Neutral Citation Number: 2015 EWHC 2289 (CH)

Case No: 7466 of 2012

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

7 Rolls Buildings,
Fetter Lane,
London EC4A 1NL

Date: 6 October 2015

Before :

MR REGISTRAR JONES

- -

Between :

(1) PHILIP ANTHONY BROOKS
(2) JULIE ELIZABETH WILLETTS
(Joint Liquidators of Robin Hood Centre Plc, in liquidation) **Applicants**
- and -
(1) KEIRON ARMSTRONG
(2) IAN WALKER **Respondents**

- -
- -

MR JAMES COUSER (instructed by **Nelsons**) for the **Applicants**
MR TIRAN NERSESSIAN (instructed by **Ashton Bond Gigg**) for the **Respondents**

Hearing dates: 1-9 and 31 July

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR REGISTRAR JONES

MR REGISTRAR JONES:

1. Judgment in this application was handed down on 31 July 2015. There was insufficient time in which to conclude the arguments concerning costs by reference to correspondence showing the manner in which the parties dealt with the application. The hearing was adjourned to today. I have read and take into account the written submissions of the parties. I have heard and take account of the oral submissions of Mr Couser for the Applicants.

2. At the close of Mr Couser's submissions I indicated that I was minded to make "no order" as to costs. This being in accordance with one of the orders proposed by the Respondents, Mr Nersessian has been instructed today not to make further submissions should I still be satisfied from what I have read and heard that I should make "no order" as to costs. I am for the reasons that follow.

3. I add before setting out my reasons that Mr Couser has helpfully pointed out with reference to wise words from Lord Justice Vos (when he sat at first instance) that should there be an appeal, those instructions will not preclude the Respondents from advancing arguments not raised orally today in a Respondents' Notice.

4. The starting point is the general rule that the unsuccessful party will pay the successful party's costs. In this case, however, the position is complicated by the facts that whilst the Applicants have succeeded, their success is very substantially less than the claim made. They have not succeeded on a number of important issues. The case they have won on would look very different to the case brought and would have incurred considerably less costs.

5. This gives rise to two difficulties when assessing costs. The first is to distinguish the work required for the application as it succeeded from the work which was part of the losing elements of the application. The second is to assess (without what might be called double counting) the overall effect on costs of the fact that the judgment identifies a substantially different case.

6. As to the first: I will not add to that difficulty by distinguishing between the claims of wrongful trading and misfeasance. In practice they went hand in hand. Nor will I deal with each and every issue but take a proportionate approach and concentrate upon key reasons for my decision.

7. The position can be summarised as follows:-

    7.1 Although the Applicants failed in respect of 3 specific dates for the period prior to 31 January 2007, it was necessary in any event to a degree to identify the financial position prior to that date in order to set the scene for the change in financial circumstances which gave rise to wrongful trading. However, their analysis of the pre-31 January 2007 position was in error as found in the judgment.

    7.2 Although the Applicants succeeded (in essence) from 31 January 2007, the minimising loss defence succeeded until 3 May 2007/29 August 2007.

7.3 Although the Applicants succeeded from 3 May 2007, the amount awarded was substantially and significantly less than their case and sought. Their analysis of loss for the purposes of compensation was largely rejected. They failed on a number of issues of loss.

7.4 On the other hand whilst no letters of offer are relied upon and therefore the Applicants cannot assert that they gave the opportunity to the Respondents to settle for a far lower sum, the Respondents made no admissions and defended the application to the hilt.

7.5 Turning to more specific issues - The argument as to the last date to which the Applicants could make their claim based upon the statements of case was largely drawn taking into account that 2 dates were added and proved important.

7.6 The Respondents succeeded in their main defence that the Applicants misconstrued the accounts and the general financial position of the company when alleging the base point from which the wrongful trading claim started. In particular the depreciation deduction argument, the issue over Bar Humbug and the general issue concerning the condition of the ride were decided in their favour.

7.7 On the other hand the Applicants' case concerning the VAT decision and advice was successful and so too, largely, their case concerning the financial position of the group undertakings.

7.8 The issue concerning original disclosure was largely drawn.

7.9 The manner in which and content of the evidence given by the parties at trial should not alter the outcome for costs (except of course to the extent it affected the decision on the application). Although I was critical of Mr Armstrong, that should not affect costs.

8. In my judgment taking all those matters into account but ignoring the second difficulty identified, it is reasonably arguable that about 60% (possibly more) of litigation time, whether in court or out, was engaged in the issues which the Respondents succeeded upon.

9. This is obviously not a case for which it can be said that the matters lost by the Applicants reflect the fact that in most cases some issues are lost and therefore this should not be taken into account in costs. It is a case where account should be taken of the fact that the application advanced too many points and too high a claim even though in my judgment it does not fall within the category of exaggerated and false claims.

10. However, it would be wrong to simply award the Applicants 30-40% of their costs because that would fail to recognise that the amount awarded to them was relatively small. It would also fail to reflect the fact that the Respondents themselves incurred costs on matters upon which they were or were largely successful.

11. Indeed there is a stronger argument for the Respondents being paid some of their costs but it should not be overlooked that the Applicants succeeded. It was plain during the hearing that the Respondents would not "back down" at all from their defence of no liability and this was wrong. They should have recognised, bearing in mind they knew the facts, that there was a case to face.

12. This leads to the second difficulty identified. The Respondents can fairly observe that their approach and decision not to "back down" must be viewed in the context of a very substantial claim which to a substantial extent has been shown to have been incorrect. A wholly different approach might have been adopted if the claim had originally been drawn to its proper scale with regard to the bases for the amount claimed, the quantum and the costs involved. It is to be borne in mind when considering conduct that the Respondents were facing a claim with costs on a conditional fee basis which would be potentially ruinous.

13. Mr Couser for the Applicants took me through the correspondence at great length within an application for indemnity costs to be paid by the Respondents and with the submission that the Respondents adopted an aggressive and single minded approach without considering settling.

14. I found Mr Couser's submissions to be strong but suffering from the true background which I have identified when describing the second difficulty. If an Applicant presents a largely misconceived claim with an unattainable quantum, it can be unfair to criticise the Respondent for failing to settle and for adopting an intransigent approach.

15. I must weigh all these matters. For assistance in exercising my discretion in those circumstances I turn back to CPR Part 44, Rule 44.3. Conduct and success cannot be measured in black and white terms in this case. Most arguments have variables. For example, whilst I have identified a general problem for Mr Couser's submissions on the correspondence, there remain good points within those submissions and it cannot be said that the Respondents "win" on the correspondence because of that problem.

16. Based upon all the matters above, I do not think it right or indeed proportionate to order assessment based upon issues won and lost. I therefore reach my decision adopting an overview of the case as a whole taking into account and balancing all the specific points dealt with above. In my judgment there should be "no order" as to costs to reflect the outcome and approach of the parties and to achieve justice. That decision applies the overriding objective and reaches a proportionate result.

Order Accordingly