing that the value of the Business Assets was nil. It is clear from the Enquiry Judgment that some part of that phase of the proceedings was also taken up with the valuation exercise. Asplin J was not able to accept either side's expert evidence on valuation which was why she directed further evidence and a further hearing. It follows from Arnold J's order in relation to the Valuation Hearing that a reduction should be made to the costs that GEHC can recover from Mr Gray to reflect the time spent in the Enquiry Hearing dealing with the valuation of the assets, the issue on which Mr Gray ultimately won. When we raised this issue during the hearing, Mr Levey referred us to the 9th witness statement

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of Mr Elliss who attempted shortly before the consequentials hearing before Arnold J in September 2019 to set out how much time had been devoted to each of the issues covered by the Enquiry Hearing. We regard any such exercise as likely to generate further debate between these parties, the costs of which will rapidly outstrip the value of the costs in issue. We have concluded that the most pragmatic order is that GEHC should not be entitled to recover from Mr Gray the professional fees and disbursements paid to Dr Becker who was GEHC's valuation expert or to Dr Lake who was its viability expert.

18. We therefore uphold Ground 6 of GEHC's appeal and vary para 6 of the order of 4 October 2019 by substituting the following:

> "The defendant do pay the claimant's costs of the Enquiry Trial Phase except for the fees and disbursements paid to Dr Stephen Becker or Dr Larry Lake. Save for applications and hearings in respect of which separate costs orders have been made, the Enquiry Trial Phase shall comprise:
>
> a. All proceedings in the account of profits up to and including the date of the 2015 Asplin Order, 28 July 2015;
>
> b. In respect of the period between the date of the 2015 Asplin Order and the date of the 2016 Asplin Order, the costs of and occasioned by the management fee calculation conducted pursuant to paras 13 to 14 of the 2015 Asplin Order."

Andrew de Mestre QC and *James Knott* (instructed by Eversheds Sutherland) appeared for the appellant.

Edward Levey QC and *Philip Ahlquist* (instructed by Enyo Law) appeared for the respondent.

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