

Neutral Citation Number: [2021] EWHC 1591 (Comm)

Case No: CL-2017-000657

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 June 2021

Before :

Sir Michael Burton GBE
Sitting as a High Court Judge

Between :

Andrew Barclay Watt & Ors

Claimant

- and -

Alpha Panareti Public Limited & Ors

Defendant

Mr Stephen Nathan QC (instructed by **Highgate Hill Solicitors**) for the **Claimant**
Paul Parker (instructed by **Spector Constant & Williams**) for the **Defendant**

Hearing dates: **8th June 2021**

JUDGMENT

Judgment by Sir Michael Burton GBE

1. Well, not surprisingly as a result of a 29 day case, there is a good deal of concentration placed upon costs, and I have found these submissions on both sides extremely helpful and I have had a good deal to think about. I deal first with the question of whether, as Mr Parker submits, I should reserve the costs,
2. There are two interlocking points here. One is that Mr Parker says that this is equivalent to a preliminary issues decision and that, very often although not always, the costs are reserved at the end of preliminary issues, although as he accepts there may well be cases in which the reality is that a lot of points have been raised and resolved and are never again to be litigated. The second question is what is left, what Mr Nathan QC calls the ‘capsule’ point. There has been a 29 day hearing, and that was to be and was a trial of liability, and I have resolved all those issues which will not arise again, and I am quite satisfied that, although technically it may be right to say that the successful cause of action is negligence and that without proof of loss negligence is not complete, nevertheless this is certainly a case in which in my judgment, unless I am persuaded otherwise, the costs to date ought to be resolved, in whatever proportion I now decide. .
3. So the answer to the ‘capsule’ question: what is left to be swallowed? Now, we know of course that there are issues about the litigation and expenses and all that kind of thing where there may be some dispute, but the reality is that for the first time Mr Parker has raised the possibility of what he calls the counterfactual, not raised at any time prior to now, namely that there may in fact be a way in which he can argue that none of these people suffered any loss, because they would all have somehow avoided the risk about which they were not advised by the First Defendants; that either they would still have gone ahead, which seems to me wholly incredible, or that they would in some way have gone ahead with the purchase of the villas, but found some other way of financing them.
4. Now, both of those, although clearly I cannot rule them out because there is no application to strike them out, seem to me to be wholly implausible and unlikely to succeed. Mr Parker submits that I should

hold up the otherwise sensible result because of an outside possibility that that result might follow, when I have seen the witnesses, I have seen them cross-examined, and know their financial circumstances, and in relation to these Claimants cannot see any way in which the counterfactual would get off the ground. I conclude that I should follow what Mr Nathan says is the common sense result that I should award whatever I am going to award in respect of the costs of this action without regard to the possibility, extremely unlikely as I think it is, that there will be no damages as a result.

5. I turn to the resolution of costs of the action to date (apart from the costs of the Claimants' unsuccessful **Barrell** application, which I have dealt with separately). We start with an agreement by both sides that I should not make the obvious order, namely that, the Claimants having failed against the Second Defendant, who was plainly, as I said in my Judgment the target of their claim, not least as witnessed by the emotion contained in the witness statements every time there was any mention of him, and sometimes when there did not need to be a mention of him, that the obvious order would be that he should, having succeeded, have judgment for costs in his favour.
6. Both sides agree that that would not be an appropriate order to make in this case, for differing reasons, and that the way I should approach it would be by making a discount for the costs otherwise payable to the Claimants, the Claimants having succeeded against the First Defendant.
7. As I said in the course of argument, that is not just a simple discount, because had the Second Defendant had his costs it would have meant that the Claimants must pay the Second Defendant's costs and not recover their own, so that, although it is a very rough and ready way of going about it there is no doubt that I must make allowance, if I am to make this allowance by way of discount. on the basis of doubling the discount, that is the amount that they are not therefore paying him and the amount they are not therefore recovering from the First Defendant.

8. So when Mr Nathan talks about making a 20% reduction to include a very small proportion of allowance for losing on lettability, that in my judgment is an understatement of what the discount ought to be.
9. The next point I want to make is that I am not in the process,, as Mr Nathan put it, of docking his clients' costs or of concluding that they have been unreasonable in the way that they have handled the case which they have in fact won.
10. Equally, I take note of what Mr Parker said, which is, as he put it, that the Claimants have won by the skin of their teeth.
11. It is true, they have, in this sense, been the victims of a bad buy, worse than a bad buy, in relation to all these apartments and villas in Cyprus, but a great deal of it was of course due to the fact that they should not have gone into this at all, because it was a most inadvisable thing for normal people up in the north of England, red wall or otherwise, or Scotland, to have gone for. As I think I said at one stage, if something looks too good to be true, it probably is too good to be true. And because I have not found any or at any rate almost none of the pleaded misrepresentations proved, it does not mean that this was not a very bad bargain for them. It is simply that they have not been able to pin that bargain in law on these Defendants and it may be, I know not, that others were or were also to blame, though I know almost nothing about the position of, for example, the action against the Bank, which was settled, or the actions against the Cyprus solicitors, which seem to have fizzled away.
12. They have had to prove their case as pleaded against the First and Second Defendants, having chosen to join the Second Defendant, as I have earlier indicated for understandable but in the event misguided reasons, and they have only just won by the skin of their teeth against the First Defendant, because as Mr Parker pointed out, out of ten misrepresentations they have succeeded on none of them. Out of six misstatements, they have succeeded on only one of them. That is enough to give them, and I entirely recognise, what Mr Parker concedes, and Mr Nathan asserts, to be the overall victory.

13. But this is a suitable case in my judgment, not least because we have started with a discount because of the position of the Second Defendant, in which I should take account of the result by reference to issues, not an issue-based costs order but a proportionate costs order, to allow for the reality of what has occurred, and I have been greatly assisted by looking at the authorities which counsel have put before me, including **Dexia Crediop SPA v Commune di Prato**, per Walker J [2017] EWHC 252 (Comm) and **Lyons v Fox Williams LLP**, a decision of Turner J [2017] EWHC, 532 (QB).

14. Turner J notes in paragraph 16, relevant to that case, as follows;

"(i) The over-arching result was complete victory for the defendant on all issues.

(ii) The issues upon which the defendant succeeded were, by some margin the most important ones and those upon which the greater part of the resources of time and effort had been expended by the parties.

(iii) This was a commercial case of a complexity which almost inevitably meant that no side would be successful on each and every area of dispute.

(iv) The defendants had not taken a 'kitchen sink' approach to the litigation as a whole which is evidenced by the settlement [of various issues]."

15. So far as this case is concerned, it cannot be said that there has been complete victory for the Claimants on all issues. Far from it.

16. As to (ii), it cannot be said in this case that the issues upon which the Claimants succeeded were *by some margin the most important ones* or *those upon which the greater part of the resources of time and effort had been expended by the parties.*

17. Although it can be said that this is commercial case of complexity, which inevitably means that no side would be successful on each and every area of dispute, I do think that because of the very factor I have indicated earlier, by reference to the misrepresentations and misstatements that the Claimants have to an extent taken a kitchen sink approach in the litigation. I do not mean that as pejorative, I mean that they have taken every point, despite encouragement by me indeed, to concentrate less at any rate on a number of the misrepresentations which did not appear likely to succeed.

18. So I stand back to look at the position, as I am encouraged to do, to seek to arrive at what is called the right approach in those judgments, or the right result.
19. Clearly, on agency, that is, as Mr Nathan has emphasised heavily today before me, the denial by the First Defendant that the salesmen were its agents, the Claimants have been successful, and that was a very important issue in the case, not the most important because there were others, but certainly a priority for the Claimants to succeed.
20. On the other hand, they have failed on establishing personal liability on the part of the Second Defendant with its double whammy, such as I earlier described.
21. Then as far as misrepresentation and misstatement is concerned, this is where the skin of the teeth comes in, the fact that out of ten misrepresentations they failed on all and out of six misstatements they failed on all save one, but one was enough.
22. Their most important and most fully argued case was lettability and on that there were two questions which arose, one a matter of Cypriot law and the other a matter of Cypriot planning law, and the Claimants lost on both.
23. In both regards, there were five almost entirely wasted days of expert evidence, and there were in addition other misrepresentations apart from lettability, all save one of which failed.
24. If one has to look at the hearing or the speeches, opening or closing, one will find a very small period of time indeed dedicated towards the one negligent misstatement on which the Claimants won, although of course it was necessary for them to establish agency on anything the salesmen might say within their authority before they could succeed on either misrepresentation or misstatement, so of course the agency issue was important; but it only led to the success on one out of many alleged misrepresentations and misstatements which were canvassed at great length, and Mr Parker went through the time spent and the days spent. I simply referred in the course of argument to Mr Nathan to the fact that in my Judgment out of 16 dense pages relating to misrepresentation and misstatement only

three related to my conclusion in the Claimants' favour and all the rest either led, in one case to no finding, and in the others to findings against the Claimants.

25. I follow what Mr Nathan says, that of course it was necessary in relation to for example lettability, to establish authority/agency, and that, provided that they won on showing falsity, they would not have had any difficulty on knowledge or belief; but they did not succeed in showing falsity, despite an enormous amount of effort to establish it.
26. So agency, yes. Personal liability, no, and an effective doubling of that aspect.
27. Misrepresentation and misstatement, only one of the misrepresentations and misstatement, and then one adds of course the small issues of proper law and assignability on which the Claimants succeeded.
28. Mr Nathan said, well, you should not disallow all the experts, just disallow some part of it, some part of costs of the Claimants' experts, because they did not further the matter. I do not conclude, as I said earlier, that this is a question of docking anything. I take the view that one should look at this in the round.
29. I have not found it easy, but I have concluded that the right answer is that the claimants should have 50% of their costs.