Yorkshire Bank plc : Clydesdale Bank Asset Finance v RDM Asset Finance Ltd : John Broadhurst t/a J.B. Coach Sales [2004] ADR.L.R. 06/30

JUDGMENT : JUDGE LANGAN: . (Sitting as a Judge of the High Court) QBD. At Leeds Combined Court. 30th June 2004.

1. I now have to give my ruling on the question of costs. The contentions made are as follows. Mr Marshall, on behalf of the claimants, submits that his clients should be regarded as the successful parties and that they should be awarded the costs of the litigation subject to a discount to reflect the fact that they failed in relation to vehicles A, B and C.

2. The discount should be what might be called a modified one to reflect something else to which Mr Marshall attaches significance, namely, that (as is alleged) the first defendant unreasonably refused to engage in mediation.

3. Mr Mills for RDM submits that different orders for costs should be made in relation to different claimants. Clydesdale should be ordered to pay RDM's costs of the defence and counter-claim; Yorkshire should be ordered to pay 75% of RDM's costs of defence and 100% of its costs of the counter-claim, and RDM should be ordered to pay 25% of Yorkshire's costs of the claim. These submissions made by Mr Mills proceed from the undoubted fact that the only vehicle in respect of which the claimants were successful at trial was vehicle D, and that in relation to that vehicle the claimant was Yorkshire.

4. In my judgment there is an artificiality about Mr Mills' overall approach which makes it one which would be wrong for the court in the particular circumstances of this case to adopt. The commercial reality of the case is this, that the claim was brought by two companies which are part of the same group, National Australia Group (Europe) Limited. The. Witnesses for those two companies were employees of the group, rather (it appeared) than of individual companies within the group. It is, I think, a matter of reasonable surmise that it was as much a matter of chance as of choice from which company an intending borrower approaching the group would obtain its loan. To distinguish between the claimant companies for the purposes of costs would, as I say, be artificial. Similarly, given that the counter-claim was relatively small in amount and arose directly out of sales of vehicles, most of which were concerned in the claim itself, it would be artificial to treat the counter-claim as giving rise to separate consideration when it comes to costs.

5. My first task must be to identify the successful party. This was an action brought to recover damages. One of the claimants at the end of the day succeeds in recovering £65,000 together with interest. That is a substantial sum, even by the standards of this mercantile court. It is not a sum which can be regarded as insubstantial, much less derisory, when compared with the total amount of the claim. It is, however, accepted on the part of the claimants that some modification must be made in the proportion of costs to be awarded to them. I say by way of preface that in a case like this it is in my judgment preferable, where possible, to make what might be called a net order as to costs. In other words, it is better to award costs to the party identified as successful subject to a discount, if necessary a heavy discount, to reflect its failure on certain issues in the litigation than it is to award costs to each party on the issues on which it is deemed to be successful.

6. What I must therefore do is to consider what, irrespective of the points made about failure to engage in mediation, the appropriate discount would be. In my judgment Mr Mills is on solid ground when he submits that RDM's failure was on a fairly narrow point. It related only to vehicle D, and in relation to vehicle D it essentially turned on whether the recollection of an honest witness, Mr Austin, of a particular conversation was reliable or not.

7. Against that it cannot be said that investigation of the background against which the parties were dealing, or of the particular circumstances relating to vehicles A, B and C, were entirely redundant. These matters were part of the background which the court had to investigate in order to determine the issue which arose on vehicle D. But for the mediation point, to which I shall come in a few moments, I would have thought it appropriate in the circumstances of this case to award the claimants 50% of their costs. Before coming to the mediation point I should say that this is not a case in which any realistic offer of compromise was made by either side. Letters have been put before the court but they were at extreme ends of the spectrum, the claimants asking for payment of the greater part of

their claim and RDM suggesting that the claim should simply be discontinued with the normal costs consequence of a discontinuance.

8. One comes then to the conduct of the parties, and in particular in relation to what is said to be the unreasonable refusal of the first defendant to engage in mediation. There are really three phases in the relevant history.

9. Phase 1 comes before proceedings were issued and at a time when the conduct of the defence had been transferred from a firm of solicitors called Needham & James in Birmingham to the solicitors who are now acting for RDM. There had been floated in correspondence between Needham & James and the claimants' solicitors the following ideas, which seem to have been agreed in principle, that draft pleadings should be exchanged in order that each party might see what the contentions of the other were, and that after such exchange of pleadings discussions should take place. It does seem to me that when the present defence solicitors came on the scene they somewhat intransigently refused to continue on the course on which their predecessors had embarked. It is perfectly true that the new solicitors did conscientiously review the merits of the defence case but they really were not, in my judgment, prepared to listen to anything resembling reason. which might come from the other side - see the end of the letter of the 20th September 2002: "We have advised our client to spend no more time on the matter", and the letter of the 27th September 2002*: "We have advised our client to spend no more money on this matter. Our client does not have any liability to your clients."* What happened in that period is, in my judgment, the subject of justified criticism from the claimants.

10. Phase 2 occurred in the autumn of 2002 after proceedings had been issued. It does not seem to me that the defence can be subject to any fair criticism in relation to that period What appears to have happened (see a letter of 27th November) is that the respective solicitors put the question of mediation on the shelf for the time being, to be taken down later.

11. Phase 3 was a period a year later in September 2003 after, I think, witness statements had been exchanged. In response to a proposal from the claimant's solicitors to hold a mediation the defence solicitors replied on the 17th September that they could see no benefit to their client in referring the matter to mediation, this was an all or nothing situation. While there were many cases where a mediation was suitable, this was not one.

12. Was the conduct of the defence in refusing mediation reasonable or unreasonable? If it was unreasonable, should it be marked by making some different order for costs to that which I have tentatively mentioned a few moments ago?

13. In my judgment the impugned conduct was unreasonable. I have regard to the following matters. First, the nature of the dispute. It was essentially factual. The question for the court was not going to be one of those stark questions of law or construction of a document on which one side will inevitably have been found right or wrong. Second, I have regard to the characters of the people involved on each side.I have seen the four gentlemen who are concerned in this transaction give evidence. I have had reservations about some of the evidence given by, I think, two of them but on the whole they seemed to me to be honest, not imbued with any spirit of bitterness or resentment to the other side, and practical commercial people. They are the sort of people who, if sat eventually round a table, might well have come to some sensible resolution of the dispute between the companies for which they worked. Third, there was in the circumstances of this case one way in which mediation would obviously have been of value. The case of each party had particular weaknesses which were not, I am sure, apparent to them until they actually got to court. I will give a couple of examples. I cannot think that the claimants were sufficiently aware of the shaky ground on which they stood in attempting to present the framework agreement as something into which the subsequent dealings of the parties could sensibly be inserted. I do not think that the defendants will have been aware of the fragility of their case on vehicle D, resting as it did largely on whether Mr Austin's testimony, set against the other evidence in the case, was going to be accepted by a court at the end of a trial. I am confident that these respective 8 weaknesses are matters which a skilled mediator would have brought home to the parties.

14. Not only in my judgment was it unreasonable to refuse to engage in mediation but the mediation was, if it took place, one which would have a reasonable prospect of success the refusal should therefore be reflected in the order as to costs. I think it appropriate to reduce the discount to which the claimants' costs would otherwise have been subject. Instead of directing that the claimant shall recover 50% of the costs, I direct that they shall recover 65% of the costs.

15. If that is a mathematical exercise I am of course bound to stand back and look at matters in the round and ask whether, at the end of the day, the result appears to be a just one.

16. It does.

17 The claimants came to court to recover damages. They were not successful as to the greater part of the amount claimed, but the claim was not met by any payment into court or a sensible offer of compromise and there was the refusal, which I have mentioned, to enter into mediation. The judgment was in a substantial sum. Given all those circumstances the discount of 35% which is involved in an award of 65% mentioned seems to me fairly to reflect the justice of the situation.

MR MARSHALL: My Lord, that merely leaves the question of costs of this exercise.

For the Claimants: MR. P. MARSHALL
For the Defendants: MR -. MILLS