

Cost in relation to the application for discovery

[2024]JRC152

ROYAL COURT
(Samedi)

5 July 2024

Before : Advocate David Michael Cadin, Master of the Royal
Court.

Between **Rassmal Investments LLC** **Plaintiff**

(a limited liability company incorporated in the
UAE)

And **Mubarak Abdullah Al Suwaiket & Sons** **First Defendant**

(a limited partnership formed in the Kingdom
of Saudi Arabia)

Abdullah Al Suwaiket **Second Defendant**

Mubarak Al Suwaiket **Third Defendant**

MAMS Holdings Limited **Fourth Defendant**

VCI Limited **Fifth Defendant**

VCI Property Holdings Limited **Sixth Defendant**

VCI Intermediate Limited **Seventh Defendant**

Advocate J. Barham for the Plaintiff.

Advocate J. D. Garrod for the First to Third Defendants.

JUDGMENT

THE MASTER:

Introduction

1. On 7 May 2024, I gave judgment in relation to the Plaintiff's application for specific discovery, which judgment was reported at Rassmal Investments LLC v Mubarak Abdullah Al Suwaiket and

Sons [2024] JRC 104. This judgment sets out my decision in relation to the costs of that application.

Principles

2. The principles on which the Court awards costs are well known and set out in Watkins v Egglishaw [2002] JLR 1 and applied in Flynn v Reid [2012] (2) JLR 226:

“12 By way of preface I note, as is common ground, that the award of costs indeed involves the exercise of a discretion pursuant to the Civil Proceedings (Jersey) Law 1956, art. 2, which provides:

“(1) Subject to the provisions of this Part and to rules of court made under the Royal Court (Jersey) Law 1948, the costs of and incidental to all proceedings in the Royal Court shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid.”

13 In Watkins v. Egglishaw (17) (“Watkins”), Page, Commr, set out the principles which, in his view, ought to guide the court in the exercise of its discretion when considering the issue of costs (2002 JLR 1, at paras, 7-9):

“7 The principles that should guide the court in the exercise of its discretion in this area appear to me, therefore, to be as follows, stating them as shortly and simply as possible:

(a) The court's overriding objective in considering costs is, as in everything else, to do justice between the parties.

(b) In many cases, that objective will be fulfilled by making an award of costs in favour of the 'winning' party, where a 'winner' is readily apparent. In any event, the "follow the event" rule can still be a useful starting point.

(c) It is a mistake, however, to strain overmuch to try to label one party as the 'winner' and one as the 'loser' when the complexity or other circumstances of the litigation do not readily lend themselves to analysis in these terms.

(d) The discretion as laid down in art. 2 of the Civil Proceedings (Jersey) Law 1956 is a wide one and ought not to be treated as fettered by any particular supposed rule or practice, other than that the discretion should be exercised judicially and broadly in accordance with the guiding principles referred to in In re Elgindata (No. 2) ... and A.E.I. v. Phonographic Performance

...

(e) It is, accordingly, open to the court to have regard to any and all considerations that may have any bearing on the overriding objective of doing justice. Its task is to take an overview of the case as a whole (Bank of Credit & Commerce Intl. v. Ali (No. 4) . . . per Lightman, J.). The new Civil Procedure Rules governing civil litigation in the English courts provide that the court 'must have regard to all the circumstances' and then go on to spell out certain matters that such circumstances include, the 'conduct of all the parties' being one and 'whether a party has succeeded on part of his case, even if he has not been wholly successful' another (Civil Procedure Rules, para. 44.3(4)). To a large extent, however, the particular matters mentioned do no more than state the obvious and it is unnecessary to import them verbatim, in any formal way, into the practice of the Royal Court.

(f) It is implicit in this that, even though a party would otherwise be regarded as having been 'successful,' justice may require that costs should not automatically follow the event."

Background

3. Notwithstanding that the orders made by the Court were not in the same terms as the summons, the Plaintiff submits that it was the winner and secured, in substance, the relief sought.
4. In contrast, the ASG Defendants submit that they successfully opposed the Plaintiff's application and the Court declined to make any of the orders sought by the Plaintiff in its summons. The ASG Defendants further submit that:
 - (i) the Plaintiff's summons was flawed as they sought information outside of what had been agreed or ordered in the ASG Defendants' document protocol;
 - (ii) there was no power for the Court to make orders against BDO LLP, Gerald Eve LLP, Crestbridge or Ocorian;

- (iii) there was no urgency in the application and it was premature;
- (iv) the Court did not accept the Plaintiff's argument that BDO LLP, Gerald Eve LLP, Crestbridge or Ocorian were holding documents as agents for the ASG Defendants;
- (v) the Court found that the most the ASG Defendants could do was to make a request for voluntary delivery of the documents, which they did not object to doing.
- (vi) the Plaintiff was unsuccessful in relation to the Ocorian documents;
- (vii) the Plaintiff was unsuccessful in relation to the third category of documents and in relation to the Request for Further Information.

5. As set out in the Judgment:

- (i) The Court made an order for discovery on 3 October 2023 and the ASG Defendants completed discovery by mid-December (paragraph 6).
- (ii) Issues were identified in that discovery and correspondence ensued. The issues were not resolved and the Plaintiff issued an application for specific discovery on 14 March 2024 (paragraph 7).
- (iii) After the summons was issued, there was no further engagement between the parties until Advocate Garrod provided an unsworn affidavit from the Second Defendant on 4 April 2024. That affidavit highlighted that:
 - (a) further documents existed in the custody of BDO LLP and Gerald Eve LLP and additional disclosure was being provided from that document pool (paragraph 9);
 - (b) further documents existed in the custody of Crestbridge and additional disclosure was being provided from that document pool (paragraph 26);
 - (c) no further documents were in the possession of Ocorian (paragraph 25).

- (iv) The Court found that the approach adopted by the ASG Defendants was wrong and the further affidavit provided by the Second Defendant was inadequate (paragraphs 16 to 18);
- (v) Issues of specific discovery did not arise in relation to the BDO LLP and Gerald Eve LLP documents because having identified additional document sources and undertaken to provide additional documents without complying with the proper procedural rules, the ASG Defendants had not yet completed discovery (paragraph 18).
- (vi) The position advanced by the ASG Defendants was that they had done enough and accordingly the Court considered whether the ASG Defendants' discovery protocol should be revised (paragraph 22).
- (vii) The Court emphatically found that the ASG Defendants had not discharged their obligations (paragraphs 23 and 28).

Discussion

6. Against the background set out above, I think it a significant stretch to submit that the ASG Defendants were the winners. The Court:
 - (i) found that their discovery was deficient and made orders requiring them to rectify the deficiencies, albeit that the orders made were not in the same terms as the summons;
 - (ii) declined to make the orders sought in relation to Ocorian, the third category of material and the Request for Further Information, but only on the basis of evidence provided by the ASG Defendants after the summons was issued.
7. In my judgment, faced with what appeared to be deficient discovery notwithstanding the endorsement from Advocate Garrood, the Plaintiff had no option but to issue a summons for specific discovery. Insofar as that summons has procured orders for additional discovery in relation to the first two categories, it was both appropriate and successful.
8. As noted in the judgment (at paragraph 29), the third category of material was different. Based on the Second Defendant's second affidavit, provided after the summons had been issued, the Court was not satisfied that additional documents existed (paragraph 39). This information was

available to the Plaintiff before the hearing and the Plaintiff could, therefore, have chosen not to pursue that aspect of its summons.

9. Similarly, the final aspect of the summons was a request for further information. Although I declined to make any order in the Plaintiff's favour, I did so on the basis that whilst the ASG Defendants' initial affidavits of discovery were inadequate, the deficiencies had been corrected by Advocate Garrood's correspondence and the further affidavit provided by the Second Defendant after the summons had been issued. This information was available to the Plaintiff before the hearing and the Plaintiff could, therefore, have chosen not to pursue that aspect of its summons.
10. Standing back from the individual issues themselves, the majority of the material filed and indeed, the time at the hearing itself, concerned the first two categories in the summons with the third category of material and the Request for Further Information forming but a small part. In my judgment, a small reduction in the amount of the Plaintiff's recoverable costs is appropriate to reflect the fact that in relation to the third category of documents and the Request for Further Information, although it was entirely appropriate to issue the summons, they should have taken stock in the light of the Second Defendant's further affidavit.
11. In my judgment, the appropriate order is for:
 - (i) the ASG Defendants to pay 80% of the Plaintiff's costs of, and incidental to, the summons for specific discovery, to be taxed by way of summary assessment, on a standard basis, if not agreed; and
 - (ii) the costs incurred by the ASG Defendants in relation to the unilateral discovery exercise carried out by them with BDO LLP and/or Gerald Eve LLP and/or Crestbridge between the issuing of the summons and the date of judgment shall be irrecoverable under paragraph 5 of Practice Direction RC 17/08.

Authorities

[Rassmal Investments LLC v Mubarak Abdullah Al Suwaiket and Sons](#) [2024] JRC 104.

[Watkins v Egglshaw](#) [2002] JLR 1.

[Flynn v Reid](#) [2012] (2) JLR 226.