BRITISH COLUMBIA ADMIRALTY DISTRICT

1924
May 14.

EVANS, COLEMAN & EVANS, LTD., ET AL ..... } PLAINTIFF;

AGAINST

THE *ROMAN PRINCE*

Practice—Costs—Discretion of judge—Amendment.

Held, that it is impossible to formulate any general rule which could adequately cover or anticipate those ever varying circumstances which should determine the application of a milder or stricter order for costs, and that in exercising a proper discretion as to costs, each case must be carefully considered in the light of its special circumstances.

2. Where it was found, during the trial, that the proper person was not in the suit as plaintiff, and where by amendment he was added, the costs of such a motion, under such circumstances, should be paid by the plaintiff to the defendant in any event.

(1) [1884-5] 1 T.L.R. 485.
(2) [1891] L.R. 2 Q.B.D. 31.
(3) [1865] 18 C.B. (N.S.) 776.
(4) [1923] 2 K.B. 573 at p. 579.

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Two days of the trial were taken up with the hearing of expert evidence, on behalf of plaintiff and defendant, on the question of whether the ship should have used two or three tugs in berthing. The court declined to accept plaintiffs theory of responsibility, but held the ship responsible on other grounds. On application of defendant for the costs of these two days in any event.

Held, that costs of the trial should follow the event, in accordance with rule 132 and the Court did not deem it fit to make any other order.

MOTION to settle certain questions of costs reserved under the judgment rendered herein on the 27th November last (1).

Vancouver, May 14, 1924, after argument before the Honourable Mr. Justice Martin, judgment was rendered the same day.

E. P. Davis for motion.

Griffin & Co. contra.

The facts and points discussed are stated in the reasons for judgment.

MARTIN L.J.A. now this 14th day of May, 1924, delivered judgment.

This is a motion to settle certain questions of costs reserved under the judgment for the plaintiffs herein of the 27th November last.

First, as to the amendment granted on the 13th of July during the hearing, adding The Evans Coleman Wharf Co., Ltd., as plaintiff, I have carefully considered this question in the light of the special circumstances of the case which must always govern the exercise of a proper discretion since it is impossible to formulate any general rule which could adequately cover or anticipate those ever varying circumstances which should determine the application of a milder or stricter order for costs. Many cases have been cited by counsel and referred to by me, and the matter was recently considered by my brothers and myself in the Court of Appeal in *Farquharson* v. *Can. Pac. Ry.* (2), wherein the decision of the learned trial judge was set aside because a wrong principle had been applied and we noted also that even if there had been no such error the imposition of

(1) [1924] Ex. C.R. 93.

(2) [1922] 3 W.W.R. 537; 31 B.C.R. 338 at p. 341.

milder terms was open to his discretion as in *E. M. Bowdens Patents Syndicate Ltd.* v. *Herbert Smith & Co.* (1), and I note that in *Performing Right Soc.* v. *London Theatre of Varieties* (2), leave was given to add the publishers as necessary co-plaintiffs to maintain a copyright action even after the case had been appealed and argued, upon the terms as to costs that

> all the defendants' costs of action thrown away by the fact that up to the moment of amendment the action was not maintainable, should be the defendants in any event,

pp. 460-1. In *Long* v. *Crossley* (3) similar amendment was allowed at the trial "the plaintiffs paying the consequent costs" of it and of the adjournment of the trial which became necessary. A striking case in Admiralty is the *Duke of Buccleuch* (4), wherein leave was given to add a necessary plaintiff, even after an an appeal to the House of Lords, in order to correct a mistake and enable a claim for damages to be assessed upon payment of the costs of the application. That is an informative case also, upon the trial, judgment and assessment of damages in Admiralty, and the following instructive observations below occur on p. 209-10:—

> The practice in the Admiralty Court goes far to shew that a decree at the hearing was never considered final in the sense that a person could not be introduced afterwards as a party to the suit for the purpose of getting assessed and receiving damages. In the case of *The Ilos* (5), where an action was brought, not by the registered owner, but a person having a bill of sale (whether taken after or before the collision does not appear), Dr. Lushington, when the matter was before the registrar and merchants, refused to dismiss the defendant on the ground of want of title in the plaintiff, ordered the reference to proceed, and added, that if there was any doubt who was entitled to receive the amount of compensation, after it had been assessed, he should direct the amount to be paid into the registry, and throw upon the party claiming it the onus of establishing his ownership.
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> In *The Minna* (6), Sir Robert Phillimore approved and followed the case of *The Ilos ubi supra.*
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> It is said by Mr. Barnes, that in both these cases the plaintiffs on the record had, or might have had, beneficial rights; but that does not appear to me to meet the point that the Court of Admiralty considered the decree of the judge as leaving still open the question of the title of the plaintiffs as owners of ship or cargo.

(1) [1904] 2 Ch. D. 86 at pp. 92 & 122; 73 L.J. Ch. 522 at p. 776.
(2) [1922] 2 K.B. 433.
(3) [1879] 13 Ch. D. 388 at 391.
(4) [1892] P. 201 at pp. 210-212.
(5) [1856] 1 Swabey 100.
(6) [1868] L.R. 2 A. & E. 97.

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And see Lord Esher's remarks on p. 211. It is to be noted that the new plaintiff was added, pp. 210, 212, not substituted as erroneously stated in the head-note.

I am of opinion that in the circumstances of this case the proper order to make is that the costs of and consequent upon the amendment should be paid by the plaintiff to the defendant in any event, being set off against those due by the defendant.

Second, as to the costs of the trial, I have come to the conclusion that they should follow the event, as in general accordance with Rule 132, and do not deem it "fit" to make any other order. I have given full and careful consideration to Mr. Griffin's submission that the dispute as to the propriety of employing only two tugs instead of three should be regarded as a separate issue of which the defendant should get the costs and he relied particularly upon *The Ophelia* (1). But in that case there were two quite distinct issues, the first being a question of faulty navigation, and the second, compulsory pilotage, which if established would have exonerated the defendant ship from liability even if negligent as pointed out by Lord Parker at p. 51. But in the case at bar the issue was faulty navigation only (apart from title) in the continuous execution of one manoeuvre, and in the determination of that question, in the circumstances herein, the proper employment of one or more tugs was really no more a separate issue than, *e.g.,* the proper employment of a hawser, of an anchor, or of the steering gear to make allowance for wind or tide. This view is consistent with the principle of the decision of the British Columbia Court of Appeal in *Seattle Construction & Dry Dock Co.* v. *Grant Smith and Co.* (2), wherein the observations I made, on p. 786, are in point and cover the present question upon lines identical in principle with the *Ophelia* case.

As to the remaining questions of admissions, and costs of the two plaintiffs, I see no good reason, in the circumstances, for excluding them from the general rule; the names of the two plaintiffs are, in pursuance of my judgment yesterday, upon the record and should have been

(1) [1914] P. 46.

(2) [1919] 1 W.W.R. 783 at p. 786.

upon it when the formal judgment was entered, and I think that no sound reason has been advanced for the removal of either of them from said record, even if this were the proper occasion to do so and in the absence of a substantive motion to that effect, and in view of the appeal which has been taken from said judgment. The costs of this motion will be in the cause.

Judgment accordingly.

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