4 pages

ROYAL COURT
(Samedi Division)

26th September, 1997 184

Before: F.C. Hamon, Esq., Deputy Bailiff, Single Judge.

Between:	Miss Jane Margaret Richardson	First Plaintiff
And:	David William Law Dixon	Second Plaintiff
And:	Reeb Investments Limited	Third Plaintiff
And:	Jefferson Seal Limited	Defendant

An application by the plaintiffs for full indemnity costs following the judgment delivered in the Royal Court on 30th July, 1997, and from the interlocutory order made on 5th June, 1997.

Advocate M. St. J. O'Connell for the First and Second Plaintiffs.
Advocate N.M. Santos Costa for the Third Plaintiff.
Advocate A.D. Hoy for the Defendant.

JUDGMENT

THE DEPUTY BAILIFF: This is an application for costs following the judgment delivered on 30th July, 1997. There is no argument before me that costs will not follow the event. The only issue in question is the basis on which the award should be made. The plaintiffs ask for indemnity costs. The defendant asks for taxed costs.

In Jones -v- Jones (No. 2) (1985-86) JLR 40, Ereaut, Bailiff, said this:

> *"As I said a short time ago, I have never fully understood why a successful litigant is not entitled to his or her full costs, subject of course to the costs in question being reasonable, having been reasonably incurred and not being excessive. I still do not understand why that is not the situation, but I have to accept that it is not the principle upon which the English courts proceed and no doubt for that reason I have to accept also it is not the principle upon which Jersey courts proceed. I think that is quite clear, first, from Preston -v- Preston and secondly, from the fact that there are very few examples in Jersey where full indemnity costs have been given. So obviously, for good reason or bad reason, we appear to have followed the English practice and I feel that I must follow that practice too".*

I am fully aware that that Court case was delivered in 1985 and there has been only a trickle of indemnity costs awarded since then.

This case was very long and very hard fought. In order to award indemnity costs there must be special or unusual features; were there any in this case? Let me quickly analyse what they may have been; firstly, the allegation of contributory negligence against Mr. Dixon, pleaded in detail and argued at length, was withdrawn by the defendant in counsel's closing address. Consequently, of course, any other claims of contributory negligence fell away and a third party claim was also lost to the defence.

A turn in the proceedings came, when, to the visible consternation of plaintiff's counsel, an investment policy of 10% was alleged to have been agreed between the parties. This was nowhere pleaded. As we said in Dixon & Ors. -v- Jefferson Seal (30th July, 1997) Jersey Unreported at p.29:

> *"There were during the course of this period a number of bonds mentioned but, if Mr. Beadle is to be believed, then the 10% return was paramount. It does seem to us unfortunate that this remarkable change of strategy is not pleaded and came out only at trial. There is no record because the discussions "formed the normal part of a broker/client relationship". That does seem to us to be a startling omission which quite clearly took the plaintiff by surprise at trial".*

The question was never put to the plaintiff, Miss Richardson.

In regard to Mrs. Beer of Reeb Investments Limited we have the astonishing statement made by Mr. Beadle, during course of trial, that her risk tolerance was, in his words, *"to have something as stable as - as secure as - bank deposits".*

A number of pleaded allegations concerning Mrs. Beer never came near to proof. For instance, the question of a "switch recommendation" was eventually tied down at trial to a meeting between Mr. Beadle and Mrs. Beer. However, that meeting was not pleaded and was nowhere documented.

We have been reminded by Mr. O'Connell that this was a trial where some 25 interlocutory orders were previously made. We have to agree with counsel for the plaintiff that the attitude of the defendant tended to show a pattern of delay, with the aim of being as unco-operative as possible.

Mr. Hoy has, as always, argued courteously and strenuously on his client's behalf.

In the course of address we have noted the statement of the Legal Practices Committee Report, Chapter 10, which says this of indemnity costs:

> *" "Indemnity (or 'full indemnity') costs". This basis is the same as "reasonable costs" except that any doubts as to whether the costs were reasonably incurred or were reasonable in amount are resolved in favour of the receiving party. Consequently, the amount allowed on this basis is usually*

higher than that allowed on the "reasonable costs" basis. It is unusual for costs to be awarded on this basis and normally such an award is made only when, for example, the court wishes to mark its disapproval of the conduct of the unsuccessful party. This basis is similar to (though not exactly the same as) the English "indemnity basis" to which we refer later".

There is a helpful passage in Rules of the Supreme Court, O.62/3/3 which says this:

"A person who takes advantage of a right of appeal, conferred by statute can not be said to be behaving disgracefully or deserving of moral condemnation, so as to justify an order for costs against him on an indemnity basis, merely because the appeal has no chance of success. In the case of such an appeal the respondent's remedy is to apply for an order to strike it out or to apply for an order for security for costs.... Over vigorous presentation and conduct of breach of confidence actions is different in nature from overt or deliberate dishonesty in the prosecution of an action and does not attract taxation on a higher basis (Berkeley Administration -v- McClelland [1990] FSR 565).

....

Failure by a defendant to consent to the entry of judgment, following an admission of liability without any tenable excuse is a serious unexcused and inexcusable dilatoriness which falls closer to the pole of misconduct, than of mere failure, and is thus, a proper basis for awarding indemnity costs".

This is a difficult matter of discretion and I have to weigh it all very carefully in the balance. However, I am going to make an award as follows:

I feel, despite the powerful arguments of Mr. O'Connell, that I can only award taxed costs for Mr. Dixon and Miss Richardson, but I am happy to award indemnity costs for Reeb Investments Ltd. Had Mr. Beadle made known the investment strategy that came out at trial, in my view, the case would not have been defended and could not have been defended on that basis. I also make an award for taxed costs on the summons of 15th June, 1997.

Authorities

Jones -v- Jones (No. 2) (23rd May, 1985) JLR 40.

Dixon & Ors. -v- Jefferson Seal (30th July, 1997) Jersey Unreported.

Legal Practice Committees Report, Chapter 10.

RSC O.62/3/3.