



Neutral Citation Number: [2020] EWHC 413 (QB)

Case No: HQ18X01600

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 February 2020

Before :

Ms Margaret Obi
(sitting as a Deputy High Court Judge)

Between :

Mr Chong Sung Choi

Claimant

- and -

Mr Chan Mok Park

First
Defendant

Ms Sook Kyung Park

Second
Defendant

Mr Robin Kingham (instructed by **Andrew & Law Solicitors Ltd**) for the Claimant
The First and Second Defendant were present but were not represented

Approved Judgment

Ms Margaret Obi:

Introduction

1. This is my judgment on costs following the written judgment (under neutral citation: [2019] EWHC 3191 (QB)) which was handed down on 26 November 2019 in the absence of the parties. The trial took place on 2 – 4 October 2019 and 7 October 2019.
2. In summary, Mr Choi entered into an agreement with Mr Park to rent the commercial premises at 20 Eden Street, Kingston Upon Thames, KT1 1BB, pending assignment of the lease, and as a consequence of false statements made by Mr Park, he suffered financial loss. Mr Choi's misrepresentation claim against the Mr Park, under s2(1) of the Misrepresentation Act, succeeded and he was awarded damages in the sum of £91,532.52. Mr Choi's unlawful means conspiracy claim against Mr Park and Ms Park failed. As a consequence, the claim against Ms Park failed in its entirety.
3. Both parties were informed that any consequential applications would be dealt with in writing. I subsequently issued directions for the receipt of written submissions. Mr Kingham, on behalf of Mr Choi, provided written submissions. No written submissions were received from Mr Park.

Claimant's Submissions

4. Mr Kingham, on behalf of Mr Choi, requested that the Court make an order in the following terms:
 - a) Money judgment for Mr Choi, against Mr Park, in the amount of £91,532.52;
 - b) Costs in *Sanderson* form, requiring Mr Park to pay the costs of both Mr Choi and Ms Park; and
 - c) Detailed assessment of costs.
5. Mr Kingham referred the Court to the judgment of Sir William Blackburne in *British Sky Broadcasting Group plc v Digital Satellite Warranty Cover Ltd* [2012] EWHC 3679 (Ch) (at paragraph 30) where the law in relation to *Sanderson* orders was summarised as follows:

“30. Another issue [...] is concerned with the circumstances in which it is appropriate to order one defendant, against whom the claimant has succeeded, to pay the costs of another defendant, against whom the claimant has failed and, in particular, the circumstances in which it is appropriate to order the unsuccessful defendant to pay the successful defendant's costs directly as opposed to those cases where it is appropriate to order the claimant to pay them leaving the claimant to recover them (if he can) from the unsuccessful defendant, so that, in effect, the unsuccessful defendant pays the successful defendant's costs but does so indirectly as part of the claimant's costs of the action. There was once much learning on the topic and the forms of order to which it gave rise were known as Sanderson (in the case of direct) and Bullock (in the case of indirect) orders. (See Sanderson v Blyth Theatre Company [1903] 2KB 533 and Bullock v London General Omnibus Co.

[1907] 1 KB 264) As Mr Moody-Stuart explained, the jurisdiction to make such orders survived the advent of the CPR, being permitted under Part 44.3, and was discussed in *Irvine v Commissioner of Police for the Metropolis* [2005] EWCA Civ 129 at [22] to [31]. I think it is sufficient only to refer to what was said in *Moon v Garrett* [2006] EWCA Civ 1121 by Waller LJ who, after considering the authorities including *Irvine*, summarised the jurisdiction as follows (at [38] and [39]):

“38. It seems to me that the above citation demonstrates that there are no hard and fast rules as to when it is appropriate to make a Bullock or Sanderson order. The court takes into account the fact that, if a claimant has behaved reasonably in suing two defendants, it will be harsh if he ends up paying the costs of the defendant against whom he has not succeeded. Equally, if it was not reasonable to join one defendant because the cause of action was practically unsustainable, it would be unjust to make a co-defendant pay those defendant's costs. Those costs should be paid by a claimant. It will always be a factor whether one defendant has sought to blame another.

39. The fact that cases are in the alternative so far as they are made against two defendants will be material, but the fact that claims were not truly alternative does not mean that the court does not have the power to order one defendant to pay the costs of another. The question of who should pay whose costs is peculiarly one for the discretion of the trial judge. ”

6. Mr Kingham submitted that it was reasonable for Mr Choi to bring an action against both defendants. He reminded the Court that the solicitors for Mr Choi wrote to both Mr Park and Ms Park on 5 May 2017 (enclosing a pre-action protocol letter) and again on 16 April 2018 without response. Mr Kingham stated that it was not until after the claim was issued and served on Ms Park on 10 May 2018 that she replied. He further stated that it was not until receipt of the Defence (on or after 31 May 2018) that Mr Choi was first put on notice of Ms Park's case.
7. Mr Kingham submitted that but for the fact that Mr Park used Ms Park's bank account in perpetrating his fraud on Mr Choi, the claim would not have been issued against Ms Park. He invited the Court to conclude that Mr Choi, did not and could not know, the degree to which Ms Park had been involved in Mr Park's activities; this was a matter that could only be elicited properly through disclosure and cross-examination at trial.
8. Mr Kingham submitted that although Ms Park succeeded in defending the case it was reasonable for Mr Choi to have joined her to the action at the outset of the claim.

Key Costs Principles

9. CPR 44.2 is the relevant order relating to the Court's consideration of costs orders. The key parts of CPR 44.2 provide as follows:

“ 44.2 (1) *The court has discretion as to –*

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

...

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

...

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;

(d) whether a claimant who has succeeded in his claim in whole or in part, exaggerated his claim.”

10. The Court's discretion under CPR 44.2 must also be guided by the overriding objective (CPR 1.1).

Decision

11. In all the circumstances, I took the view that the following questions, derived from the authorities cited above, were relevant to the exercise of my discretion:

- a) Was it reasonable for Mr Choi to bring and/or pursue a claim against Ms Park? This question involves a consideration of whether it can be said that there was uncertainty as to what extent Ms Park was involved, if so at what stage, and the extent to which, if at all, the defendants may have blamed each other. If it was not

reasonable to bring an/or pursue a claim against Ms Park, a *Sanderson* order should not be made.

- b) Even if it was reasonable for Mr Choi to bring and/or pursue a claim against Ms Park, should the costs of that unsuccessful claim be borne by Mr Park? This question involves a consideration of whether, in the round, it would be unjust to order Mr Park to be liable for Ms Park's costs.

I address each of these questions in turn below.

Was it reasonable for Mr Choi to bring and/or pursue a claim against Ms Park?

12. I have concluded that, taking all relevant factors into account, it was not reasonable for Mr Choi to bring a claim against Ms Park. Therefore, it was also not reasonable for to him to pursue the claim. There are a number of interrelated reasons for that conclusion:

- i. ***Uncertainty*** - Mr Choi was in no doubt that it was Mr Park alone who was responsible for the false statements. The absence of any doubt, of course, explains why a claim for misrepresentation was not pleaded against Ms Park. The unlawful means conspiracy claim against both defendants was, as I stated in my substantive judgment, '*unpromising*'. I accept that at the outset Mr Choi knew that he had paid significant sums of money directly into Ms Park's bank account. However, that was the only evidence which linked Ms Park to the unlawful actions of Mr Park and, in and of itself, was not a sufficient basis for a claim to be brought against her. Furthermore, by the time the defence was served there was no indication that the prospects of the claim were likely to improve. An unlawful means conspiracy occurs were: (i) two or more persons act together; (ii) to take action which is unlawful; (iii) with the intention to damage a third party (or they can reasonably foresee that their actions may cause damage to that third party); and (4) the third party suffers damage as a result. Where misrepresentation is relied on as the unlawful means, in order to be found proved, there must be an agreement that a misrepresentation will be made. There was no evidence that Ms Park knew that the putative representations were false and no evidence that she entered into an agreement with Mr Park that a misrepresentation would be made. The evidential hurdle was high, and Mr Choi had little prospect of clearing it. No doubt Mr Choi recognised that the evidence against Ms Park was weak and speculative, which is why (as I found) he attempted to bolster the case against her by stating that she was present at the meeting which took place at the *Costa Coffee* in New Malden on 10 August 2016, when he knew that was not true.
- ii. ***Blame*** - Until shortly before the commencement of the trial Mr Park and Ms Park were represented by the same legal representative which clearly indicated that there was no conflict between them. It was therefore unsurprising that at no point during the interlocutory stages did they blame each other for the events which took place. As in all cases, there was a possibility that discrepancies could arise following disclosure and cross examination, but the prospect of this happening was low.

- iii. ***Reasonableness Generally*** – Mr Choi and his legal team were required to take a close look at the basis on which they were seeking to bring the claim against Ms Park. They had to make an assessment, on the basis of the information available to them, as to whether or not they were likely to succeed against her. The case against Ms Park was weak from the outset and was not pursued with enthusiasm and commitment when compared with the pursuit of the claim against Mr Park. In my judgment this is a case where Mr Choi and his legal team should have taken a view at the outset, or at least at the early stages of the proceedings, as to the prospects of success against Ms Park. A reasonable claimant would have concluded at the early stages that the claim was so weak that it should no longer be pursued.

13. Although the above conclusions are sufficient to deal with the application for a *Sanderson* order, I went on to consider the second question.

Even if it was reasonable for Mr Choi to bring a claim against Ms Park, should the costs of that unsuccessful claim be borne by Mr Park?

14. Even if I am wrong in my analysis, as set out above, and it was reasonable for Mr Choi to bring and pursue a claim against Ms Park, I consider that it would still be unjust to order Mr Park to pay the costs of that failed endeavour. The injustice arises principally out of the same matters identified at paragraph 12 above; in particular, (a) the overall weakness of the case against Ms Park; (b) Mr Park and Ms Park did not blame each other; and (c) Mr Choi's attempt to bolster the case against Ms Park by falsely asserting that she was present at the meeting which took place on 10 August 2016.
15. In my judgment, the most significant matter that demonstrates the injustice of making a *Sanderson* order is that Ms Park was not involved in the misrepresentation and there was no evidence that she was involved in an agreement with Mr Park that he would make false statements to Mr Choi. It would be unjust to order Mr Park to pay the costs of the unsuccessful pursuit of allegations against Ms Park, in circumstances where the defence responses to the issues which related to her, have been demonstrated to be correct as a matter of fact. To conclude otherwise would, in effect, penalise Mr Park in costs for being proved right. Such a result should not arise from the proper exercise of the Court's discretion.
16. Accordingly, taking all the relevant facts and matters into account, I consider that, even if Mr Choi had acted reasonably by bringing a claim against Ms Park, it would be unjust in any event to visit the costs of the unsuccessful claims upon Mr Park.

Conclusion

17. For the reasons set out above I reject the application made on behalf of Mr Choi for a *Sanderson* order in respect of Ms Park's costs. It would be wrong in principle and wrong on the facts, to order Mr Park to pay any part of those costs.
18. Therefore, Mr Choi will be liable for Ms Park's costs and liable for his own costs of pursuing Ms Park. Mr Park shall be liable for Mr Choi's costs in pursuing the claim against him and his own costs of defending the case.

19. An order should be drawn up to reflect the following:

- (i) Money judgment for Mr Choi, against Mr Park, in the amount of £91,532.52;
- (ii) The general rule with regard to costs that the unsuccessful party shall pay the costs of the successful party;
- (iii) Detailed assessment of costs.