

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 IN THE FINANCIAL SERVICES DIVISION

3 CAUSE NO. FSD 11 OF 2015 (IMJ)

4
5 BETWEEN:

6
7 TABITHA PHILANDER (AS THE TRUSTEE IN
8 BANKRUPTCY OF THE ESTATE OF ROBERT
9 DON FOSTER, A BANKRUPT)

10 PLAINTIFF

11 AND

12 (1) GKF HOLDINGS LIMITED

13
14 (2) GARY KIRK FOSTER

15 DEFENDANTS
16



17 Written Submissions

18 on Costs Received: 8 January 2016 from Mr. Peter McMaster Q.C. and Mr. Andrew
19 Jackson of Appleby for the Plaintiff

20
21 6 January 2016 from Mr. Ian Huskisson of Travers Thorp Alberga
22 for the Defendants

23
24 Before: The Hon. Justice Mangatal

25
26 Draft Judgment 3 February 2016
27 Circulated:

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29 Judgment Delivered: 8 February 2016
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31

32 *Headnote*

33
34 *Costs - Unsuccessful claim made by Trustee in Bankruptcy - Whether Trustee personally liable for costs,*
35 *subject to right of indemnity against the insolvent estate to the full extent of the assets - Contingency Fee*
36 *Agreement - Whether covering Counterclaim - Whether Plaintiff unsuccessful on claim but successful on*
37 *counterclaim entitled to any costs.*
38

39 JUDGMENT

40 1. On the 9 December 2015, I delivered a written judgment in this matter, in which I handed
41 down Judgment for the First Defendant on the Claim, and Judgment for the Plaintiff on

1 the First Defendant's Counterclaim. The question of costs was reserved for further
2 written submissions to be made by Counsel. This is my judgment on the issue of costs.



4 **THE PLAINTIFF'S SUBMISSIONS**

5 **On the First Defendant's Costs of Defending the Claim**

6 2. The Plaintiff, the Trustee in Bankruptcy of the Estate of Robert Foster, a Bankrupt ("the
7 Trustee") accepts that the First Defendant GKF Holdings Limited ("GKF") should have
8 its costs of defending the claim, subject to one issue: namely, the costs occasioned by the
9 late service of a witness statement from Reginald Delapenha. The Trustee's position is
10 that that witness statement should have been served with the rest of GKF's evidence in
11 March 2015.

12
13 3. Instead, the witness statement of Mr. Delapenha was served on the morning of the third
14 day of trial with the consequence, the Trustee submits, that Counsel for each side had to
15 spend all of the third and fourth day of trial, and time on the weekend, addressing the
16 Court on that development and dealing with further discovery. It was submitted that the
17 length of the trial and the work entailed as much as doubled as a result of the occurrence
18 and timing of this event.

19
20 4. The Trustee argues that the usual costs order where a party obtains leave to serve a
21 witness statement after the time at which witness statements were directed to be
22 exchanged is that the party obtaining leave must bear the costs of and occasioned by the
23 late service and that that is the right approach here. However, the Trustee does not seek

1 exactly this Order in this case, because Appleby was engaged under a Conditional Fee
2 Agreement (“CFA”) to pursue the claim against GFK and the Trustee has no liability to
3 Appleby for fees relating to the claim in circumstances where it has failed.
4

5 5. The appropriate order for costs, the Trustee’s Counsel submits, is that the Trustee pay
6 GKF’s costs of the claim save for GKF’s costs of and occasioned by the late service of
7 Mr. Delapenha’s witness statement. Counsel goes on to suggest that the quantification of
8 this aspect of the costs can be dealt with on taxation.
9



10 **The Plaintiff’s Costs of Defending the Counterclaim**

11 6. The Trustee’s Counsel, in response to a submission by the Defendants’ Counsel that the
12 CFA was not sanctioned by the Court, sent to the Court a copy of an Order made by
13 Henderson J. on 18 June 2014 in Cause No. FSD 183 of 2010 (AHJ), *In the Matter of*
14 *the bankruptcy of Robert Don Foster (A Bankrupt)*. Henderson J. had, upon an ex parte
15 summons issued by the Trustee, made amongst other orders, an order that the terms of the
16 CFA between the Trustee and Appleby (Cayman) dated 8 May 2014 be approved.
17

18 7. The Trustee accepts that no costs can be recovered under the CFA, but only because it
19 was an all or nothing CFA. If the Claim had succeeded, the Trustee posits, she would
20 have sought base costs. However, according to the Trustee’s Counsel the point does not
21 arise because it was the Claim that was conducted under the CFA and not the
22 Counterclaim. The submission is that the CFA expressly excludes a Counterclaim.

1 8. This Court has now had sight of the CFA and will return to this subject under the
2 "Resolution of the Issues" section of this Judgment.
3

4 **Costs Incurred by the Second Defendant**

5 9. The Trustee submits that it would be inappropriate for the Court to make any order for
6 costs in favour of the Second Defendant Gary Foster ("Gary"). As I noted in my earlier
7 judgment, the Statement of Claim expressly indicated that no substantive relief was being
8 sought against Gary.



9
10 **THE DEFENDANTS' SUBMISSIONS -**

11 **On the First Defendant's Costs on the Claim**

12 10. The only issue in contention here is the matter of the costs attendant on Mr. Delapenha's
13 evidence. GKF'S Counsel refer to the *Grand Court Rules, O.62, r.4(9)*, which provides a
14 definition of "costs thrown away" and applies "where proceedings or any part of them
15 have been ineffective or have been subsequently set aside...". GKF submit that Mr.
16 Delapenha's evidence was neither ineffective nor was it set aside. It was, it was argued,
17 served late with leave when unpleaded and unfounded allegations of fraud were pursued
18 at trial. It was submitted that there was no proper basis upon which the Trustee could be
19 awarded costs in respect of this aspect of the Claim.

20
21 **In Relation to the Counterclaim**

22 11. It was firstly submitted that none of the Trustee's costs are in any event recoverable
23 because the Trustee's attorneys were engaged under a CFA, which was not sanctioned by

1 the Court and because fees incurred under CFAs are not recoverable in any event. My
2 note of Mr. Penner, agent of the Trustee in Bankruptcy's evidence is that he believed
3 there was Court sanction for the fee arrangement with Appleby, but he could not recall
4 whether there was a Court order.

5
6 12. The Defendants rely upon Practice Direction 1/2001 , paragraph 7.2, and the decision of
7 the Court of Appeal in the unreported decision in *Barrett v the Attorney General*,
8 delivered 14 February 2012, to say that a successful litigant who engages attorneys on a
9 conditional fees basis is not entitled to recover any costs whatsoever from the losing
10 party.

11
12 13. Appleby have produced a Court order in which Henderson J. sanctioned a CFA so I will
13 concentrate on other aspects of the Defendants' Submissions.

14
15 **Alternative Position on the Counterclaim**

16 14. The Trustee's Counsel in correspondence with the Defendants' Counsel suggested that
17 they were engaged by the Trustee to respond to the Counterclaim on a different
18 contractual basis than in respect of the main Claim, in other words, not on a conditional,
19 or as the Defendant's Counsel puts it, on a contingency basis. Counsel for the Defendants
20 says that if this were correct, then in principle, the Defendants accept that costs could be
21 recovered. However, it was submitted that the onus must be on the Trustee to satisfy the
22 Court that Appleby were engaged on an entirely separate retainer in respect of the
23 Counterclaim.



1 15. The Defendants' Counsel go on to indicate that their request for disclosure of the actual
2 agreement relating to the Counterclaim has been declined. Further, that Appleby have
3 also declined to confirm that the Trustee has been separately invoiced for and paid the
4 costs of the Counterclaim. It was submitted that this strongly suggests that the costs of the
5 Counterclaim have been treated as if they were part of the contingency arrangement.
6 Counsel go on to submit that in these circumstances, and unless proper disclosure is made
7 then the Court is asked to infer that the costs of the Counterclaim have been incurred on
8 the same contingency basis as the rest of the Claim and are therefore irrecoverable.

9
10 16. The Defendants also point out (correctly), that the Court has noted in the written
11 judgment delivered on 9 December 2015 that the Counterclaim was defensive in nature.
12 They further submit that the Counterclaim also amounted to no more than two
13 substantive paragraphs and probably took up no more than 5-10 minutes of Court time at
14 trial. The submission continues that, in the event the Court is not with the Defendants on
15 the earlier argument as to recoverability, that the order for the Trustee's costs be
16 addressed by a percentage deduction from GKF's costs rather than a separate order.

17
18 17. It was argued that such an order would save the time and costs of having two taxations
19 and would allow the Court to make an assessment of the time and costs actually taken up
20 by the Counterclaim, an assessment which, it was submitted, the Taxing Officer would
21 not be best placed to make. The Defendants suggest a deduction of no more than 1%
22 given the minimal time taken up at trial in dealing with the Counterclaim. The alternative
23 order would therefore be that GKF recovers 99 % of its costs only.



The Second Defendant's Costs

18. The Defendants refer to the fact that at an early stage in the proceedings the Second Defendant had made an application for an order that the claim against him be struck out. An Order was made on 7 January 2015 that Gary should pay the costs of and occasioned by the Summons which was taken out to strike out the claim against him. Gary's Counsel claims that this order came about as a result of, and as part of, an agreement between the parties as to how to proceed.

19. The Defendant's Counsel puts forward the Second Defendant's position in this way: If the Court agrees with the Defendants on the CFA issue, the Second Defendant will agree to there being no order as to his costs. Should the Court disagree with the Defendants on recoverability of conditional fees then the Second Defendant would seek an order for costs so that he can set these costs off against the Trustee's in any event costs order on the strike out application. It was submitted that it was reasonable that he should have his costs of responding to and taking advice as to litigation intentionally brought against him which has failed.

Other Matters

20. The Defendants' Counsel has also asked that other matters be reflected in the Order made, for the avoidance of doubt. One of the orders sought has nothing to do with costs, and deals with undertakings given to the Court upon the discharge of an Ex Parte Mareva Injunction obtained by the Trustee. The Defendants seek that:

- a. the order expressly reflect the position at English common law that a Trustee in Bankruptcy is personally liable on an adverse costs order, subject to an indemnity



1 from whatever assets there are in the estate. Reference was made to the decision
2 of the UK Supreme Court in *BPE v Gabriel* (2015) UKSC 39, and to *Re Pacific*
3 *Coast Syndicate Limited* (1913) Ch 26. (In correspondence, the Trustee's Counsel
4 took the position that no special form of costs order providing for personal
5 liability is necessary or appropriate, as the position follows as a matter of law).

6 b. since the Trustee is the Taxing Officer, it is agreed that the taxation should be
7 referred to an external Taxing Officer. The Defendants argue that, given the fact
8 that the Gary continues to be liable for irrecoverable interest on the loan he took
9 out, a direction that the taxation be referred to an external Taxing Officer within
10 14 days is sought.

11 c. an order be made discharging the Trustee, GKF, and its directors from
12 undertakings offered to the Court upon the discharge of the ex parte Mareva
13 injunction obtained by the Trustee.
14

15 **RESOLUTION OF THE ISSUES**

16 **In Relation to the Claim**

17 21. In my judgment, although Mr. Delapenha's witness statement came late in the day, and
18 prolonged the trial somewhat, the Defendants' late response did seem indeed, as argued
19 by their Counsel, to have arisen from the approach which the Trustee's Counsel took
20 during a very extensive opening of the case. In my view it was the Opening and cross-
21 examination of Teresa Foster, that placed a heavy emphasis on whether there was some
22 kind of side-deal relating to the sale of the Grand Caymanian Resort, for which there had
23 hitherto been no or no sufficient warning in the pleadings. As I see it, this acted as the
24 catalyst for the Defendants' late decision to adduce evidence from Mr. Delapenha - see
25 paragraphs 132-133 of the main Judgment. As a consequence, I am of the view that no
26 sum falls to be deducted on this basis from GKF's entitlement to costs of the Claim.
27



1 **Whether Trustee Personally Liable, Subject to Indemnity**

2 22. In *BPE Solicitors* one of the specific issues with which the Supreme Court was
3 concerned was the issue of whether there was any absolute rule that where an action is in
4 progress at the time of the Trustee's appointment and is adopted by the Trustee, the
5 Trustee should necessarily be required, simply by virtue of his adoption of the action, to
6 be personally liable to pay the other side's costs of legal proceedings, including those
7 incurred at a time when he was not a party and whilst the action was being conducted by
8 the bankrupt for his own account. It was held that there was no such absolute rule and
9 that the most that could be said is that it may be appropriate as a matter of discretion to
10 make such an order. In the course of discussing surrounding issues, Lord Sumption
11 expressed the ordinary rule to be that a trustee in bankruptcy is treated as party to any
12 legal proceedings he commences or adopts, and is personally liable for any costs which
13 may be awarded to the other side, subject to a right of indemnity against the insolvent
14 estate to the full extent of the assets-paragraph [4].

15
16 23. At paragraphs [9] and [10] Lord Sumption discusses the principles. At paragraph [11] the
17 learned Law Lord indicates that these principles are easy enough to apply in a case
18 where, (as in the instant case), substantially all the costs of the other side were incurred at
19 a time when the litigation was being conducted by the Trustee. At paragraphs [9] and
20 [10], he states:

21 "[9] A trustee in bankruptcy, unlike the liquidator of a company, is
22 personally a party to legal proceedings which he has adopted. The reason
23 is that the assets of the bankrupt at the time of the commencement of the
24 bankruptcy vest in him personally, and the bankrupt has no further interest



1 in them. The rule, which dates back to the beginning of bankruptcy
2 jurisdiction in England, is currently embodied in s 306 of the *Insolvency*
3 *Act 1986*. The trustee's position differs in this respect from that of a
4 liquidator, for although a liquidator is a trustee for the proper
5 administration and distribution of the estate, the assets remain vested in
6 the company and proceedings are brought by or against the company. It
7 follows that with the exception of a limited (and for the present purposes
8 irrelevant) class of purely personal actions, a bankrupt Claimant has no
9 further interest in the cause of action asserted in the proceedings.
10 Likewise, as Hoffman LJ observed in *Heath v Tang* [1993] 4 All E.R.
11 694,... where the bankrupt is the defendant, he has no further interest in
12 the defence, because the only assets out of which the claim can be satisfied
13 will have vested in the trustee.

14 [10] ...It follows that an order for costs in favour of the other side is made
15 against the trustee personally in the same way as it would be made against
16 any other unsuccessful litigant. The cost of satisfying the order is treated
17 as an expense of performing his office, for which he assumes personal
18 liability just as he does for any other expenses and liabilities incurred in
19 the administration and distribution of the estate, but subject to a right of
20 indemnity against the assets if the expenses and liabilities were properly
21 incurred.”



22
23 24. Section 37 of the *Bankruptcy Law (1997 Revision)* indicates that when the provisional
24 order in bankruptcy is made against the debtor, the property of the debtor immediately
25 passes and vests in the Trustee. I have not been able to find nor have I been referred to
26 any express provision of the *Bankruptcy Law* or the *Grand Court (Bankruptcy) Rules,*
27 *1977* and amendments thereto, that deal with the issue of costs. The reasoning behind the
28 ordinary rule discussed in *BPE Solicitors* commends itself to me, and in my view, applies
29 in the instant case. I think it may well be useful to make the order express, so that it can

1 be readily seen and understood. I would therefore make an express order that the Trustee
2 shall pay GKF's costs (to be taxed on the standard basis if not agreed) personally, subject
3 to a right of indemnity against the insolvent estate to the full extent of the assets.

4
5 25. I am also minded to direct the Plaintiff to refer the taxation of GKF's costs to an external
6 Taxing Officer pursuant to Practice Direction No. 5 of 2014 within 14 days of filing of an
7 application for taxation.

8
9 **Costs on the Counterclaim**

10 26. In relation to the Counterclaim, I certainly agree with the Defendants' submission that the
11 onus is on the Trustee to satisfy the Court that Appleby were engaged on a different
12 contractual basis than the CFA in relation to the Counterclaim. The Trustee has produced
13 to the Court, at my request, a copy of the CFA and this document does appear to
14 expressly indicate that the CFA does not cover any counterclaim. It is not easy to see why
15 the Trustee in Bankruptcy needed to enter into a CFA in relation to the Claim due to a
16 lack of sufficient funding, (or at any rate because of very limited financial resources), to
17 pay legal fees to litigate the Claim, but yet entered into a different arrangement with
18 Appleby regarding the Counterclaim. Had the CFA not been produced, I would have
19 agreed with the Defendants' Counsel that it would be reasonable to draw the inference
20 that the Counterclaim was also handled, or rather encompassed, by the same CFA or on
21 the same conditional basis.



1 27. However, in all of the circumstances of this case, it is to my mind neither itself cost-
2 effective, nor a proper allocation of the Court's resources to embark further on such an
3 enquiry. As I indicated in my earlier Judgment, the Counterclaim appears to have been
4 really launched more as a shield and for the purposes of set-off rather than as a
5 substantive separate claim. I agree with the Defendants that the Counterclaim and the
6 Trustee's response there to, in terms of the pleading, and the time taken by both sides in
7 Court to deal with this matter, were a relatively minor proportion of the overall time and
8 resources deployed in relation to the matter. I am therefore prepared to accept that the
9 Trustee would be entitled to Costs on the Counterclaim. However, those costs ought to be
10 minimal.

11
12 28. In my view, (and I so assess this, since as trial Judge I am better placed so to do than the
13 Taxing Officer), the Costs attendant on the Counterclaim would represent at its highest
14 no more than 10% of the overall costs in relation to the matter. In my judgment, the
15 fairest way to deal with this is to order that GKF recover only 90% of its costs, being the
16 percentage balance due after deduction of the Trustee's costs attendant on the
17 Counterclaim.

18
19 29. In relation to Gary, as stated previously, he did not have a substantive claim against him.
20 He nevertheless was named as a party. Upon reflection, it seems reasonable that he would
21 indeed be entitled to costs of responding to and taking advice on litigation intentionally
22 brought against him which has wholly failed. However, again, these costs should be
23 minimal. In my judgment, it would be fair to order that Gary is entitled to costs to cover

1 those matters, which I assess as being of the same order and extent as the costs order
2 made in the Trustee's favour on 7 January 2015 in respect of the strike out application.
3 These costs orders should thereby cancel each other out.
4

5 30. I am also prepared to make the Order sought discharging the respective undertakings.
6 Strictly speaking, they would not form part of the Orders at trial. I would therefore ask
7 that Counsel provide a final Judgment and a separate Consent Order regarding the
8 undertakings reflecting my reasoning set out in this Judgment.
9

10
11 
12 **The Hon. Justice Ingrid Mangatal**
13 **JUDGE OF THE GRAND COURT**
14

