IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT, FINANCIAL SERVICES DIVISION

Civil Appeal No. 11 of 2019
(Formerly Cause No FSD 0065 of 2009 (RMJ))

BETWEEN:

ENNISMORE FUND MANAGEMENT LIMITED

Appellant

-and-

FENRIS CONSULTING LIMITED

Respondent

BEFORE:

The Rt Hon Sir John Goldring, President
The Rt Hon Sir Bernard Rix, JA
The Hon Sir Richard Field, JA

DEALT WITH BY WAY OF WRITTEN SUBMISSIONS RECEIVED FROM
Appleby (Cayman) Ltd, Attorneys for the Appellant (EFML)
Ogier, Attorneys for the Respondent (Fenris)

Ruling Released on 22 June 2020

RULING ON COSTS AND SET-OFF

Sir Richard Field, JA

Costs

The parties' submissions

The case for the Respondent ("Fenris")

1. Fenris argues that, having been awarded on appeal compensation in the sum of €558,034.89 in respect of the Appellant's cross-undertaking, Fenris should have its costs of the appeal and of the inquiry into damages conducted below. In Fenris' submission, it is the "successful party" for the

purposes of Order 62, Rule 4 (2) of the Grand Court Rules and the award of compensation is the "event" for the purposes of Order 62, Rule 4 (5).

2. Ord 62, r 4(2) and r 4 (5) provide:

> Ord 62, r 4(2)
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> The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.
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> Ord 62, r 4 (5)
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> If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

3. Fenris submits that where a sum has been awarded to a plaintiff, the effect of Ord 62, r 4 (5) is that the defendant can only be awarded the costs of the proceedings if: (i) the court holds that the "event" was a victory for the defendant so that the defendant should be awarded the costs in accordance with Ord. 62, r 4 (5); or (ii) there is material before the court (e.g. improper or unreasonable conduct) on which it can exercise its discretion to hold that some other order should be made. Applying this approach to the instant case, Fenris contends that: (i) the award of compensation to Fenris was "the event" since Fenris had to come to court to recover the amount found to the due; (ii) Fenris cannot be said to have pursued its claim improperly or unreasonably and the Appellant ("EFML") having denied any liability to pay compensation, there is no material before the Court on which it can properly make some other order as to costs.

4. Responding to EFML's reliance on two offers made without prejudice save as to costs (WPSAC) that were for larger sums than that awarded by this Court, Fenris further argues that EFML could and should have protected itself by making a payment into court under Ord 22, r 1, the more so since, pursuant to the proviso to Ord 22, r 14 (2), the Court cannot take into account any offer of compensation made WPSAC under Ord 22, r 14 (1), if, at the time the offer is made, the party

making it could have protected his or her position as to costs by means of a payment into Court under Order 22, r 1, which, it is submitted, is the case here.

5. Ord 22, r 1 (1) & (2), r 3, r 5 and r 14 provide:

> Ord 22, r 1 (1) & (2)
>
> (1) In any action for a debt or damages any defendant may at any time pay into Court a sum of money in satisfaction of the cause of action in respect of which the plaintiff claims or, where two or more causes of action are joined in the action, a sum or sums of money in satisfaction of any or all of those causes of action.
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> (2) On making any payment into Court under this rule, and on increasing any such payment already made, the defendant must give notice thereof in Form No. 14 of Appendix I to the plaintiff and every other defendant (if any); and within 3 days after receiving the notice the plaintiff must send the defendant a written acknowledgment of its receipt.
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> Ord 22, r 5
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> If any money paid into Court in an action is not accepted in accordance with rule 3, the money remaining in Court shall not be paid out except in pursuance of an order of the Court which may be made at any time before, or after the trial or hearing of the action; and where such an order is made before the trial or hearing the money shall not be paid out except in satisfaction of the cause or causes of action in respect of which it was paid in.
>
> Ord 22, r 14
>
> (1) A party to proceedings may at any time make a written offer to any other party to those proceedings which is expressed to be "without prejudice save as to costs" and which relates to any issue in the proceedings.
>
> (2) Where an offer is made under paragraph (1), the fact that such an offer has been made shall not be communicated to the Court until the question of costs falls to be decided and the Court shall take into account any offer which has been brought to its attention when making an order for costs.

Provided that the Court shall not take such offer into account if, at the time it is made, the party making it could have protected his position as to costs by means of a payment into Court under Order 22.

6. In Fenris' submission, the inquiry into damages conducted below was an "action for damages" within Ord 22, r 1 (1) and the expression "cause of action" in Ord 22, r 1 (1) refers as much to claims that are initiated with the leave of the Court as a matter of discretion such as inquiries as it does to a writ action. Equally, there is no reason why the reference to "damages" in Ord 22, r 1 (1) should not also cover a claim for compensation. Once the Court has ordered an inquiry the claimant under the inquiry has a right to claim compensation. This is reflected in the pleadings served in the inquiry, with Fenris pleading in its Points of Claim a claim for damages pursuant to EFML's cross-undertaking on the grounds that it suffered loss and damage as a result of the injunction.

7. In support of its submission that EFML could have made a payment into Court, Fenris cites the decision of Mr John Cherryman QC sitting as a Deputy High Court Judge in *Braben v Emap Images Ltd* [1997] 1 WLR 1507. Here, as the headnote states, the plaintiff brought an action against the defendant for infringement of copyright and sought, inter alia, an inquiry as to damages or an account of profits. The defendant admitted the infringement and offered to submit to an inquiry as to damages or an account of profits at the plaintiff's election, and it paid £5000 into court "in satisfaction of all the causes of action in respect of which the plaintiff claims." The plaintiff elected to take an account of profits but was willing to accept the monies in court in satisfaction of his claim. Not having accepted the payment-in within the 21 days allowed by our Ord 22, r 3, the plaintiff applied for an order under Ord 22, r 5 authorising payment out to him.

8. The rules under RSC Order 22 considered by the Deputy Judge, namely rules 1, 3 and 5, are substantially similar to Ord 22, r 1(1), r 3 and r 5 contained in the Grand Court Rules that are set out above.

9. The Deputy Judge held that the plaintiff's application for payment out of the money failed. In his view, on the proper construction of RSC Ord 22, the plaintiff was not able to invoke RSC Ord 22, r 5 following his election to take an account of profits because: (i) under RSC Ord 22, r 1 the payment-in that is authorised is in satisfaction of a cause or causes of action for a debt or damages; (ii) RSC Ord 22, r 3 only authorises acceptance in respect of a cause or causes of action for a debt or damages; (iii) the concluding words of RSC Ord 22, r5 ("where such an order is made before the trial or hearing the money shall not be paid out except in satisfaction of the cause of action or causes of action in respect of which it was paid in") preclude any payment out where the cause or causes of action for a debt or damages in respect of which the moneys were paid in is no longer

subsisting at the time the application for payment out is made, as was the situation in the instant case because the claim for damages had disappeared when the plaintiff elected to take an account of profits instead.

10. Fenris submits that it is implicit in the Deputy Judge's reasoning that he regarded the initial claim for an inquiry as to damages as falling within RSC Ord 22, r 1 and so, by parity of reasoning, Fenris' claim for an inquiry as to damages is within Ord 22, r 1 (1).

EFML's case

11. EFML contends that it should have the costs of the appeal and below on two alternative grounds: (1) EFML was the successful party because Fenris advanced but one case – it would have invested the frozen funds in portfolio management as pleaded in its Points of Claim – and that one case failed with this Court setting aside the order made below and awarding compensation on the completely different basis of a generic investment loss; and (2) EFML made two offers WPSAC for sums in excess of the €558,034.89 awarded to Fenris, first in respect of the inquiry below and secondly in respect of the appeal.

12. The first offer WPSAC was made by letter dated 11 November 2016 shortly after Fenris had issued the summons seeking an inquiry into damages. In this letter, EFML offered WPSAC to pay €1 million in full and final settlement of Fenris' rights arising from the cross-undertaking and the inquiry. The offer was expressed to be open for acceptance for 21 days from receipt of the offer and it was stipulated that if it was accepted within this period EFML would in addition pay Fenris' costs of the inquiry on the standard basis up to the date of acceptance (to be taxed if not agreed). The letter also stated that EFML was willing to pay the €1 million into a court or escrow account on suitable terms, at Fenris' option and subject to agreement on terms. The offer was being made rather than the €1 million being paid into court under Ord 22 because that Order did not apply to the enforcement of cross-undertakings but only where there was "an action for a debt or damages" where "a cause of action" was sued on, whereas the enforcement of such undertakings where they are breached was by punishment for contempt of court.

13. EFML also points out that pursuant to Ord 22, R 1 (2), payments into court under Ord 22, r 1 (1) have to be accompanied by notice to the plaintiff in Form 14 which requires the defendant to state the cause or causes of action in satisfaction of which the payment is made. In EFML's submission, the only coherent answer to this question in the instant case would have to be "none", which would have led to the court office having to refuse the payment in.

14. On 22 November 2016, Fenris rejected EFML's offer.

15. EFML's second offer without prejudice save WPSAC was made by letter dated 16 April 2018, by which time McMillan J had awarded compensation of €5.7 million odd and EFML had informed Fenris that it intended to appeal. The sum offered in settlement was now €4.25 million which was open for acceptance within 21 days.

16. Fenris rejected this offer by letter dated 18 April 2019 in which it offered to settle for €4,976,746,.87, plus costs to be taxed if not agreed.

Discussion and decision

17. In my view, EFML's submission that Ord 22, r 1 (1) does not apply to an inquiry as to damages in respect of a cross-undertaking in damages is well founded. As Lord Diplock made clear in *Hoffmann-La Roche v Trade Secretary* [1975] AC 295 at 361 A-E, the cross-undertaking is given to the Court, not to the plaintiff, and it is enforced by proceedings for contempt of court. A party who fulfils the role of claimant in an inquiry as to damages begun by summons with the leave of the Court is therefore not bringing an action for a debt or damages founded on a cause of action within Ord 22, r 1 (1).

18. Fenris' reliance on *Braben v Emap Images Ltd* is misconceived. The plaintiff's cause of action there was for breach of copyright and his original claim for an inquiry as to damages was accordingly a claim in an action for damages within RSC Ord 22, r 1 (1).

19. It follows that the proviso to Ord 22, r 14 (2) is inapplicable and in accordance with Ord, r 14 (2) this Court must take into account EFML's offers WPSAC when deciding what order for costs should be made.

20. In my judgment, given that EFML's offers WPSAC were well in excess of the compensation awarded to Fenris and that the compensation was awarded on a quite different basis from that which underlay the one case Fenris advanced both below and on appeal, EFML should pay Fenris' costs of the inquiry down to 22 November 2016 when Fenris rejected the first offer and Fenris should pay EFML's costs below incurred after that date including EFML's costs of the appeal, to be taxed on the standard basis if not agreed.

Set-off

21. In the event that EFML obtains a substantial costs order in its favour, it applies for an order allowing it to set off those costs against the €558,034.89 compensation it must pay to Fenris. The application is supported by an affidavit sworn by a director of EFML, Mr Andrew Blair, who deposes that Fenris is a Belize company which appears to have no assets other than its rights pursuant to the cross-undertaking in damages. Mr Blair also states that Mr Vigeland, whose substantial role in Fenris' affairs is described in the judgment of this Court, failed to comply with substantial costs orders made against him in England in favour of EFML and a co-defendant and had to be sued for those costs in Norway right up to the level of Norway's Supreme Court before they were paid.

22. In *Lockley v National Blood Transfusion Service* [1992] 1 WLR 492, where the issue was whether the costs payable by a legally aided plaintiff could be set off against costs or damages to which the plaintiff has or will become entitled, Scott LJ (with the agreement of the other members of the EWCA) set out a number of propositions, the first four of which were:

(1) A direction for the set-off of costs against damages or costs to which a legally aided person has become or becomes entitled in the action may be permissible.

(2) The set-off is no different from and no more extensive than the set-off available to or against parties who are not legally aided.

(3) The broad criterion for the application of set-off is that the plaintiff's claim and the defendant's claim are so closely connected that it would be inequitable to allow the plaintiff's claim without taking into account the defendant's claim. As it has sometimes been put, the defendant's claim must in equity impeach the plaintiff's claim.

(4) Set-off of costs or damages to which one party is entitled against the costs or damages to which another party is entitled depends upon the application of the equitable criterion I have endeavoured to express. It was treated by May J in *Currie & Co v The Law Society* [1977] QB 990, 1000, as a "question for the courts discretion". It is possible to regard all questions regarding costs as being subject to the statutory discretion conferred on the court by section 51 of the Supreme Court Act 1981. But I would not have thought that a set-off of damages against damages could properly be described as a discretionary matter, nor that a set-off of costs against damages could be so described.

23. Scott LJ went on to say (obiter) that whilst a set-off of costs against costs when all are incurred in the same action seems so natural and equitable as to need no special justification, it was less obvious that a set-off of costs against damages would always be justified

24. In *Brookes v Harris* [1995] 1 WLR 981, at 925D-F, Ferris J pointed out that Scott LJ's fourth proposition was obiter and that it also appeared that three earlier decisions holding that the question whether costs and/or damages could be set-off against costs and/or damages was a matter for the discretion of the court had not been cited to the court in *Lockley*. Those earlier decisions were *Edwards v Hope* [1885] 14 QBD 922, *Reid v Cupper* [1915] 2 KB 147 and *In re A Debtor (No 21 of 1950) (No 2), Ex parte The Petitioning Creditors v The Debtor* [1951] Ch 612.

25. In *Fearns v Anglo-Dutch Paint and Chemical Company Limited* [2010] EWHC 2366 (Ch), Mr George Leggatt QC (as he then was) sitting as a Deputy High Court Judge held that the discretionary approach taken in these three earlier decisions where the court had regard to what is just in the particular circumstances was to be preferred to that taken in *Lockley*.

26. The difference between the two approaches is far from stark since the modern test to determine whether there should be an equitable set-off is whether the cross claim is so closely connected with the claim that it would be manifestly unjust to allow the claimant to enforce payment without taking into account the cross claim, see e.g. *Geldof Metallconstructied NV v Simon Carves Ltd* [2010] EWCA Civ 667. However, the discretionary approach is the more flexible approach and for that reason I am of the view that that is the approach that should be adopted when deciding whether costs and/or damages can be set-off against costs and/or damages incurred or awarded in the same or different proceedings.

27. In my view, applying the discretionary approach, justice requires in this case that EFML be entitled to set-off against the compensation payable to Fenris the costs both below and of the appeal awarded in EFML's favour since both entitlements have arisen in the same set of proceedings and because if no set-off is ordered it is highly likely that EFML will not recover its costs.

28. I would equally grant the set-off claimed if EFML had to show it was entitled to an equitable set-off. In my view, the award of compensation and the award of costs are so closely connected that it would be manifestly unjust to allow Fenris to be paid the compensation awarded without netting off EFML's entitlement to costs. I am of this opinion because the costs awarded to EFML were incurred in proceedings brought by Fenris in the course of which Fenris, through its counsel, indicated that it had no objection to this Court deciding whether to award compensation in respect

of a generic investment loss rather than on the pleaded basis of a portfolio of investments in Small Caps.

29. It is true that the costs payable by Fenris to EFML have not yet been determined but this is no problem where equitable, as distinct from legal, set off is in play.

30. In addition to an order that Fenris must pay the EFML's costs below and in the appeal, EFML invites the Court to order as follows:

(1) That the costs to which the Appellant is entitled here and below be set off against the sums that the Appellant is required to pay the Respondent pursuant to the undertaking.

(2) That pending the determination of the amount of costs payable by the Respondent to the Appellant the Appellant shall pay the Respondent €95,000 in respect of the sums that the Appellant is required to pay pursuant to the undertaking.

(3) The Appellant's obligation to pay the balance of the amount due to the Respondent pursuant to the undertaking shall be stayed.

(4) That upon the determination of the amount of costs payable by the Respondent to the Appellant the Appellant shall pay the Respondent any balance due in respect of the undertaking or (if applicable) the Respondent shall pay the Appellant mutatis mutandis.

31. Fenris have made no submissions on the set-off issue. In my judgment, this Court should make the order proposed by EFML.

Conclusion

32. I propose that this Court should order as follows:

(1) The Appellant shall pay the Respondent's costs of the inquiry below down to the 22 November 2016 and the Respondent shall pay the Appellant's costs below and of the appeal incurred after 22 November 2016, to be taxed on the standard basis if not agreed.

(2) The costs to which the Appellant is entitled here and below shall be set off against the sums that the Appellant is required to pay the Respondent pursuant to the undertaking.

(3) Pending the determination of the amount of costs payable by the Respondent to the Appellant the Appellant shall pay the Respondent €95,000 in respect of the sums that the Appellant is required to pay pursuant to the undertaking.

(4) The Appellant's obligation to pay the balance of the amount due to the Respondent pursuant to the undertaking shall be stayed.

(5) That upon the determination of the amount of costs payable by the Respondent to the Appellant the Appellant shall pay the Respondent any balance due in respect of the undertaking or (if applicable) the Respondent shall pay the Appellant mutatis mutandis.

Sir Bernard Rix, JA

I agree

Sir John Goldring, President

I also agree