Neutral Citation Number: [2016] EWCA Civ 158

Case No: A2/2014/3956

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT BRISTOL
His Honour Judge Rutherford
2BS02586

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2016

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
LADY JUSTICE BLACK
and
LORD JUSTICE GROSS

- -

Between :

PATIENCE	**Appellant**
- and -	
TANNER and ANOTHER	**Respondent**

- -
- -

Steven Ball (instructed by **Clarke Willmott LLP**) for the **Appellant**
Jonathan McNae (instructed by **Gordon Dadds LLP**) for the **Respondent**

Hearing dates : 01 March 2016

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Judgment

Lord Justice Gross :

INTRODUCTION :

1. This is another unfortunate case where costs have come to overshadow the issues as to liability originally in dispute. With respect, the failure to separate wood from trees has brought the parties to the position in which they now find themselves.

2. So far as relevant to this appeal, by his judgment dated 13th November, 2014 ("the judgment"), reflected in his subsequent order dated 11th February, 2015, HHJ Rutherford ordered:

   i) That the Respondents ("the Respondents", " Mr Tanner" and "Bloor" as appropriate) pay the Claimant's ("Mr Patience's") costs up to and including the 29th May, 2014 on the standard basis;

   ii) That Mr Patience pay Mr Tanner's and Bloor's costs from 29th May, 2014, on the standard basis.

3. From that judgment, Mr. Patience appeals to this Court. He contends that that part of the Judge's order requiring him to pay Mr. Tanner's and Bloor's costs from 29th May, 2014 should be set aside in favour of an order that he should recover all of his costs of the proceedings, alternatively that after 29th May, 2014, he should recover a reduced portion of his costs.

4. The Respondents have not sought to challenge the Judge's conclusion that they pay Mr. Patience's costs up to and including the 29th May, 2014. They do, however, seek to uphold the Judge's decision as to the payment of costs in their favour from the 29th May, 2014, both for the reasons he gave and, if necessary, by way of a Respondents' Notice.

5. We were told that the costs for the period post-29th May, 2014 were roughly as follows: Mr. Patience's costs were in the region of £35-40,000, inclusive of VAT; the Respondents' costs amounted to some £80,000, excluding VAT, of which Mr. Tanner's came to about £20,000 and Bloor's to about £60,000.

THE UNDERLYING FACTS AND THE PROCEDURAL HISTORY

6. In short summary, in 2006, Mr. Patience sold an area of land to Mr. Tanner on terms that Mr. Tanner would then grant, or procure the grant of, rights of way. In March 2007, Mr. Tanner sold the land (with some other land) to Bloor, a property developer. The 2007 transfer obliged Bloor to perform Mr. Tanner's obligations for the grant of easements, pursuant to Mr. Tanner's 2006 agreement with Mr. Patience.

7. By 2012, the land (or such part of it as is material) had been developed into a housing estate but the relevant easements had not been granted. It is said, on behalf of Bloor, that it could have made a grant of rights over various different routes; however, not all the routes would have been as useful to Mr. Patience. Accordingly, rather than unilaterally grant the easements in a manner most useful to Bloor, attempts were made to determine whether a route could be set out that would be of utility to Mr. Patience.

8. At all events, in 2012 and just under 6 years after the sale agreement was entered into, Mr. Patience issued proceedings. He claimed specific performance to compel Mr. Tanner to procure the grant of the easements, alternatively damages.

9. Mr. Tanner defended the claim on a variety of grounds, including laches. Proceedings were stayed for negotiation purposes before Mr. Tanner then commenced Part 20 proceedings against Bloor, in effect in the alternative to his Defence. In the main, at least *vis a vis* Mr. Patience, Bloor adopted Mr. Tanner's Defence.

10. By May 2014, the time for the exchange of witness statements was approaching. On the 8th May, 2014, Bloor's solicitors ("GD") wrote to Mr. Patience's solicitors ("CW") in the following terms ("the May offer"):

> " We enclose original and counterpart Deed Grant of an Easement for execution by your client. For the avoidance of doubt, once completed, this document will grant your client the rights contained….[in]…the Agreement dated 20 July 2006 between your client and Leonard Tanner.
>
> ……
>
> In light of your client's pleaded case we expect to receive the original and counterpart of the deed executed by your client by return and by no later than **4pm on 29 May 2014** (21 days from the date of this letter).
>
> ….."

The same letter then went on to deal with proposals for extending time for exchanging witness statements. An unexecuted deed of grant was enclosed.

11. It is plain from subsequent correspondence, in particular an e-mail dated 27th May ("the 27th May e-mail") that the May offer was understood by CW as constituting "an open offer to grant my client a defined right of way across the housing estate". However and as will be apparent, the May offer said nothing as to the costs consequences of accepting the offer. In the 27th May e-mail, sent to GD and Mr. Tanner, CW queried the position as to costs, in the event that Mr. Patience accepted the proposed Deed of Grant. CW added that in view of Bloor's offer there was "…clearly the possibility that the substantive issues in the claim may well be settled".

12. In the event, by a Consent Order, signed by all parties on the 28th May, 2014, the forthcoming Case Management Conference ("CMC") was adjourned and the claim was stayed until 4th July, 2014, "to allow the parties to explore the possible resolution of this matter".

13. The 29th May (21 days after the making of the May offer) came and went without Mr. Patience accepting the May offer.

14. It may, however, be noted that before the 29th May, both Mr. Tanner and GD had indicated that they would respond to CW's query as to the costs consequences of accepting the May offer. No response was, however, then forthcoming and, on the 10th June, 2014, CW chased for a response. On the 11th June, GD indicated that they

were proposing responding in one document to all the issues raised by CW and were in the process of taking Bloor's further instructions.

15. Following a further e-mail of 12th June from CW to GD, continuing to seek clarification of the May offer before confirming whether or not Mr. Patience was prepared to accept it, GD responded at length on the 16th June ("the 16th June e-mail"). GD here stated that, by making the May offer, Bloor had "made a real attempt to give Mr. Patience everything he asked for in his claim". The 16th June e-mail continued as follows:

> " Your client failed, however, to accept the Offer within the 21 day period. The Offer has therefore lapsed and is now not capable of being accepted. If your client had any queries in respect of the Offer he should have raised these in good time prior to the deadline.
>
> Because your client has failed to accept the Offer we consider that he is at a serious risk in terms of costs sanctions in respect of these Proceedings. "

The e-mail then went on to deal with a number of detailed matters, or contentions, as to the rights of way and complained that Mr. Patience had not cooperated in seeking to resolve the matter before the commencement of the legal proceedings. There was thus an argument as to costs (both post- and pre- action). The 16th June e-mail concluded as follows:

> " It is a matter for your client as to whether he wishes to continue with these Proceedings. Our client's offer was very generous as we do not consider that your client has any entitlement to the extent of the rights contained within the Offer. You should note that our client is minded not to repeat such an offer.
>
> Unless your client is willing to immediately withdraw these Proceedings it appears that this matter will be proceeding to trial."

16. It does not appear that there was any response from CW to the 16th June e-mail.

17. The stay was lifted and the action proceeded. The trial was fixed to begin on Monday 10th November, 2014.

18. On the 3rd November, GD, on behalf of Bloor wrote to CW ("the November offer") in "…a final attempt to resolve this dispute" – re-offering "the terms" of the May offer. The November offer underlined the mounting costs and stated that if all the proceedings could not be satisfactorily compromised by 15.00 on Wednesday 5th November, then the parties would be required to attend the hearing in any event.

19. On the 5th November, CW confirmed that Mr. Patience was "content to accept" Bloor's open offer and enclosed the Deed of Grant of Easement, executed by Mr. Patience.

20. Nonetheless, the parties attended before the Judge on Monday 10th November, somewhat, it would appear, to his surprise, as can well be understood.

THE JUDGMENT UNDER APPEAL

21. At the very beginning of the judgment, the Judge said this:

> " 1. This case is all about costs: how the costs of this action, which settled just before the trial, should be apportioned between the three parties. "

In the event, the trial took some two and a half days even though it was dealt with by submissions and without any live evidence.

22. The Judge observed (at [7]) that, at no time between the sale to Mr. Tanner and the issue of proceedings in 2012 had anyone asserted that Mr. Patience had lost the right to insist on the rights of way. Further, it was important to note that the obligation to grant the rights of way did not depend on Mr. Patience having to do anything. Referring (at [8] and following) to the failure to resolve matters by 2009, the Judge remarked that Mr. Patience "…clearly was not the easiest man with whom to negotiate". There was then (i.e., in 2009) talk of Bloor simply proceeding with the grant of the easement regardless of the location which would be most convenient for Mr. Patience.

23. Pulling together some at least of the threads, the Judge said this:

> " 14. It seems to me, therefore, that the claimant had a valid cause of action at the date when he commenced the proceedings, and indeed still at the date he served them on the defendant. The defendant had a simple choice at that stage. He could accept that he had failed to procure the rights of way and immediately ensure that they were now granted by Bloor. If he had done that, then the negotiations over the preceding years and subsequently would perhaps have been very relevant on the issue of costs…..
>
> 15. Furthermore, as the ball was at all times ….firmly in the court of the defendants…it was never necessary for there to be a negotiated solution. At any time, Mr. Tanner and Bloor could have brought this matter to an end, as indeed they finally did."

24. The Judge then adverted to the fact that, instead, Mr. Tanner and Bloor had chosen to defend the action. Negotiations in 2013 came to nothing. Coming to the May (2014) offer (set out above), the Judge said (at [21]) that "…the solicitors for Bloor finally did what they could have done at any time in the preceding years, and indeed what they said they were going to do in 2009. They sent a Deed of Grant." Though the May offer (at [23]) "can perhaps be read somewhat ambiguously" and might have misled CW into thinking that it was not subject to a deadline, the Judge was satisfied that the offer made it clear that Mr. Patience had 21 days in which to accept it. Continuing, the Judge brought matters up to date:

> " 24. At the very end of last week, however, the claimant did accept exactly the same Deed granting an easement as had been offered to him… [by the May offer]… and, it is accepted on his side, that this has fully discharged the obligations of both Mr. Tanner to the claimant and of Bloor to Mr. Tanner and that there is nothing left to litigate. So the action has, in effect, settled. The costs, no doubt, are enormous….. I need to stand back and apply a dose of common sense. "

25. A little later (at [32]), the Judge (in effect) repeated his view that there was a "proper, sustainable cause of action when these proceedings were commenced". Mr. Patience had been successful; he was always entitled to and now he had his right of way, though both Mr. Tanner and Bloor had maintained in the proceedings that he could not have them. Thus the Judge continued (at [33]), the "starting point" in assessing costs was that costs followed the event but that was not or, given the wide discretion on costs contained in CPR Part 44.2 not necessarily, "the finishing point".

26. The Judge's conclusions are then drawn together, between [34] and [40]. They can be summarised as follows:

i) In deciding what order to make as to costs, the Judge needed to have regard to all the circumstances, including the conduct of the parties and their success or otherwise. He must also have regard to any "admissible offers to settle", even if not an offer within CPR Part 36.

ii) Mr. Patience had been successful. He had sought and obtained, in effect, specific performance. Mr. Tanner and Bloor could have brought matters to an end by granting Mr. Patience the rights they had now granted him.

iii) It had not been "at all reasonable" for Mr. Tanner and Bloor to defend the case on the basis that Mr. Patience had lost his right to any right of way.

iv) The proceedings were commenced because of Mr. Tanner and Bloor's failure to do what they could and should have done "some time ago". They could not now say that all their costs should be borne by Mr. Patience.

v) "But", as the Judge put it, a "big but", there remained the May offer to take into account. It was not a Part 36 offer because it did not accept that Mr. Patience would have his costs up to the date for acceptance (i.e., 21 days from the offer). That was deliberate, because it was intended that that "the issue of costs at the very least should still be open to argument".

vi) However, the May offer "should have brought this case to an end". Instead, the case had gone on up until trial, when Mr. Patience had "now accepted the grant in exactly the same form as offered in May and accepts that this fully discharges the defendant's obligations". The Judge had:

> "….reached a clear conclusion that the claimant is entitled to his costs on the standard basis up to and including 29 May 2014 when he could have [and] should have brought these proceedings to an end. That being so, it cannot be just that

> thereafter the defendants should have to bear the costs of the proceedings to date. They are entitled to look to the claimant for their costs thereafter."

vii) The post-29th May 2014 costs were to be paid on a standard basis (at [44]).

27. Following the judgment, there were some exchanges with counsel from which it emerged that the Judge had made a mistake in his judgment in supposing that if the May offer had been a Part 36 offer, then Mr. Tanner and Bloor would have been entitled to the post-29th May 2014 costs on an indemnity basis. Having very fairly acknowledged his error, the Judge repeated that a "dose of common sense" was required. The May offer, he repeated, "ought" to have brought the action to an end. The case had instead "gone right up to the wire" still on the basis that it was being alleged that Mr. Tanner and Bloor were in breach:

> " A wholly untenable position it seems to me and it would have been wholly untenable back in May if it [i.e., the May offer] had been accepted.
>
> I think that the decision I have come to on costs should stand. I think it is a fair decision; that the claimant should have his costs up to the date when he should have accepted this and the defendants should have their costs thereafter because the claimant maintained that he still had a cause of action and a triable cause of action against the defendant, Mr. Tanner, when by the time we got here on Monday morning he did not….. "

THE RIVAL CASES

28. For *Mr. Patience*, Mr. Ball submitted that costs follow the event; Mr. Patience had been successful and should be awarded his post-29th May costs; he should not be deprived of his costs and, still less, should he be liable for the Respondents' costs after the 29th May. Mr Patience had not accepted the May offer because he preferred to come to an agreement as to costs; thereafter, he thought that Bloor's conduct in withdrawing the offer had been cynical and had become "agnostic" as to reaching an agreement. It was correct that Mr. Patience could have put in a counter-offer after the Respondents' withdrawal of the May offer but faced the difficulty of Bloor's "split personality" – on the one hand, Bloor professed a wish to be helpful to Mr Patience but, on the other, disputed Mr Patience's entitlement to his rights of way. Mr. Ball accepted that the November offer was identical to the May offer. However, the Judge had erred in his approach; on the correct analysis, Mr Patience had beaten the May offer in that, after the trial, he had been awarded his costs up until the 29th May – and the time for making the relevant comparison was after trial. Moreover, the May offer had not been an offer to *settle*; hence the trial had to go on. The May offer was no more than attempted mitigation by the Respondents; even if it had been unreasonable of Mr. Patience not to accept it that should result, at worst, in him being deprived of some "modest" pre-trial costs; he would still have had to come to court for the trial.

29. For the *Respondents*, Mr McNae submitted that the "fulcrum event" was the May offer; the Judge was right but, in any event, the decision he made was one open to him in the exercise of his discretion and we should not interfere. An appellate court would

ordinarily be slow to interfere with a Judge's decision on costs; all the more so when, as here, all that had been left to the Judge is the decision on costs when the test was one of "manifest injustice": see *BCT Software Solutions v Brewer & Sons* [2003] EWCA Civ 939; [2004] IP & T 267 Rep. 267, at [8] and [15]. That decision was applicable; although Mr Patience had (even in November) insisted on a trial, this case had essentially settled by the start of the trial and there was no "manifest injustice" here. As to why the Respondents had not answered CW's inquiries as to costs and, while those queries were still outstanding, withdrawn the May offer, Mr McNae contended that the context was everything; the offer had been overtaken by events – namely, Mr Patience pressing for more than he was entitled to in terms of matters such as the road surfaces, turning circles and the like. As was common ground, an easement goes to a right of way not to the surfaces in question. From the perspective of the Respondents, Mr Patience was seeking to negotiate a better grant than that to which he was entitled. Asked why the Respondents had simply not let the offer stand, Mr McNae answered by asking why it had not been accepted before it lapsed. If, contrary to his submissions, the Judge's decision could not stand for the reasons given, then Mr McNae submitted that it was nonetheless to be upheld for the reasons contained in the Respondents' Notice – namely that the Respondents had sought to resolve this matter over a period of years and even when all concerned had (erroneously) thought that Mr Patience's claim was time barred.

30. In reply, Mr Ball reiterated that the Respondents had maintained their defences to the claim throughout; it was an "imponderable" as to whether the trial would have been avoided had Mr Patience accepted the May offer – the parties had remained far apart even at trial in November. As to the May negotiations, Mr Patience was exploring the terms of the offer not seeking to improve the grant.

DISCUSSION

31. The law in this area is well established; as Davis LJ expressed it in *F & C Alternative Investments Ltd v Barthelemy (No.3)* [2012] EWCA 843; [2013] 1 WLR 548, at [42]:

> " Decisions on costs after a trial are pre-eminently matters of discretion and evaluation. Further, it is particularly important to bear in mind that a trial judge – especially after a trial such as this one – will have a knowledge of and feel for a case which an appellate court cannot begin to replicate. The ultimate test, of course, for the purposes of an appeal of this kind is whether the decision challenged is wrong. But it is well established that an appellate court may only interfere if the decision on costs is wrong in principle; or if it involves taking into account a matter which should not have been taken into account or failing to take into account a matter which should have been taken into account; or if it is plainly unsustainable. "

32. In *BCT Software Solutions Ltd v Brewer & Sons (supra)*, the parties settled the action shortly after the trial had begun but were unable to reach a compromise on costs. They therefore agreed that the costs of the proceedings should be decided by the court. The Judge did so, essentially adopting an "issue-based" approach. On the claimant's appeal to this Court, all three members of the constitution were troubled by the Judge having undertaken the exercise; indeed, at [8], Mummery LJ said that if

there was a point of principle in that case it concerned the question of whether the judge should have embarked upon the particular exercise at all. However, given that both parties had agreed that the judge should undertake the task, Mummery LJ also observed (at [8]) "….it is reasonable to expect them to accept his decision, unless it can be shown that the result is, in all the circumstances, manifestly unjust". In such a situation, this Court should interfere with the judge's discretionary decision on costs "…with an even greater degree of reluctance than is usually the case…" (*loc cit*). Chadwick LJ said nothing on this particular point and Brooke LJ agreed with both judgments.

33. With respect, it is not entirely clear to me that the reference to "manifest injustice" imposes a further threshold requirement, additional to the classic test as now expressed in *F & C Alternative Investments Ltd v Barthelemy (No.3) (supra),* before interference by this Court is justified. Nor is it clear to me that the Court in *BCT Software Solutions* was intending to enunciate any new principle. Still further, it is not self-evident why this Court should be more reluctant to intervene where (as in *BCT Software Solutions*) the Judge has not conducted the trial; *cf.* the opening remarks in the passage cited from Davis LJ's judgment in *F & C Alternative Investments Ltd v Barthelemy (No.3)*. Be that as it may, given the view I take of the facts of the present case, I am content to proceed as if a test of "manifest injustice" were additionally applicable where the Judge has exercised his discretion as to costs with the agreement of the parties when they have otherwise settled the case. For these particular purposes, I am further prepared to proceed on the working assumption that there was such a settlement here, so that the "manifest injustice" requirement is not rendered inapplicable because of the absence of a settlement.

34. I return to the facts. A very few facts loom large and can be distilled from the mass; the minutiae can be put to one side – as can the theoretical (almost philosophical) arguments as to whether the May offer was an offer to settle or merely an effort at mitigation; the difference is immaterial. So too, with the arid dispute between the parties as to whether the case had truly "settled" by day one of the trial. Points such as those distract attention from the real issues; their price, as the Court observed in argument, was needlessly expensive litigation continuing to trial between parties not substantively at odds.

35. As it seems to me, the Judge was amply justified to hold that Mr Patience should not have his costs after 29th May, 2014. It is common ground that the November offer was in identical terms to the May offer. There was thus no good reason for Mr Patience not to have accepted the May offer.

36. In depriving Mr Patience of his costs after the 29th May, the Judge gave effect to the May offer, as provided by CPR 44.2(4)(c). The Judge did not, however, stop there. As we have seen, he went on to order Mr Patience to pay the Respondents' post-29th May costs. He did so, despite the Respondents having withdrawn the May offer.

37. In my judgment, just as there was no good reason for Mr Patience not to accept the May offer, so there was no good reason for the Respondents to have withdrawn the May offer – rather than letting it stand – until they re-issued the identical offer on the 3rd November, one week before the trial was due to commence. I am unable to accept that Mr Patience's probing of the May offer justified its withdrawal – still less the legal posturing and dogged resistance to the substance of the claim from the 16th June

at least until the 3rd November. The continued commercial haggling as to the rights of way on Mr Patience's part may well have been tiresome; but it did not furnish any or any good reason for the abrupt withdrawal by the Respondents of the May offer with, it may be remarked, a number of questions to which they had promised answers remaining unanswered. On the view taken by the Judge, however, and despite the circumstances of its withdrawal, the May offer not only served to deprive Mr Patience of his post-29th May costs but obliged him to pay the Respondents' costs for that period as well.

38. As it seems to me, the conduct of both Mr Patience (in not accepting the May offer) and the Respondents (in withdrawing it) contributed substantially to the case coming before the Judge for two to three days of argument in November, when it should long since have settled. The force of the point is emphasised by the undisputed fact that the November and May offers were identical. Given the parties' sustained determination to pursue this dispute, no one can be *sure* that, if the May offer had been accepted or allowed to stand, the hearing before the Judge would not have taken place. But the *dynamics* of the situation would have been dramatically altered had the May offer been accepted or allowed to stand so the *probabilities* are that the case would have settled well before then. Moreover, I would not wish to do anything to encourage the approach to litigation demonstrated by the parties before us – in needlessly prolonging this litigation, to their own cost.

39. I sympathise greatly with the position in which the Judge found himself and share his sense of bemusement which found expression in passages in the transcript and judgment. I fear, however, that while the Judge correctly focused on the failings of Mr Patience after the 29th May, the judgment suggests that, in reaching his conclusions, he lost sight of and did not take into account the failings of the Respondents after that date. However understandable, that is a material omission.

40. It follows that this Court would be justified in intervening under the test in *F & C Alternative Investments Ltd v Barthelemy (No.3) (supra)*; most simply put, the Judge failed to take a matter into account which should have been taken into account. If it is necessary that there be a "manifest injustice" before intervening (*BCT Software Solutions Ltd v Brewer, supra*), then, for my part, I am satisfied that there was such an injustice here: the Judge's focus on the conduct of Mr Patience alone rather than on the conduct of both Mr Patience and the Respondents post-29th May, has cost Mr Patience some £80,000 in terms of costs which he is liable to pay by reason of the judgment. Reluctant as this Court should be to intervene in matters such as this, I am, with respect to the Judge, unable to accept that such a result is properly sustainable.

41. In coming to this conclusion, I have not overlooked that appropriate effect is to be given to the May offer, notwithstanding the Respondents' failings (as just outlined). However, an additional and relevant factor here is that the May offer did not give Mr Patience his costs up until the 29th May; by contrast, the Judge's conclusion – awarding Mr Patience his costs up until that date - entails that he "beat" the May offer. The Respondents could have addressed this aspect of the matter by making a Part 36 offer on the 8th May but that they did not do. Such considerations fortify me in thinking that in depriving Mr Patience of his post-29th May costs, the Judge gave sufficient effect to the May offer and that, for the reasons already set out, he was neither entitled nor obliged to go further and order Mr Patience to pay the Respondents' costs thereafter.

42. Furthermore, I am not dissuaded from this conclusion by Mr McNae's reliance on the Respondents' Notice. The essence of the Respondents' Notice was a focus on the parties' conduct overall, over a period of a number of years. The Judge, however, had such conduct well in mind when ruling that Mr Patience was entitled to his costs up and until the 29th May, 2014. As earlier underlined – and perfectly understandably – the Respondents have not sought to challenge the Judge's decision on that part of the case.

43. No sensible question arises of this Court remitting the matter for further consideration by the Judge. We must substitute our own view. In my judgment, the conduct of the parties post-29th May was such that each party should bear its own costs after that date. To my mind, the justice of the case cries out for "no order as to costs" after 29th May, 2014. That is the order I would make, in place of the Judge's order that Mr Patience should pay the Respondents' costs thereafter. To such extent, I would allow the appeal.

Lady Justice Black :

44. I agree.

President of the Queen's Bench Division :

45. I also agree.