Rio Properties Inc v Gibson Dunn & Crutcher [2005] ADR.L.R. 04/22

BEFORE LORD JUSTICE JONATHAN PARKER, LADY JUSTICE ARDEN : CA : 22nd April 2005

1. **LADY JUSTICE ARDEN**: This is an appeal from the order of HHJ Maddocks dated 16 December 2004 sitting as a Deputy Judge of the High Court of Justice, Chancery Division. The relevant part of the order is at page 27 to 28 of the appeal bundle, and it provides:
*"Pursuant to the undertaking set out in paragraph 4 of Schedule 2 to the Order of 23 July 2002, **Rio** Properties Inc do pay to Gibson Dunn & Crutcher and Anthony Bonanno any costs that they might have incurred in complying with their obligations under the Orders of 26 June 2002, 29 July 2002, 2 August 2002 and 9 August 2002, such costs to be assessed in accordance with the terms of the undertaking."*

2. It is sufficient for me to take the background facts from the judgment of this court (Jonathan Parker LJ and Laddie J) given on 29 July 2004 and reported at [2004] 1 WLR 2702. This judgment was given on appeal from the earlier order of HHJ Maddocks in the same proceedings. On that appeal the primary issue was whether it was proper for the court, while a bankruptcy petition was pending, to appoint someone other than the Official Receiver, in this case Mr Buchler, to be an interim receiver and manager of the company's property.

3. Jonathan Parker LJ, with whom Laddie J agreed, stated:
*2. By his order dated 23 July 2002 ("the July 2002 order") HHJ Maddocks appointed David Buchler, a licensed insolvency practitioner, as interim receiver and manager of the estate of Amer Mouaffac Almidani ("the bankrupt"). At the date of the July 2002 order a bankruptcy petition was pending against the bankrupt. The petition, which had been presented on 27 December 2001 by **Rio** Properties Inc (a company incorporated in the State of Nevada, USA) ("**Rio**"), was based on gambling debts amounting to some $1.8million. On 2 August 2002 Judge Maddocks made a bankruptcy order on the petition. On 7 August 2002 Mr Buchler was appointed the bankrupt's trustee in bankruptcy.*

3. In the period between the making of the July 2002 order and the making of the bankruptcy order Mr Buchler applied (without notice) for, and was granted, orders for disclosure of information relating to the bankrupt's affairs. The orders were made against Messrs Gibson Dunn & Crutcher ("Gibsons"), solicitors acting in the administration of the estate of the bankrupt's late father, in which the bankrupt was entitled to a share. The partner in Gibsons with responsibility for that matter was Mr Anthony Bonanno.

4. On 7 August 2002, immediately prior to making the bankruptcy order, the judge made two further orders. First, he made an order purporting to extend Mr Buchler's appointment as interim receiver and manager pending the appointment of a trustee in bankruptcy. Secondly, he made a further disclosure order against Gibsons. This last-mentioned order was varied by a further order made on Mr Buchler's application on 9 August 2002 (that is to say, two days after he had been appointed trustee).

5. On 29 August 2002 Gibsons and Mr Bonanno applied for (among other things) a declaration that the July 2002 order was a nullity, and that in consequence all subsequent orders (including the disclosure orders) made on the application of Mr Buchler purportedly acting as interim receiver and manager under the July 2002 order were also nullities. The application was heard by HHJ Maddocks."

4. *Later in his judgment Jonathan Parker LJ gave the following further details of the orders made in August 2002:*
"17. The disclosure order dated 2 August 2002 ordered Gibsons to deliver to Mr Buchler by 12 noon on Tuesday 6 August 2002 all files and documents in their possession custody or power relating to matters in which they had acted for the bankrupt and all files and documents relating to the bankrupt's share in his late father's estate.
18. The orders made on Friday 2 August 2002 were served on Monday 5 August 2002. On Tuesday 6 August 2002 the appellants applied for, and were granted, a stay of the disclosure order made on the previous Friday until after Friday 9 August 2002. Accordingly nothing had been done by the appellants pursuant to the disclosure order dated 2 August 2002 by the time of Mr Buchler's appointment as trustee on Wednesday 7 August 2002."

5. *I will adopt the same definitions as my Lord did in that case.*

6. *On the application which was the subject of the earlier appeal, HHJ Maddocks found against Gibsons on their argument that the appointment of someone other than the Official Solicitor as interim receiver was*

irregular. He granted permission to appeal. This court rejected that appeal in July 2004 and held that the court could appoint a person other than the Official Receiver to be an interim receiver and manager.

7. *It is clear from the passages which I have read from the judgment of Jonathan Parker LJ that there were orders for disclosure made against Gibsons. In one of those orders, namely the order of 23 July 2004, an undertaking was given by **Rio** which is crucial to this appeal. That undertaking was in the following terms:*

   *"The Petitioning Creditor [which was **Rio**] will pay the reasonable costs of anyone other than the Debtor which have been incurred as a result of this Order or compliance with it."*

8. *As part of his submissions on the earlier appeal, counsel for Gibsons submitted that the order of 9 August was an irregularity since it continued what on their submissions was an invalid order, namely the order for disclosure made by HHJ Maddocks on 2 August 2002. So this court had to consider the effect of the order of 9 August 2002. At paragraph 53 of his judgment, Jonathan Parker LJ said this:*

   "53. I turn next to the orders made on 2 August 2002, and to the order dated 9 August 2002 which purported to continue the earlier disclosure order, subject to variations. Mr Uff challenges these orders not on the basis that they were nullities but on the basis that they were irregular and liable to be set aside as of right. He submits that in consequence the order dated 9 August 2002 was similarly irregular. Assuming for the moment that the orders dated 2 August 2002 were indeed irregular, nevertheless in my judgment Mr Uff's challenge must fail. By its order dated 9 August 2002 the court, in substance, imposed a new regime for disclosure and for the service of a witness statement; and it did so in circumstances where, by reason of the stay which had been granted, nothing had been done under the regime imposed by the earlier disclosure order. In the circumstances I cannot accept Mr Uff's submission that the 9 August 2002 order was somehow infected by the (assumed) irregularity of the earlier orders."

9. *Accordingly, in that paragraph, in my judgment, the court ruled that the order of 9 August was not simply an order which varied the earlier disclosure of 2 August because since those orders had been made Mr Buchler had ceased to be a receiver and had instead been the trustee in bankruptcy of the debtor. Accordingly, the order of 9 August was, in effect, a new self-standing order, and it therefore could not be affected by any invalidity or irregularity in the earlier orders. There was no doubt that the order of 9 August 2002 could be made on the application of the trustee in bankruptcy.*

10. *The decision of this court in July 2004 was considered by HHJ Maddocks before he made the order of 16 December 2004. The judge held, however, that the original order had not been discharged, but varied, and that accordingly Gibsons were entitled to the benefit of the undertaking contained in the order of 23 July to the extent that they had done anything under the original orders. What Gibsons was required to do was not referable exclusively to the order of 9 August. The judge also took no account of an offer which the appellants had made as to costs in a letter dated 7 August 2004. After describing the state of the proceedings, that letter stated:*

    *7. Considering all of the above, the practical issue between the parties is now costs. In view of the overriding objective, it is incumbent upon all the parties to consider ways of resolving the matter without recourse to the **Court**. In the interests of resolving all of the above outstanding **Applications** and the **Appeal**, the **Trustee** is prepared to settle all of the outstanding **Applications** and your **Appeal** on payment to him of £8,000 as a contribution towards his costs. This would mean that*

    *7.1. Your **Part 18 Application** would be dismissed.*

    *7.2. Your **Appeal** will be withdrawn.*

    *7.3. The **Trustee** will not proceed with his **Application** for costs in relation to the hearings on **7 November 2002** and **5 June 2003**.*

    *7.4. The **Cost Orders** obtained thus far in favour of the **Trustee** against your clients would not be enforced by the **Trustee**.*

    *7.5. Your clients will not enforce any **Costs Order** in their favour against the **Trustee**.*

    *7.6. The **Slip Application** would proceed in as much as the **Court Orders** need to be corrected but otherwise there would be no order as to costs on this **Application**."*

11. *As to this offer, the judge held:*

    "It remains to consider the effect of the offer of settlement by the letter of 7 August 2003. The letter is certainly to be applauded as a genuine attempt to resolve all the miscellaneous heads of costs by a composite

settlement. It deserved a more positive response. Nevertheless, I find it difficult to treat the letter as a Part 36 offer. The very number of different issues, including the appeal which was pending and one issue which I think was not covered, being the costs under the undertaking, make it difficult to apply. If it were to be applied it would, first, require the costs claims to be resolved and the costs quantified. Only then could it be seen whether the offer fell short of or exceeded the final outcome.

20. I do not therefore feel able to mark the failure to accept the offer as a ground for making an order as to the payment of interest or the payment of any costs on an indemnity basis, nor do I see it as appropriate to make some other form of order to mark that failure."

12. On this appeal, Mr Victor Joffe QC appears for the appellant, **Rio**. The first issue on the appeal is the question of whether the undertaking in the order of 23 July 2002 could be relied upon for the purposes of making an order for costs against **Rio** in the terms which the judge made. The essence of Mr Joffe's submission on this part of the appeal is that the receivership came to an end on 7 August and that the order therefore must have come to an end on that date. He takes the matter this far. He says that Gibsons were not obliged to comply with the order once it had terminated on 7 August. It was not an order which had to be complied with because the receiver was no longer receiver. He had ceased to hold office and the trustee in bankruptcy had been appointed.

13. On this part of the appeal, Mr David Uff for Gibsons and Mr Bonanno seeks to uphold the order of the judge on the grounds that the judge gave. He submits that Gibsons could not ignore the order for disclosure, the last order being the order of 2 August. He submits, therefore, that the judge was right to say that the costs of complying with the disclosure orders were referable to the undertaking.

14. The second issue on the appeal is whether the judge was right in refusing to take account of the offer in relation to costs. On this part of the appeal, Mr Joffe essentially makes two submissions. He submits that the same principles should apply to the offer of 7 August as apply under CPR 36 even though the offer was not made in accordance with the requirements of that rule. He has referred us to **McPhilemy v Times Newspapers** [2002] 1 WLR 934, in which this court considered order CPR 36 and made clear that once it was shown that the person who had received a Part 36 offer ought to have accepted it, the court had no discretion other than to award indemnity costs. That decision also explains that, because of the special provisions of Order 36, it was not necessary for the court to conclude that the conduct of the party ordered to pay costs on an indemnity basis was such as to merit the mark of disapproval by the court which is necessary for an award of indemnity costs in other contexts.

15. Mr Joffe's second submission is a submission in the alternative that if the judge was right to conclude that he was not obliged to award indemnity costs, nonetheless he should have given consideration to the question of following the same basis of taxation as under CPR 36 on the basis that it is as important to encourage recipients of offers to accept them when the offers are made outside CPR 36 as it is when offers are made within CPR 36. He refers to the passages in the McPhilemy decision which show the policy behind CPR 36 and the provisions for the automatic award of indemnity costs.

16. CPR 36 represents a very strong statement of policy that the acceptance of offers to dispose of litigation on appropriate terms is desirable. A party who does not accept an offer which he ought to have accepted will under CPR 36 have to pay costs on an indemnity basis. CPR 36 therefore underlines the importance attached to such offers.

17. For his part, Mr Uff submits that offers as to costs are on a different footing from offers as to, say, damages. Costs are not an objective of litigation, they are the consequence of litigation, and he went as far as at one point to submit that the same consequences should not apply to an offer to settle outstanding claims for costs. He submitted that that would offend the indemnity principle. But in the alternative, he submits that, as of the date of the letter (7 August 2003), it was not possible to demonstrate, as the appellants were obliged to do, that the offer was necessarily one which Gibsons should have accepted. It involved an assessment of factors which were then uncertain, for instance the offer made no reference to the undertaking contained in the order of 23 July. There was an exchange of correspondence in which Gibsons sought to clarify that matter but **Rio** did not address it. The

appeal which is referred to in the offer of 7 August was at an early stage, and few costs would by then have been incurred.

18. Mr Joffe submits that the costs covered by the undertaking did not form part of the offer. But even if this was so, Mr Uff seeks to rely on the exchange of correspondence as showing the steps which Gibsons took to respond to the offer made to them.

19. I now turn to my conclusions. First, I take the question whether or not the costs could have been awarded against **Rio** on the footing that they were within the undertaking contained in the order of 2 August. It will be recalled that that undertaking only covered costs of disclosure which were incurred as a result of the order of 23 July or compliance with that order. There were subsequent orders for disclosure made on the application of the receiver. By the time of the application of 9 August, however, the receiver had ceased to hold office, and the trustee was in office. That is a matter which affects the legal analysis, even though the same person, Mr Buchler, was first receiver and then trustee. In my judgment, the clear effect of paragraph 53 of the judgment of this court in July 2004 was that the order of 9 August was a separate and self-standing order. In my judgment, the receivership had already determined on the appointment of the trustee on 7 August.

20. Mr Joffe has submitted that Gibsons could have ignored the order for disclosure of 2 August. In my judgment, it is not necessary to resolve that submission because the question at issue is what was the juridical basis of the court's order of 9 August. When you look at that order, it is clear that the receiver was not present before the court. If he had been present it could only have been in his capacity of a former receiver, and he would have had no status to seek the order. The order proceeds on the basis that it is by way of variation of the order of 2 August, but, as I see it, the parties are really using that order as a template for the purposes of a further order for disclosure. The parties before the court were Gibsons, who had made an application for variation, and the trustee. It did not matter to the court whether it made a completely new order or varied the old order because, on any basis, the order could be made once the trustee was appointed, because the trustee had power under the Insolvency Act to apply for such an order. But as the receivership had determined, the order was in my judgment a fresh one in point of substance, and therefore the costs of disclosure incurred by Gibsons pursuant to that order could not be regarded as costs falling within the undertaking given by **Rio** and recorded in the order of 23 July.

21. Accordingly, in my judgment, the judge fell into error in coming to his conclusions on this point, and his order for costs which I set out at the beginning of this judgment must be set aside.

22. I now turn to the second aspect of this appeal, namely the question whether the judge was right to put on one side the offer of 7 August 2003. I take first Mr Joffe's first submission as to whether the judge should have applied CPR 36 or whether the offer was outside that rule. In my judgment, CPR 36 should only be treated as applying to offers which fall within it; in other words, a judge should not regard himself as bound to award indemnity costs and interest in the same way that he would have been bound if the offer had fallen within CPR 36.

23. It follows from that conclusion that, in considering the relevance of the offer of 7 August, the question was one for the discretion of the judge. In exercising that discretion, I would accept that the judge should consider the public interest in encouraging parties to consider and evaluate offers to settle claims made against them and to accept them. That policy applies whether the claim made against them is for costs or for damages or for some other relief. But it is a question for the discretion of the judge whether to award costs on a standard or indemnity basis, and whether to award interest, or to make some other order to mark the fact that an offer should have been accepted. Here the judge did recognise the importance as a matter of public policy of parties considering and evaluating offers. That is clear from paragraph 19 of the judgment. But the judge went on to take the view that the offer in this particular case was difficult to evaluate and, in essence, the respondents could not be criticised for not having accepted it. This was after all an offer as to costs and that would depend not only on the outturn of any outstanding application -- either the substantive application or an application for costs -- but also on the outturn of any assessment process.

24. The judge came to the conclusion that he should not take account of the offer in making his order for costs. In my judgment, that conclusion was not outside the range of the reasonable exercise of discretion.

25. There are two matters to which I can specifically refer and they are the two referred to by the judge. First, the appeal which was referred to in the offer as to costs was the appeal which subsequently came on in July 2004. In August 2003 it was at a very early stage, and thus although this court eventually assessed the costs of that appeal at £39,000, that would not have been the sum to be placed on that element of the offer as at 7 August 2003. It did not follow that that amount had been incurred by that date by any means.

26. The second matter is the question of the payment of costs under the undertaking. As I have said, the respondents did try to clarify the terms of the offer with respect to the undertaking. I have held, in contradistinction to the judge, that the undertaking did not justify the award of costs against **Rio** on 16 December 2004. But the question of the undertaking still has relevance to the order for costs which the judge was to make on 16 December because it demonstrates that the respondents did not simply reject the offer and give it no consideration. They considered it and wrote a detailed letter. Within that letter they raised the question of how the costs covered by the undertaking were to be dealt with.

27. For those reasons, in my judgment, it cannot be said that the judge exercised his discretion on the basis of wrong principle, and accordingly I would dismiss the appeal on this point.

28. LORD JUSTICE JONATHAN PARKER: I agree with my Lady's reasons and conclusion in relation to each of the two points which fall for decision on this appeal.

Order: appeal allowed in Part. Paragraph 1 of the order of 16 December 2004 is set aside. No order as to costs.

MR VICTOR JOFFE QC (instructed by Messrs Bermans) appeared on behalf of the Appellant

MR DAVID UFF (instructed by Messrs Pannone & Partners) appeared on behalf of the Respondent