Online Case 31

Swain Mason and Others

v

Mills & Reeve (a Firm)

[2012] 4 Costs LO 511

Neutral Citation Number: [2012] EWCA Civ 498
Court of Appeal (Civil Division)
23 April 2012

Before:
The Master of the Rolls, Richards LJ and Davis LJ

Headnote

Having dismissed the claimant's appeal against the dismissal of his professional negligence action against the defendant solicitors, the Court of Appeal (judgment delivered by Davis LJ) turned its attention to the defendant's cross appeal on the costs decision below, in particular, whether the trial judge had placed too much emphasis on the defendant's refusal to contemplate going to mediation, in coming to his decision. Only the paragraphs relating to the cross-appeal are included.

Judgment

1. **Davis LJ:** […]

Cross Appeal

57. I turn then to the cross appeal on the question of costs. Clearly costs will have been very significant indeed in this case.

The Judgment on Costs

58. The relevant provisions of CPR Rule 44.3 are as follows:

"(1) The court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order. …

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction (Pre-Action Conduct) or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

(6) The orders which the court may make under this rule include an order that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment.

(7) Where the court would otherwise consider making an order under para (6)(f), it must instead, if practicable, make an order under para (6)(a) or (c). …"

59. It is elementary that a trial judge has a discretion on costs with which the appeal court will not readily interfere; a costs order will, generally speaking, stand unless it is vitiated by an error of principle or the failure to take into account a relevant matter or the taking into account of an irrelevant matter; or unless it is simply plainly wrong. There is thus a generous margin of discretion available to the trial judge: who also has the important advantage not only of knowing the details of the case but also of having the "feel" of the case.

60. The hearing on costs took place some time after the judgment was handed down. Lengthy written arguments, supplemented by oral argument, were presented to the judge. The claimants went so far as to submit that, notwithstanding that they had lost at trial and the claim had been dismissed, they should have 80% of the costs of the proceedings. It is wholly unsurprising that the judge rejected so unrealistic a submission. For its part, the defendant sought payment of all its costs (on a standard basis), as the successful party.

61. The judge duly referred to the provisions of CPR Rule 44.3. He elected to follow an issues based approach – understandably not leaving such aspects to the costs judge on assessment, which could only have added further expense and delay. In the event the judge elected to break down the issues to (in some cases) some quite precise areas, no doubt reflecting those issues on which the claimants asserted they had

succeeded at trial. He identified seven such issues. On each he considered whether the defendant should recover costs or whether it should notionally pay costs.

(1) The first concerned the state of Mr Swain's health at the relevant time. The judge found that aspects of the evidence favoured both sides; and it was a "score draw". Thus he concluded that it was not an issue in respect of which the defendant should be deprived of any of its costs. The defendant can have no complaint on that issue, therefore.
(2) The second was the perceived prospect of Mr Swain dying at the relevant time. The judge thought the outcome on this had favoured the claimants and was a matter "which I think must be reflected in costs". But he found that it was reasonable for the defendant to have explored the matter and so it should not notionally have to pay the claimants' costs on that issue.
(3) He reached the like conclusion on a third issue, relating to Mr Swain's knowledge and understanding of tax. In substance the claimants had succeeded but the issue "was part of the necessary background to the finding of the absence of breach of duty".
(4)(5) He then dealt with the two issues of causation: how would Mr Swain have reacted to the advice if the claimants established the duty to give advice and then what the MBO team's response to a requested deferment of completion would have been. On these two issues the claimants were "unequivocally successful" (the judge had helpfully set out his findings on these aspects of causation in para 205 to 208 of his judgment, notwithstanding that he had found the alleged breach of duty not established). The judge said that causation was a matter the defendant "simply did not have to contest". He considered that the defendant should notionally bear the claimants' costs of those issues; albeit that taken together "that issue was not a particularly large issue".
(6) The sixth issue related to Kirby & Haslam. The defendant had at one stage been asserting that there was a breach of duty on the part of Kirby & Haslam; and at trial apparently had still maintained that firm's role was of potential significance. In consequence, disclosure of their files had been sought and granted: a "vast quantity of documents", as the judge described it, being disclosed. The judge acknowledged that "the rights and wrongs are not all on

one side", as he put it. But at the end of the day the exercise had resulted in zero benefit, as the judge found, for the defendant. The judge said: "It seems to me those who engage in large scale disclosure exercises which amount to fishing expeditions and catch nothing must pay for them." The judge considered that the whole exercise had been very costly and the defendant thus should pay for it.

(7) The seventh issue related to the construction of the retainer letter. The judge considered that the claimants had been successful on that but it had to be investigated and was not an issue in respect of which the defendant should notionally pay the claimants' costs.

62. The judge then turned to consider what he styled "an entirely separate matter", which was in respect of the parties' conduct. At various stages the claimants had proposed mediation or any other appropriate form of alternative dispute resolution. At two of the hearings before him, furthermore, Peter Smith J had encouraged the parties to consider mediation. At all stages, however, the defendant declined to participate, taking the stance that the claim was entirely without merit. The defendant had in fact offered a "walk away" shortly prior to proceedings and had also responded to a Part 36 offer made shortly before the first trial by offering only to negotiate over its own costs if the proceedings were withdrawn. The defendant had been prepared to move, and had moved, no further.

63. The judge referred to the Court of Appeal decision in *Halsey* v *Milton Keynes General NHS Trust* [2004] 1 WLR 3002; [2004] EWCA Civ 576. There, in deciding whether a party had acted unreasonably in refusing alternative dispute resolution, the Court of Appeal identified factors that could be relevant, including (a) the nature of the dispute (b) the merits of the case (c) the extent to which other settlement methods had been attempted (d) whether the costs of alternative dispute resolution would have been unreasonably high (e) whether delay would have been prejudicial and (f) whether the alternative dispute resolution would have had a reasonable prospect of success. It was stressed by the Court of Appeal this was not an exhaustive check-list. The judge duly considered these factors. In addressing the merits of the case, the judge said this:

"So far as the merits of the case are concerned, it seems to me that the defendant has been vindicated in its assessment of the strength of the

> claimants' case so far as breach of duty is concerned, but as will be clear from my analysis of the issues earlier in this judgment, I do not agree that the defendant's assessment of the merits of the claimants' case was universally accurate. On the contrary, it seems to me that the defendant's assessment of the claimants' prospect of success was at variance with the result in the judgment in a number of respects."

64. It was not really disputed that the matters identified in (a), (c), (d) and (e) of the "check-list" were consistent with mediation being appropriate. In this context, however, the judge said that one of the advantages of mediation would be that, if successful, there was avoided the risk to the defendant of being exposed to what the judge called "collateral reputational damage". He described that as a "relevant factor in the present case". He also noted that in a "minor respect" he had found the defendant in breach of duty.

65. On the question of whether alternative dispute resolution would have had a reasonable prospect of success, his conclusion was that there was a real possibility that, had there been a mediation, both parties would have gained a "better understanding of the weaknesses in their own case"; and that it was "not unrealistic" to suppose that mediation might have produced a settlement although he concluded that it was more likely than not that it would have been unsuccessful. He considered that the prospect of a successful outcome was not so unrealistic as to justify "the defendant's intransigent refusal at every stage even to contemplate the possibility of mediation". He then said this:

> "It seems to me that the defendant's attitude in simply refusing even to contemplate the possibility of mediation on the grounds that the claim was utterly hopeless was an unreasonable position to take. Accordingly, I consider that the defendant's attitude to mediation is a factor that should be brought into account in making an overall assessment of what costs order should be made."

66. The judge's overall conclusion was to this effect:

> "Standing back and viewing all of the matters which I have considered in the round, the result as it seems to me is this. There are issues upon which I consider that the defendant, despite being overall the successful party, should not recover its own costs. There are also issues in respect of which I consider that it should notionally pay the claimants' costs.

> Furthermore, there is the additional factor of the unreasonable refusal of the defendant to mediate. Taking all of those factors into account, and giving most weight to what I regard as being the overall degree of success which I consider that the defendant achieved in my judgment, I consider that a fair and just order to make is that the claimants should pay 50% of the defendant's costs."

Argument and Conclusions

67. Mr Simpson complained that the judge erred in his approach. On all the seven issues identified by the judge these were, he submitted, matters that in effect had to be explored as part of the whole background: and in any event were relatively peripheral such as not to justify so large a reduction in the costs award to the defendant as successful party. He also said that the judge had been entirely wrong to hold against the defendant its refusal to mediate. For his part, Mr Mathew submitted that the judge had exercised his discretion in a way in which the appellate court should not interfere.

(a) The Seven Issues

68. Mr Simpson said that the defendant was constantly facing a moving target in the way in which the claimants were seeking to formulate their case. Further, the whole background had to be explored. In such circumstances all these particular matters, he said, were properly in issue. He particularly complained about the attribution of costs on the causation issues. He said that – as illustrated by para 204 of the judgment – the defendant had succeeded on one major aspect of causation and on the other aspects the defendant inevitably had to join issue on the pleaded case, and there was nothing unreasonable in it so doing.

69. Mr Simpson throughout much emphasised that the defendant had not acted unreasonably in defending any of these matters as raised and in joining issue with them. Obviously if a party does unreasonably take a position which increases costs that will be material in deciding on the award of costs to the party if he is successful overall at trial. But reasonableness, although of course relevant, is not the only yardstick here. As stated by Longmore LJ in *Summit Property Ltd* v *Pitmans* [2001] EWCA Civ 2020 at para 16 of his judgment (with which Tuckey LJ and Chadwick LJ agreed):

> "In my judgment it is also no longer necessary for a party to have acted

> unreasonably or improperly before he can be required to pay the costs of the other party of a particular issue on which he (the first party) has failed."

There are a number of other authorities to like effect. As put by Sir Robin Jacob in *MMI Research Ltd* v *Cellxion Ltd* [2011] EWHC 426 (Pat) at para 9:

> "A defendant cannot take as many 'reasonable' points as it likes and not have to pay for any of them if they are unsuccessful."

70. Of course, it does not follow that a successful defendant necessarily will be deprived of costs on issues on which it has not succeeded. It is a matter of evaluation and discretion by reference to the circumstances of each case and there is no automatic outcome.

71. In the present case, I can see that some judges, in a case such as this and acknowledging that it is a rare litigant who wins on every single issue, may well not have adopted quite the approach which the judge did here. For example, on the second and third issues the judge himself accepted that these were part of the necessary background relevant to the findings as to whether or not there was a breach of duty. One can also be sympathetic to Mr Simpson's observations concerning the causation issues. But on all these matters one has to remember that this was the exercise of discretion by the trial judge, who had the feel of the case. I would also reject the suggestion by Mr Simpson of there being an element of "double counting". The judge was, I conclude, entitled to approach matters as he did and I can see no proper basis for the appellate court to interfere.

72. I would, however, like to make one particular observation on the Kirby & Haslam costs: clearly a very significant item. The judge was perfectly entitled to style this as a fishing exercise yielding no benefit to the defendant, for which it should pay. Mr Simpson took what, with respect to him, was a thoroughly bad point in relying on the fact that the claimants had ultimately consented to an order for such disclosure of the Kirby & Haslam documents and so (he asserted) could not be heard now to say the exercise was unreasonable or unnecessary. That is quite wrong. A party should not ordinarily in this context be, as it were, penalised for agreeing to an order sought by the other party: so to consent avoids increasing interlocutory costs. Consent was pragmatic. Anyway, had the claimants resisted I suspect

the defendant would immediately have accused them of being unhelpful or obstructive or of having something to hide. In my view the judge's approach on this issue was fully justified.

(b) Refusal By Defendant to Agree to Mediation

73. I am much more troubled by the judge's approach as to conduct and in particular by his holding it against the defendant, in terms of costs, that it declined to enter into mediation or any other form of alternative dispute resolution.

74. There are, I think, three objections to the judge's approach:

1) First, the judge had in terms found that the defendant had been "vindicated" in its assessment of the strength of the claimants' case so far as breach of duty was concerned. Thus its position, maintained throughout, had been shown to be justified on a matter which would have been (and was) determinative of the case in its favour.
2) Second, quite what "weaknesses" in the respective cases would have been revealed in a mediation is not explained by the judge. I note that it is also not said that, if identified, their revelation could have led to a mediated settlement.
3) Third, I do not understand why avoidance of "collateral reputational damage" to the defendant should have been considered a relevant factor in this case, counting against the defendant. A settled professional negligence claim is capable, in some instances, of leaving behind reputational damage. Some professional defendants may, entirely reasonably, wish publicly to vindicate themselves at trial in respect of claims which will have been publicly aired by the commencement of proceedings. It is a matter for them. It would be unfortunate – speaking generally – if claimants in cases of this kind could be encouraged to think that such a consideration as identified by the judge could enhance their bargaining position.

75. I also have concerns at the judge's assessment that the possibility of a mediated settlement was "not unrealistic". At all stages the parties in reality were a hundred miles apart. The claimants had sought £750,000 and costs by a Part 36 offer served shortly before the first trial. The defendant's best offer had never been more than a "drop hands" approach (before proceedings). Its assessment of the strength –

or rather weakness – of the claimants' pleaded case on breach of duty never altered. It is difficult to see, given the circumstances, how a mediation could have had reasonable prospects of success. Moreover, in such circumstances I do not think it right to style critically the defendant's refusal to agree to a mediation as "intransigent". Nothing changed in this particular case (unlike many cases) to necessitate a re-evaluation on the question of liability. A reasonable refusal to mediate does not become unreasonable simply by being steadfastly, and for cause, maintained.

76. In *Halsey*, the Court of Appeal was concerned to make clear that parties are not to be compelled to mediate. Further, as stated by the Court of Appeal at para 16 of the judgment delivered by Dyson LJ: "mediation and other ADR processes do not offer a panacea and can have disadvantages as well as advantages; they are not appropriate for every case". The Court of Appeal was also concerned to point out the relevance of the fact where a party reasonably believes that he has a strong case; otherwise there is scope for a claimant to use the threat of costs sanctions to extract a settlement even where the claim is without merit: "courts should be particularly astute to this danger" (at para 18). It was thus emphasised that where a party reasonably believes that he has a watertight case that may well be a sufficient justification for a refusal to mediate. That has obvious resonance here, given the judge's finding that on the core issue of breach of duty the defendant's assessment of the strength of its case and weakness of the claimants' case had been vindicated. That, to my mind, remains very much in point: even if on some (non-core) issues the defence case proved to have weaknesses. After all, it is indeed a relatively rare case where a party succeeds on every issue raised.

77. The fundamental question remains as to whether it had been shown by the unsuccessful party (the claimants) that the successful party (the defendant) had acted unreasonably in refusing to agree to a mediation. In my view, that could not be shown here; and I therefore think that the judge was wrong to bring into account, adversely to the defendant, the defendant's attitude to mediation in deciding what costs overall should be awarded.

78. Given this, and given the other matters mentioned in para 74 above, I think that the judge's exercise of discretion on costs was, with respect, flawed.

Conclusion on Cross Appeal

79. It thus falls to this court to exercise the discretion afresh. The judge did not ascribe any particular percentages to the various issues which he had identified as relevant: nor, indeed, did he ascribe any particular percentage to "the defendant's attitude to mediation" as a factor to be brought into account on the question of costs. Neither party, however, has sought to say that the matter should be remitted to the trial judge for further determination.

80. Mr Mathew submitted that, if the judge did err on the issue of refusal to agree to mediation, it amounted – as he put it – only to a small amount of tarnish on the corner of the mirror and should involve an adjustment of no more than 5%. Mr Simpson submitted, on the other hand, that a far greater adjustment was called for: and 5% was effectively, in the circumstances, *de minimis*.

81. The detail with which the judge addressed the mediation point indicates that it had importance to him in the overall assessment that the claimants should pay 50% of the defendant's costs. On the other hand, the claimants had the benefit of the judge's conclusion on the other issues which, as I have indicated, this court should respect and which taken together were clearly significant. In all the circumstances, and necessarily painting with a broad brush, I would, exercising the discretion afresh, award the defendant 60% of its costs of the proceedings.

82. Accordingly I would allow the cross-appeal on costs by substituting a figure of 60% payable by the claimants for that of 50% indicated by the judge.

Post Script

83. The trial, and its outcome, will have been disastrous for the four daughters of Mr Swain: not only in costs terms but also (it is not difficult to apprehend) in terms of anxiety, pressure and emotional upset. The trial judge himself indicated at the end of his own judgment concerns at their likely feelings at the outcome. One feature, at all events, that seems to me to shine through the evidence is Mr Swain's evident long term wish, as a father, to make as handsome financial provision as he could for his daughters. I anticipate that this will not, in the result, have been achieved: his wish will have been frustrated.

84. **Richards LJ:** I agree.

85. **Lord Neuberger MR:** I also agree.

Robin Mathew QC and *Alexander Learmonth* (instructed by Berry & Walton) appeared for the appellants.

Mark Simpson QC and *Marianne Butler* (instructed by Mills & Reeve LLP) appeared for the respondent.