Dispute Resolution
Case Law Update
Rosling King LLP

Background

Grenda Investments Limited (**the "Claimant"**) applied for summary judgment in its claim against Mr Barton (**the "Defendant"**) in respect of certain loan facilities. The Defendant cross applied and sought to strike out the Claimant's claim, alleging an abuse of process by the Claimant. The Defendant asked the Court to infer that inactivity in the proceedings from the end of 2015 until autumn 2016 meant that the Claimant had decided not to pursue its claim. The Defendant alleged that there was a non-pursuit agreement between the parties as the Claimant had agreed at a meeting that it would not pursue the Defendant for the sums owed under the loan facilities. Both applications were dismissed and it was left to the Court to consider what order, if any, to make in respect of costs.

The Strike Out Application

The Defendant submitted that costs should be costs in case (i.e. paid by the loser at the end of the trial) as the factual premise surrounding the application (namely the non-pursuit agreement) would still be dealt with at trial. The Honourable Mr Justice Picken was not persuaded by this argument. Whether the alleged non-pursuit agreement would be explored at trial, he explained, was uncertain, but the abuse of process argument had "run its course" and would not be revisited at trial. As a consequence, and as the strike out application was unsuccessful, the costs should be borne by the party who issued the application i.e. the Defendant.

The Summary Judgment Application

When considering the costs in respect of the summary judgment application, Picken J explained that the position was not as straightforward. He firstly assessed the position with regard to the delay taken by the Defendant in providing "the level of particularisation" required to clarify his Defence with regard to a set-off agreement and held that the delay was unsatisfactory. He therefore ordered the Defendant to pay the Claimant's costs up until the date when witness evidence was provided which clarified the facts surrounding the set-off agreement.

Picken J then dealt with the "majority of the overall cost" which had been incurred after the evidence referred to above was provided. The Claimant argued that the issues of the case should be differentiated, with the Defendant paying for the costs related to the alleged non-pursuit agreement. In this regard, the Claimant argued that the summary judgment application was successful or at least not wholly unsuccessful. Picken J decided to "approach the question of costs in a more global way" as evidence relating to the non-pursuit agreement was in the minority. He subsequently ordered costs in the case for the Defendant only and explained this was a fair approach because if the Defendant prevailed at trial he would get his costs of the summary judgment application. Conversely, if he did not succeed at trial, he would not get his costs of the summary judgment application but neither would the Claimant.

The Defendant argued the Court's approach was inconsistent with the costs order in the

Strike-out application but Picken J clarified the position by explaining the strike-out application "has been made and is now never going to see the light of day again. The summary judgment application has been made and has failed, but the issues to which it was directed will see the light of day again, because they will be the very issues to be explored at trial".

Commentary

The case is a reminder for all parties that in assessing costs, the Court can, and will, exercise its discretion and consider the particular facts of the case and any applications before it.

For further information, please contact Georgina Squire or the Partner with whom you usually deal.