JUDGMENT : MR JUSTICE STANLEY BURNTON : QBD. 21st March 2006.

Introduction

1. On 27 February 2006 I handed down my judgment in this case, dismissing both the claim and the counterclaim. I heard lengthy submissions on costs. Due in part to the fact that the hearing took twice as long as the parties' estimate, I reserved my judgment on costs. This is my judgment on costs. It relates only to the costs of the proceedings in the Queen's Bench Division transferred there pursuant to the order of Keith J of 7 April 2004.

The principal contentions of the parties

2. The respective contentions of the parties could hardly have been more contrary. For Mr Lloyd, Mr Ticciati submitted that Mr Svenby should pay his costs, less a deduction to reflect the costs that would have been incurred if the issue of justiciability of the claim to the registration mark had been decided as a preliminary issue. In this connection he relied on the fact that Mr Svenby's solicitor had agreed to the order made by Keith J transferring this case to the Queen's Bench Division for trial of the issues between Mr Lloyd and Mr Svenby. If I was against him on that, he submitted that Svenby should pay the cost of and occasioned by the application for inspection of Mr Lloyd's car made on 25 November 2005, and of the hearing on 13 December 2005 when Mr May and Mrs Chitty gave evidence, on the basis that their evidence could and should have been heard when other evidence was head, and that the need for a separate hearing arose out of Mr Svenby's re-amendment of his Defence and Counterclaim.

3. For Mr Svenby, Mr Mellor submitted that Mr Lloyd should pay his costs, on an indemnity basis, with interest from the date of payment of his solicitors' bills and an interim payment on account. Mr Lloyd had brought the claim and it had failed. The Counterclaim had added little or nothing to the costs of the claim. He also relied upon the fact that a serious allegation of improper conduct (i.e., the claim for slander of title/malicious falsehood) had been pleaded against Mr Svenby without justification, and had ultimately been abandoned; he submitted that there had never been any basis for the injunction sought against Mr Svenby; and he relied on the offer to settle made in Mr Svenby's solicitors' letter to Mr Lloyd's solicitors dated 19 October 2005 and the ensuing correspondence. With regard to the application for inspection, he submitted that that had been made necessary by the disclosure of new photographs of Mr May's car; that it had been wrongly and unsuccessfully opposed by Lloyd; and in regard to the last day's evidence, he submitted that it did not arise from his re-amendment of his Defence and Counterclaim, and would have been required in any event.

4. In response to these submissions, Mr Ticciati submitted that the malicious falsehood claim had added little to the costs of the proceedings; that the plea of non-justiciability had been pleaded at a very late stage, in a draft amendment sent on 27 October 1005, and had it been pleaded earlier could and would have been determined as a preliminary issue, and if determined against Mr Lloyd would have led to the proceedings coming to an end, with a saving of the costs of the trial. He further submitted that the second inspection was unnecessary, since it was obvious that the car in Mr May's photos matched Mr Lloyd's; that Mr Lloyd's opposition to the inspection was justified, if only on logistic grounds. Mr Ticciati submitted that this was not a case for indemnity costs.

The incidence of costs

5. A sensible starting point is the principle that he who brings a claim that fails should pay the costs of that claim. Conventionally, that would lead to Mr Lloyd paying the costs of his claim and Mr Svenby paying the costs of the counterclaim. In fact, it seems to me that the costs of the counterclaim were negligible. This principle would therefore lead to an order that Mr Lloyd pay the costs of these proceedings, possibly less a small reduction on account of the counterclaim.

6. I see no reason to depart substantially from this result. The fact that Mr Svenby's solicitor agreed to the order of Keith J seems to me to be neutral. The result of Mr Lloyd's judicial review proceedings was a claim that was adverse to Mr Svenby, and he had to defend it, and it had to be tried, even if the result was that neither of them had any "right" to the mark. Mr Lloyd drew Mr Svenby into this litigation. As far as I can see, Mr Svenby's attitude to it has been consistent. He took no steps to challenge the withdrawal of the registration mark by the DVLA. I refer to paragraphs 5 and 6 of Mr

Mellor's skeleton argument for judgment. I have no reason to doubt their contents. In Mr Svenby's solicitors' letter of 19 October 2005, headed "***without prejudice save as to costs***", they stated: *"Mr Svenby wishes to make clear that he has no interest in Mr Lloyd's car, its provenance or any of the claims made about it, unless or in so far as they impact on his car. Mr Svenby would like to be left alone, and to have his car left alone. …*

Mr Svenby wishes to make it absolutely clear that, aside from the circumstances which present themselves in this action, he has no interest in Mr Lloyd's car or what Mr Lloyd would like to claim about it. In the unlikely event that anyone were to approach him with any question about Mr Lloyd's car, Mr Svenby is and will remain perfectly happy and willing to direct any enquirer to Mr Nye's books or to Mr Lloyd himself, if that is what your client would prefer. Please let us know."

7. This sentiment was repeated in Mr Mellor's opening skeleton argument:

"33. So far as Mr Svenby is concerned, he wanted no part of this action. He would like to be left alone. He would like his car to be left alone. It is now an extremely valuable piece of property which he purchased for a considerable sum and in which he has invested considerable sums. The car is maintained in its original Le Mans livery. Mr Svenby has a right to his property being left undisturbed.

34. Furthermore, outside the confines of this action, Mr Svenby has no interest in Mr Lloyd's car and no interest in saying anything about Mr Lloyd's car.

35. As regards the relief sought, for understandable reasons, it is the two injunctions which cause Mr Svenby the most concern. If granted, he would be unable to present his car in its original Le Mans livery. The value would be reduced markedly. The inability to apply WTM 446 and the loss of the chassis plate would give any future purchaser substantial reasons to bargain down the price, and could well cause doubts to be expressed as to whether this car was really the car which raced at Le Mans or a replica.

36. Since the claim has been brought against him, Mr Svenby seeks to defend his property. His Counterclaim is brought with those considerations in mind."

8. It was consistent with this attitude that as soon as Mr Lloyd abandoned his claim for an injunction to restrain Mr Svenby from using the registration mark on his car, Mr Svenby abandoned his counterclaim in passing off.

9. I bear in mind that Mr Svenby made a fruitless attack on the authenticity of the chassis of Mr Lloyd's car. However that issue was raised in order to defend the claims made by Mr Lloyd, as is demonstrated by the letter of 19 October 2005.

10. Mr Svenby's solicitors' letter of 19 October 2005 contained a reasoned offer to settle these proceedings on the following terms:

"1. The right to the registration mark WTM 446: since [Mr Svenby] has no interest in driving or having his car driven on the public roads, he has no objection to Mr Lloyd applying to DVLA to use the registration number on his car.

2. The right to prevent Mr Svenby's car carrying the designation WTM 446: we do not believe that your client has any right to prevent Mr Svenby's car carrying the designation WTM 446 off the public roads e.g. at race meetings. Accordingly, this offer allows Mr Svenby's car to continue to carry the designation WTM 446 and Mr Lloyd will be required to accept that he should not seek to prevent Mr Svenby's car from carrying the designation WTM 446 at race meetings or other off public road activities.

3. The chassis number BHL 126: You will be aware that Mr Svenby's car carries a plate bearing the chassis number BHL 126. To the best of Mr Svenby's information, the car has carried that plate for many years since the car raced at Le Mans in 1963. Mr Svenby has explained in his witness statement why the removal of that chassis number would adversely affect the value of his car. Accordingly, as part of this offer, this chassis number will remain on Mr Svenby's car. Furthermore, Mr Svenby does not believe that the existence of that chassis number on his car says or represents anything about Mr Lloyd's car. The history of both cars is summarised in various places, including Mr Nye's book entitled "Powered by Jaguar". …

4. There be no Order as to costs."

11. Mr Lloyd's solicitors rejected this offer but initially made no counter-offer. Mr Svenby's solicitors asked whether Mr Lloyd was prepared to put one forward. He did so in his solicitors' letter of 24 October 2005: *"Our client has the following proposals:-*

1. Your client gives up the right to use of the chassis number and accepts, in writing, that our client's chassis is correctly numbered BHL 126.

2. That your client accepts that the DVLA shall register our client's car with the registration number WTM446 and accepts, in writing, that your client's car does not have the right to be registered at the DVLA with that number.

3. Your client must pay our client's costs on standard basis but shall only be responsible for that proportion of costs not paid by the DVLA (if any). Our costs up to the end of the trial are estimated to be £118,000.

4. Our client will licence the use of the number of WTM446 by your client on private occasions (not for public road use) provided a visible form of words is affixed under each numberplate to the effect that the use of the number on the car does not imply that your client's car is entitled to be registered with that number on the road. We are sure a convenient form of words can be agreed."

12. This was close to a demand for surrender. At trial, Mr Lloyd failed to better the offer made in Mr Svenby's solicitors' letter of 19 October 2005. It is true that considerable costs had been incurred by the date of the letter, but much would have been saved if the offer had been accepted. Its rejection, and the terms of the counter-offer, as well as the plea of malicious falsehood, give a picture of a claim advanced aggressively but unsuccessfully. Subject to the impact of the late amendment of the Defence to plead non-justiciability, there can be no question of Mr Svenby's entitlement to his costs from the date of the rejection of his offer.

13. Turning to the plea of non-justiciability, its lateness is clearly relevant to costs. However, the Claimant must bear responsibility for failing to analyse the basis of his claim to the registration mark. In addition, given the response to Mr Svenby's offer of settlement, and the claim for malicious falsehood, as well as the reaction to the pleading (and indeed to the mention I made of my concerns on the issue), I do not accept that Mr Lloyd would have agreed to the trial of the issue of non-justiciability as a preliminary issue, or that a decision upholding non-justiciability would necessarily have led him to settle his claim for malicious falsehood, which, if pursued, would have led to the costs of the trial being incurred. In his skeleton argument for judgment, Mr Mellor stated:

"7.4 The Court will understand that the claim in malicious falsehood and the claim to the injunction were the claims which caused the greatest concern to Mr Svenby. They were also the claims which basically made this case unsettleable."

I do so understand.

14. Turning to the costs of the second inspection of Mr Lloyd's car, I reserved those in anticipation that they might fairly go with the results of that inspection. Lloyd's opposition to the second inspection was reasonable, given the logistical difficulties it involved. The inspection was unhelpful to Mr Svenby. He should bear the costs of and occasioned by the application and the inspection.

15. So far as the last day of evidence is concerned, I think they are likely to have been incurred in any event. I make no special order in relation to those costs.

16. I take account of all these points. The lateness of the plea of non-justiciability requires some adjustment of the order I would otherwise make, to take into account the possibility that the Court would have ordered a trial of a preliminary issue, with a consequential saving in costs; and I bear in mind the costs of the counterclaim. The order I make is that Mr Lloyd pay 80 per cent of Mr Svenby's costs, subject to the order I make as to the second inspection of Mr Lloyd's car.

The basis of assessment of costs

17. In my judgment, Mr Svenby is entitled to an order that his costs be assessed on an indemnity basis. In so deciding, I have taken into account the guidance given by the Court of Appeal in ***Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson*** [2002] EWCA Civ 879. My reasons for making an order for indemnity costs are as follows:

(a) The costs of these proceedings were always going to be disproportionate to what was at stake. Indeed, I expressed my concerns as to the costs right at the beginning of the trial. A person of moderate means would not have brought these proceedings.

(b) Mr Lloyd's claim of malicious falsehood should never have been made. It involved an unfounded serious imputation as to the honesty or propriety of Mr Svenby's conduct. It is no answer that it was pleaded to include in the trial an issue as to the chassis number.

(c) The claim for injunctive relief was without legal foundation.

(d) Mr Lloyd pursued these proceedings notwithstanding the very reasonable offer made by Svenby in his solicitors' letter of 19 October 2005.

Interest on costs

18. I see no reason why I should not follow the guidance of the Court of Appeal in ***Bim Kemi AB v. Blackburn Chemical*** [2003] EWCA Civ 889 at [18(c)]. Mr Lloyd must pay interest at 1 per cent over base rate from the date of payment by Mr Svenby of each of his solicitors' bills on 80 per cent of the amount so paid.

Interim payment

19. There is no reason not to make an order for an interim payment on account of Mr Svenby's costs. I do not have a figure for his costs. I propose to make an order that Mr Lloyd pay within 28 days 40 per cent of the costs Mr Svenby has paid his solicitors. If the amount cannot be agreed, I shall determine it on written submissions and evidence.

Oliver Ticciati (instructed by Wilmot & Co Solicitors LLP) for the Claimant
James Mellor (instructed by Davies Wallis Foyster) for the First Defendant