In The Supreme Court of Bermuda

CIVIL JURISDICTION
2016: No. 24

BETWEEN:

FREDERICK MEENS

Plaintiff

-v-

DESMOND RICHARDSON

Defendant

REASONS FOR DECISION

(in Court)[1]

Tort-claim for damages for conversion-counterclaim for damages for services rendered-costs-consequences of plaintiff unreasonably ignoring settlement offer

Date of Trial: June 12-13, 2018
Date of Decision: June 13, 2018
Date of Reasons: June 22, 2018

Ms. Arisha Flood, AAF & Associates, for the Plaintiff
Ms Akilah Beckles, Cox Hallett Wilkinson Limited, for the Defendant

[1] The present Judgment was circulated without a hearing to save costs.

Introductory

1. The present action was commenced by an Originating Summons issued on January 29, 2016. The main claim was for damages for conversion. It related to the retention by the Defendant of commercial goods belonging to the Plaintiff in premises leased by the Defendant at Unit 2B, 16 Wallers Point Road, Southside, St. David's ("the Premises"). It was common ground that the goods had been retained since in or about January 2014.

2. On February 2, 2016 following a hearing at which the Defendant did not appear, I ordered the Defendant to afford the Plaintiff access to the Premises to identify and remove his property, upon the Plaintiff undertaking not to dispose of it. This injunction was varied on February 11, 2018 when the Defendant undertook not to dispose of the Property claimed by the Plaintiff, pending an application by the Defendant to discharge the injunction altogether.

3. The action clearly ought to have been commenced by Writ. The Plaintiff's new attorney obtained leave to file a Statement of Claim on October 25, 2016. The pleading added new claims of deceit and conspiracy to the comparatively straightforward conversion claim. An initial somewhat unintelligible claim that an invalid sublease was granted was retained. At the hearing on October 25, 2016, I encouraged the parties to seek a commercial resolution to the dispute because it seemed obvious that the costs of litigating the various claims would be disproportionate to the value of the underlying dispute.

4. However the matter continued and I gave further directions for the exchange of pleadings on August 24, 2017 when the Plaintiff indicated that he wished to abandon his claim for conversion. This was apparently because he wished to restore a company to the register and assert that the relevant goods belonged to the company, a position which was not fully reflected in the Statement of Claim filed on September 8, 2017 which claimed damages for "*both the torts of conversion and conspiracy, and negligent and fraudulent misstatement*" (paragraph 15). The Defence and Counterclaim denied liability for all torts and sought 50% of certain renovation costs ($34, 283.11). On March 19, 2018 I gave further pre-trial directions and the Plaintiff finally elected to solely pursue his personal claims in tort.

5. At the trial it merged that that there was very little dispute on any matters of substance between the parties. I found no need to reach any findings on the most contentious issues between the parties as these related to matters which had no direct bearing on the respective claims. The Defendant admitted that he had retained a substantial quantity of goods which belonged to the Plaintiff, potentially worth far in excess of his approximately $34,000 Counterclaim. The Plaintiff effectively conceded that as a partner of the Defendant he was liable to share the costs of renovations carried out by

the Plaintiff for his benefit, although certain items were disputed. In the result on June 13, 2018:

(1) I granted judgment for the Plaintiff on his conversion claim and ordered the Defendant to deliver up the goods (said by the Plaintiff to have costs him in excess of $500,000);

(2) I ordered that damages should be assessed;

(3) I allowed the Defendant's Counterclaim in the reduced amount of $15, 746.71[2] (disallowing the amounts claimed for loss of "operational wages" and "loss of income" suffered by the Defendant's business). However, I stayed enforcement of the Defendant's judgment pending the assessment of the Plaintiff's damages.

6. Having heard counsel I made no Order as to costs. These are the reasons for my decision of June 13, 2018.

Findings: the Plaintiff's conversion claim

7. As the Plaintiff only adduced evidence capable of supporting his claim in conversion, this was the only claim which needed to be formally considered. The following narrative was in substance common ground. The Plaintiff imported hardware items for sale on a retail basis. The parties jointly incorporated three companies (including Bermuda Hardware Wholesalers Ltd.) in May 2012 in anticipation of carrying on business together.

8. In August 2013 he moved his inventory from premises he was leasing at Lovers Lane, Paget to the Premises (Wallers Point Road Southside) for initial storage in space leased by the Defendant for his company Ceilings Plus Ltd. The anticipated space was not initially ready, and most of the inventory was stored on an adjacent property. The Defendant carried out renovations with some assistance from the Plaintiff to create a storage and retail space for the Plaintiff's hardware business. By the end of the year the Plaintiff's inventory was on the 16 Wallers Point Road property. On January 10, 2014, the parties signed a sub-lease agreement for 12 months for a monthly rent of $1350. The Plaintiff did not make the initial monthly payment (due in advance) when it was either due or expected. On or before January 15, 2014, the Defendant changed the locks and denied the Plaintiff access to his inventory. The Plaintiff paid the Defendant $1350 on February 6, 2014. By February

[2] As explained below, the amount should have been $15,745.71.

10, 2014, it was clear that the parties' business relationship was at an end as evidenced by an email of that date from the Plaintiff to the Defendant.

9. On January 15, 2014, the Defendant was not seeking a liquidated sum in return for releasing the Plaintiff's inventory. He asked the Plaintiff in an email of that date: "*Have you come up with a respectable proposal?*" In the Plaintiff's February 10, 2014 email to the Defendant, he claimed to have lent $400,000 to Bermuda Hardware Wholesalers Ltd which would have to be repaid. I inferred from the Plaintiff's oral evidence that this sum corresponded to his then estimate of the value of the inventory he had personally purchased and which was stored at the Defendant's premises. On July 1, 2015, the Defendant emailed a settlement proposal in which he claimed $60,000 in respect of particularised renovation costs and reserved the right to particularise two other more shadowy claims which were never pursued.

10. No attempt was made by the Defendant to justify retaining the Plaintiff's inventory by reference to matching the value of the goods retained with the amount of the debt claimed from the Plaintiff. The only liquidated claim asserted was apparently first communicated 18 months after the Plaintiff's inventory was first retained. A lien will either arise expressly through contract (or by statute), or by implication in equity in recognised commercial contexts (e.g. in favour of a judgment creditor or an unpaid vendor). The Defendant's counsel in the circumstances sensibly did not pursue the plea that the Defendant had a lien over the goods at trial. That was the only defence advanced in response to the conversion claim. Ms Flood aptly relied on the following legal definition of conversion in *The Environment Agency-v- Churngold Recycling Ltd.* [2014] EWCA Civ 909 (Moses LJ, Gloster LJ and Vos LJ concurring):

> "*12. The essence of the tort of conversion was summarised by Lord Nicholls in Kuwait Airways Corporation v Iraqi Airways Co (Nos. 4 and 5) [2002] 2 AC 883 [2002] UKHL 19:-*
>
> > *'In general, the basic features of the tort are threefold. First, the defendant's conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods.'*"

11. Applying this legal test, I found that the Plaintiff's claim was sufficiently proved. Accordingly, the Plaintiff was entitled to an Order requiring the Defendant to deliver up the goods.

Findings: the Defendant's Counterclaim

12. The Plaintiff admitted under cross-examination that he was liable to pay half of the renovation costs incurred by the Defendant for the purposes of their equal partnership. He denied the ability to assess the reasonableness of the specific sums claimed and disputed the entirety of the sums claimed for income which the Defendant might otherwise have generated if his workers had been engaged in other projects. Ms Beckles conceded in her closing submissions that there was no evidential support for the last two items, but still sought $30,000. I found that there was no legal support for the last two items claimed either.

13. The total amount of the Counterclaim representing 50% of the renovation costs was $34,283.11. I was willing to accept, based on the Defendant's evidence and despite limited documentary support, that the comparatively modest and precise figures had been accurately calculated. The two unmeritorious items claimed were $8787.40 ("*Loss of Operational Wages*") +$9750 ("*Loss of Ceiling's Plus Income*") = $18,537.40. I therefore awarded the Defendant $34,283.11-$18,537.40=$15,745.71[3].

14. I stayed enforcement of this award pending the assessment of the Plaintiff's damages, since it appeared to me to be unlikely that the amount awarded to the Defendant would be significantly more than the amount ultimately awarded to the Plaintiff. I should add that it is equally far from clear that the damages the Plaintiff is entitled to be awarded will be significantly more than the sum to which the Defendant is entitled. After all, the Plaintiff could have secured the return of his goods over two years ago had he responded meaningfully to a March 21 2016 settlement offer (not to mention a July 1, 2015 pre-action open offer, made almost three years ago). In this regard, and without in any way deciding this issue at this stage, it must be remembered that the Plaintiff was very arguably under an ongoing duty to mitigate his loss. As the English Court of Appeal (Moore-Bick LJ) held in *Uzinterimpex JSC-v-Standard Bank plc*, 12 August 2008, Times Law Reports:

> "*why should a person deprived of his property not be expected to take reasonable steps to recover it, and so reduce the loss he would otherwise suffer? …in principle the claimant ought to take all reasonable steps to ensure that his losses from being deprived of his property, whether temporarily or permanently, were kept to a minimum…*"

[3] Using mental arithmetic on the Bench, I erroneously enunciated the award as $17,746.71, subject to correction of the arithmetic before the final Order was drawn up.

15. In the *Standard Bank* case, the claimant had declined to accept the bank's proposal that the goods be sold and the cash held in escrow until the dispute was litigated. Although conversion was proved, the successful claimant was refused damages in the form of storage costs because this loss could have been avoided if the goods had been sold as the defendant proposed.

Costs

16. On March 21, 2016 the Defendant's attorneys wrote the Plaintiff's former attorneys without prejudice save as to costs offering to return the goods if the Plaintiff paid $34,000. That offer was apparently ignored. On November 8, 2016, after I had encouraged the parties to settle out of Court on October 25, 2016, the Defendant's attorneys wrote the Plaintiff's new attorneys renewing that same settlement offer. No or no meaningful counter-offer was made and the Plaintiff has obtained an Order for the delivery up of his goods with the very marginal success of reducing the quantum of the Counterclaim by approximately $18,500. The Defendant complied with the overriding objective; the Plaintiff did not[4].

17. Order1A/1 of this Court's Rules defines the overriding objective and the parties obligations in relation to this governing principle in the following material way:

> "*(2) Dealing with a case justly includes, so far as is practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) saving expense;*
>
> *(c) dealing with the case in ways which are proportionate—*
>
> *(i) to the amount of money involved;*
>
> *(ii) to the importance of the case;*

[4] The Plaintiff's counsel insisted in the course of argument that the Defendant's second without prejudice letter had been responded to but conceded that the response was not significant. After the trial the relevant response was supplied to the Court. It did not advance the settlement process in any meaningful way because no specific counter-offer was made.

(iii) to the complexity of the issues; and

(iv) *to the financial position of each party…*

3. The parties are required to help the court to further the overriding objective."

18. In the present case it was obvious that both parties had modest resources and that there was a risk of the costs involved in going to trial exceeding the amount of money in dispute. When the Defendant made a settlement offer in March 2016 and renewed it in November 2016 (with the Court encouraging the parties to settle with a view to saving costs on October 25, 2016), the Plaintiff was obliged to at least make a credible substantive response. His only valid objection to the Counterclaim involved less than $20,000 and the Plaintiff was in any event under a duty to mitigate his loss by seeking the earliest possible return of his goods.

19. Order 1A of the Rules must, as regards costs, be read with the following provisions of Order 62:

"***62/10 Misconduct or neglect in the conduct of any proceedings***
10 (1)Where it appears to the Court in any proceedings that any thing has been done, or that any omission has been made, unreasonably or improperly by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party."

20. In *Francis-v-Carruthers* [2007] Bda LR 32, I held:

"*19. In my judgment when an offer of settlement has been made and rejected by a litigant following the 'Calderbank' form, the Court has the discretion to take the reasonableness of the rejection of the offer into account in two key ways. Firstly, where a defendant recovers as much or more than the sum offered, the Court may consider awarding the costs after the offer to the defendant, as would occur with payment in. In addition, and this point is not explicitly supported by the above authorities, it must be permissible for the Court to take into account a rejected offer of settlement where a plaintiff has recovered more than the offered sum, but acted unreasonably in not either (a) accepting the offer or (b) otherwise seeking to settle the action on commercially reasonable*

terms. Because order 62 rule 10 explicitly empowers the Court to have regard to any unreasonable acts or omissions on a litigant's part…

20. In addition, and of broad general relevance, I have regard to the provisions of Order 1A of this Court's Rules, which embody (with effect from January 1, 2006) the Overriding Objective. These new guiding principles for the conduct of civil litigation were introduced at the same time as the new Order 62, which itself introduces the modern concept that successful litigants should be able to recover nearly all their actual costs, even on a standard basis taxation. The parties are obliged to assist the Court to achieve the Overriding Objective, which requires the Court to manage cases in a way which, inter alia, (a) saves expense and (b) is proportionate to the amount of money involved. In non-commercial cases involving litigants of limited means, the parties are positively required to conduct litigation in a way which does not waste costs. These factors are also relevant in deciding whether and, if so, to what extent, justice requires the usual "winner takes all" approach to costs to be modified or displaced."

21. Because the Plaintiff's claim was for unliquidated damages, payment into Court was not possible and so the offer could be taken into account under the traditional and narrower principles. The modern procedural framework is more flexible. A reasonable settlement offer was made by the Defendant and ignored by the Plaintiff. This Court was bound to take this non-response into account having regard to Order 1A and Order 62 rule 10(1) of the Rules. I found no good reason to distinguish between the costs position before and after the March 21 2016 'without prejudice save as to costs offer'. Firstly, the offer was sensibly made roughly two months after the commencement of the litigation. Secondly, the Plaintiff did not apparently respond at all or in any meaningful way to a $60,000 pre-action settlement offer sent by the Defendant as an attachment to an email dated July 1, 2015 which concluded: "*Note: I am open to a fair negotiation. Looking forward to your reply*".

22. I found that the Plaintiff had in all the circumstances pursued the present litigation in an unreasonable manner which was inconsistent with the requirements of the overriding objective in Order 1A of this Court's Rules. Although the Plaintiff had clearly succeeded overall, I made no order as to costs so that each party will bear their own costs.

Conclusion

23. At the end of the trial it was difficult to avoid the impression that this litigation largely arose because a promising partnership was rent asunder by external commercial pressures which resulted in two former friends turning against each other. The Defendant was wrong to detain the Plaintiff's goods after terminating the sub-lease. The Plaintiff was unreasonable to spurn the Defendant's settlement overtures. There was no real villain in this drama. If common sense were belatedly to prevail, the parties might well decide that the time has now come to finally pull down the curtain on this legal show.

Dated this 22nd day of June, 2018 _____

IAN RC KAWALEY CJ