Abacus (C.I.) Ltd v Grupo Torras S.A.and Ors

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	11 January 2005
Neutral Citation:	[2005] JRC 3
Reported In:	[2005] JRC 03
Court:	Royal Court
Date:	11 January 2005

Text

[2005] JRC 3

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, **Esq., Deputy** Bailiff, **sitting alone**.

In The Matter of a Settlement made on 21st August, 1981 between His Excellency Sheikh Fahad Mohammad Al Sabah (1) and Abacus (C.I.) Limited (2) (The “Esteem Settlement”).

And In The Matter of a Settlement made on 24th August, 1992 between His Excellency Sheikh Fahad Mohammed Al Sabah (1) and Abacus (C.I.) Limited (2) (The “Number 52 Trust”).

And In The Matter of Articles 47 and 49 of the Trusts (Jersey) Law 1984 (as amended) and the Royal Court Rules 1982, Rule 4/5.

Between
Abacus (C.I.) Limited, Trustee of the Esteem Settlement and the Number 52 Trust
The Trustee

Grupo Torras S.A.
First Plaintiff

and

George Clifford Culmer, Trustee in Bankruptcy to the First Defendant
Second Plaintiff

Sheikh Fahad Mohammed Al Sabah
First Defendant
Barbara Alison Al Sabah
Second Defendant

and

Mishal Roger Al Sabah
Third Defendant

and

Advocate Michael St. John O'Connell, representative of the minor and unborn beneficiaries of the Esteem Settlement and the Number 52 Trust
Fourth Defendant

and

Michael St John O'Connell, representative of any person whom may in the future be the spouse or former spouse of any child or remoter issue of the First Defendant
Fifth Defendant

Advocate N.F. Journeaux **for the First Plaintiff**.

Advocate K.J. Lawrence **for the Trustee**.

Advocate N.M. Santos-Costa **for the Second and Third Defendants**

Authorities

Alsford v Boyd (6th May, 1992) Jersey Unreported; [1992/78].

Blenheim Trust v Morgan (1st June, 2000) Jersey Unreported; [2000/94A].

Dixon v Jefferson Seal (13th January 1998) Jersey Unreported; [1998/6].

Dick v Narango (6th April, 1990) Jersey Unreported; [1990/48A].

Application by the First Plaintiff for costs arising out of: (1) its application for clarification of the Royal Court's Judgment of 12th March, 2002: (2) an unsuccessful application by the Trustee to adjourn the clarification hearing; and (3) today's costs hearing, following acceptance by the Trustee of the First Plaintiff's interpretation of the Judgment of 12th March, 2002.

Bailiff

THE DEPUTY

1 This is an application by the First Plaintiff, GT, for costs in relation to issue 1 of a summons which was due to be heard today. The matter has, in fact, been conceded prior to the hearing both by the defendants and the Trustee and accordingly GT now asks for costs.

2 Two matters arise. First, who should be ordered to pay the costs and secondly on what basis? As to the first issue Mr Journeaux asks for costs, jointly and severally, against both the defendants and the Trustee, in its capacity as trustee not personally. Mr Santos-Costa, on behalf of the beneficiaries, accepts that they should pay costs on the standard basis, they having indicated initially that they were going to oppose the construction put forward by GT but having now conceded the matter.

3 Miss Lawrence, on the other hand for the Trustee, submits that there are no grounds for making the Trustee pay costs. Mr Journeaux argues that the Trustee did descend into the arena, in that it wrote letters which raised the issue and which could be said to have suggested that it was taking the point.

4 In my judgment, the Trustee has not stepped outside its proper function of being neutral in this case. I have been referred to a letter of 20 th May, 2004, from Ogier and Le Masurier, the Trustee's advocates, to Baker McKenzie, GT's English solicitors. In that letter the Trustee raises the point that there is an ambiguity concerning paragraph 11 of the Order of this Court of 11 th March, 2002, and goes on to say that it would not be right for the Trustee, in effect, to adopt either one or other interpretation without the agreement of both parties.

5 The Trustee, therefore, suggested that my views, as the judge who made the order, should be sought by correspondence. That indeed is what happened and on 24 th June, 2004, Ogier and Le Masurier wrote to me outlining the issue. They made it clear on page 2 of that letter, that GT took one view and the defendants another view. It went on to say that:

> *"In view of this fundamental disagreement between the main parties to the*

> *preliminary issue, it is the Trustee's view that it would be inappropriate for it to concede the point either way, unless both GT and the beneficiaries are in agreement."*

6 Ogier and Le Masurier had suggested I might be able to deal with the matter by way of correspondence, but GT wrote a few days later saying that they wished to have the opportunity of making submissions. Accordingly, the matter was put off for a hearing.

7 I do not criticise GT in any way for the attitude which they took, but I am satisfied that this was at all times in reality a dispute between the defendants on the one hand and GT on the other. GT took the view that the Trustee's costs should come out of the "rump" of the trust fund after payment of the sums due to GT under the preliminary judgment; whereas the defendants took the view that the Trustee's costs would come out of the gross, in effect, of the trust fund.

8 As I say, I am satisfied that the Trustee did act neutrally. In those circumstances, it seems to me that it would be wrong to visit it with an order for costs in favour of GT. I think that the persons who were opposing GT's view should pay the costs; that is to say the defendants. So I do not make an order for costs against the Trustee.

9 I then have to consider the second issue which is whether the order for costs against the defendants should be on the standard basis or, as Mr Journeaux contends, on an indemnity basis. Mr Journeaux refers me to the case of *Dick v Narango* (6th April, 1990) Jersey Unreported [1990/48A], a decision of the Court of Appeal. In that case the appellant instituted proceedings in the Matrimonial Division of the Royal Court, but then withdrew them at the eleventh hour. The Court of Appeal decided that he should pay costs on the indemnity basis and, in passing, it said this:

> ***"Mr Scholefield has explained to us the circumstances which led the appellant to take this decision.*** We appreciate those circumstances but it appears to us that if, for reasons of his own whether good or bad, a party who has instituted proceedings subsequently decides to drop them before they come into Court, it is fair that he should pay for that conduct the price of compensating the other party by way of indemnity costs.".

10 Mr. Journeaux argues that the position here, is in principle, no different. Admittedly the defendants did not institute these proceedings, but they caused them by the attitude they were taking to the interpretation issue but withdrew their opposition shortly before the hearing.

11 Mr Santos-Costa on the other hand argues that *Dick* should be confined as a statement of general principle, — if that is what it was intended to be — to cases where a plaintiff has instituted, but has then withdrawn, proceedings before trial. The position is different for a defendant; it is not he who has started the ball rolling. It is commonplace for defendants to

deny liability and defend a case but then to concede sometime before trial. It is not the norm, in those circumstances, to visit them with indemnity costs. Indeed to do so, says Mr Santos-Costa, would be counter-productive, because it would mean that if a defendant faced reality and accepted that he had no defence prior to trial, he would have to pay indemnity costs, whereas if he fought on regardless and duly went down in flames at trial, he would only have to pay standard costs, absent some unusual or exceptional feature. It cannot be right, says Mr Santos-Costa, to differentiate in this way and indeed it would act as a disincentive to defendants to accept reality prior to trial.

12 The general principle, of course, in relation to indemnity costs is conveniently set out in the case of *Dixon v Jefferson Seal* (13th January, 1998) Jersey Unreported; [1998/6]. I do not propose to cite from it, but in general there is a requirement for some special or unusual feature which makes it fair and appropriate to award indemnity costs rather than standard costs.

13 I accept Mr Santos-Costa's arguments. In my judgment the case of *Dick* is not easily translated to cases in which a defendant concedes liability. This is not, of course, to say that in no circumstances could a defendant in such a case ever be ordered to pay indemnity costs; on the contrary, if the Court were satisfied that the defendant had knowingly, or thoroughly unreasonably, strung the matter out and then conceded at the last moment he may well, of course, be ordered to pay indemnity costs. There may be all sorts of circumstances in which it would be right to make an order in those cases. But there is no general rule that a defendant who gives up prior to trial should have to pay indemnity rather than standard costs.

14 Furthermore, I am satisfied in this case, that there is nothing of that nature present here. I take the view that it was arguable as to whether the construction put forward by the defendants was correct. The defendants and the Trustee have not pursued it and, in my judgment they were right not to do so. Had I been called upon to rule I would have agreed with GT's interpretation. That is not to say that it was unreasonable, or wholly inappropriate, for a different view to be taken. In the circumstances, therefore, I do not consider that the defendants were acting unreasonably or in such a manner as to attract the sanction of indemnity costs. They have accepted the reality and must therefore pay standard costs.