

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CIVIL DIVISION

3 CAUSE NO: G0019 OF 2015
4

5 BETWEEN:

6 JOY HOPE ANN VERNON

7 PLAINTIFF

8 AND:

9 EILEEN JENNIFER GREEN

10 DEFENDANT
11

12 Appearances:

13 Mr. Clyde Allen of Clyde H. Allen Chambers for the
14 Plaintiff

15 Mr. Paul Keeble and Mr. Andrew Woodcock of
Hampson and Co. for the Defendant

16 Before:

The Hon. Justice Cheryll Richards Q.C.

17 Heard:

25th September 2019

18 Draft Judgment:

25th October 2019



22 HEADNOTE

23 *Civil Division – Civil Procedure Rules – Application to Strike Witness Statement –*
24 *Application for indemnity costs to be awarded.*

27 JUDGMENT
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1. This is a ruling on costs following the hearing of the Defendant's application on the 25th September 2019. By Summons filed on the 11th July 2019, the Defendant sought, *inter alia*, dismissal of the Plaintiff's action, for contumelious disregard of the Orders of the Court and in the alternative, striking, redacting or expunging from the record certain paragraphs of the witness statements of the Plaintiff and that of witness Roy McLaren. The alternative application was made pursuant to GCR O.38/2A (8) and O.41/6 in accordance with the dicta in **1999 Supreme Court Practice** O.38/2A/13 and/or the inherent jurisdiction of the Court. The basis was the allegation that the statements contained unfounded, offensive and unacceptable personal attacks on Counsel for the Defendant or inadmissible argument and hearsay.
2. The matter has had a lengthy history since the Plaintiff filed an amended Writ of Summons and Statement of Claim on the 6th of February 2015. By Order of Williams J. made on the 7th December 2017 there is to be split trial of the issues of liability and quantum. At the time of this hearing the trial on the issue of liability was set down for the 1st October 2019. The Defendant's application was therefore said to be made with a view to the commencement of the trial on that date.
3. I declined to dismiss the action noting that the Plaintiff had, since the filing of the Defendant's Summons, paid the outstanding hearing fee and the trial was therefore due to proceed in a matter of days. I also noted that the dismissal sought was based on disregard of the Orders of the Court made on the 19th January 2017 and the 8th December 2015.





1 4. Counsel for the Defendant relied on the case of *Paula Foster v Junior Davis*¹, and noted that
2 Counsel for the Plaintiff and Defendant in that case were the same as Counsel for the Plaintiff
3 and the Defendant in the present proceedings i.e. Messrs Allen and Keeble. In the case of Paula
4 *Foster v Junior Davis*, Mangatal J. struck the witness statement of the Plaintiff from the record
5 on the basis that it was an inadmissible scandalous document which consisted mainly of a
6 personal attack on Counsel for the Defendant.

7
8 5. Counsel urged that the instant matter was in a similar vein and that he would find it difficult to
9 appear at the forthcoming trial should the contents of the witness statement remain unaltered.
10 Thus the Defendant sought the striking, expunging or redacting of the following paragraphs of
11 the Plaintiff's witness statement dated 2nd June 2016:

12 13, 14, 16, 17, 18, 19, 20, 21, 22, 24, 45, 46, 47, 60, 70, 71, 72, 73, 74, 77, 78, 79, 80, 82,
14 and 85
15

16 6. Counsel on behalf of the Plaintiff noted in response that this witness statement had been
17 provided in 2016 to address a number of issues such as disclosure and had not been prepared
18 with sole regard to a trial on liability.

19
20 7. Both parties referred to paragraphs of the *1999 Supreme Court Practice*. Counsel for the
21 Defendant referred in particular to paragraph 38/2A/7 dealing with the content of witness
22 statements:

23 *"The overriding features of the written statements of the witness which may be served*
24 *pursuant to the direction of the court under para (2) are that:-*
25 *1) they are intended for use at the trial itself; and*
26 *2) that they relate to issues of fact to be adduced at trial.*

¹ (G 239 of 2016 14th May 2019)

1 *Accordingly, the written statement of such a witness must contain only such material facts*
2 *as the witness is able to prove of his own knowledge (cf O.41. r. 5 (1) as to the content of*
3 *an affidavit).Again like the oral evidence of the trial witness, his written statement must*
4 *not contain any inadmissible evidence (para 8.) It must not therefore contain any hearsay*
5 *evidence...a written statement must not contain any expressions of opinion but be confined*
6 *to matters of fact."*

7
8 8. Counsel also referred to paragraph 38/2A/13 which states inter alia:

9
10 *"There is accordingly an obligation on the parties preparing the witnesses' statements to*
11 *be served pursuant to para.2 above to ensure that they contain no inadmissible evidence.*
12 *This means that they must take care to omit any hearsay evidence or statements of*
13 *information and belief even if the grounds and sources thereof are given or any expression*
14 *of opinion, or any matter which is scandalous irrelevant or otherwise oppressive (see*
15 *O.41,r. 6). If the statement of a witness should by chance contain any such material, it*
16 *should be corrected as soon as possible (see para 38/2A/9), or otherwise the opposite party*
17 *may apply to strike out such material and in appropriate cases, for the service of a fresh*
18 *statement."*

19
20 9. Counsel for the Plaintiff in response highlighted paragraph 38/2A/9 which provides,
21 *inter alia*, that the amendment of a witness statement for inadmissible evidence is best
22 left to be heard after the witness has produced it at trial rather than dealt with by prior
23 application to compel the statement to be amended.

24
25 10. Having heard from both parties I was particularly concerned as to the unnecessary references
26 to opposing Counsel within the witness statement which did not appear to be of probative
27 assistance to the issue of liability. There are paragraphs referring to what opposing counsel said
28 in Chambers, as to being shocked at the advice given and other such comments, some going
29 beyond shock to allege other matters. Plainly these inclusions do not conform to the guidance
30 provided in the Supreme Court Practice paragraphs. 39/2A/7 and 13. In so far as the witness
31 statement is to be relied on for the forthcoming trial on liability it should conform to the Rules
32 and guidance.

1 11. I concluded that some of the material in the witness statement was at the very least irrelevant
2 and that the following paragraphs should be struck in part or whole:

3 13, 16, 17, 18, 21, 74, 77, 78, 79, 80, 85

4
5 12. With respect to the witness statement of Roy McLaren dated 27th January 2017, for the same
6 reason, I agreed with the submissions of the Defendant that paragraph 5 of that statement should
7 also be amended to delete the reference to opposing counsel. I concluded that in preparation
8 for the trial these witness statements should be removed from the file and replaced with
9 statements without these references.

10
11 13. The Defendant sought costs for the hearing of the Summons on an indemnity basis and
12 submitted that as the successful party there is an entitlement to costs. Counsel for the Plaintiff
13 opposed the application on the basis that the Defendant had been successful only to a limited
14 extent having received much less than had been sought.

15
16 14. The Affidavit filed by the Defendant in support of the Summons is that of Dale Edwards dated
17 7th August 2019. He produces correspondence² which indicates that on 12th July 2019 Counsel
18 for the Plaintiff was invited to review his client's witness statement and to identify
19 objectionable material. It does not appear that this was done or that there was any attempt to
20 reach agreement on this matter.

21
22 15. Section 24 of the *Judicature Law (2017 Revision)* provides a power to order costs in the
23 discretion of the Court. It is *inter alia* in the following terms:

24

² Page 14 of Exhibit DE 4

- c. costs from or until a certain date only;
- d. costs incurred before proceedings have begun;
- e. costs relating to particular steps taken in the proceedings;
- f. costs relating only to a distinct part of the proceedings; and
- g. interest on costs (at the prescribed rate for Cayman Islands dollars) from or until a certain date, including a date before judgment."

17. In accordance with the statutory provisions and the guidance provided in the case of *AEI Rediffusion Music Ltd v. Phonographic Performance Ltd*³, I am mindful that the follow the event principle is a starting point only and that it is essential that consideration be given to the circumstances of the case as a whole.

18. In that case, Lord Woolf M.R. considered the similarities and distinctions between the exercise of a discretion on costs by a tribunal and that by a Court. The learned Judge stated:

"In re Elgindata Ltd. (No. 2) [1992] 1 W.L.R. 1207. Nourse L.J. in that case set out some useful general principles which provide a guide as to the ordinary approach to costs which he derived from an examination of earlier cases. He said, at p. 1214:

"The principles are these. (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs. Of these principles the first, second and fourth are expressly recognised or provided for by rules 2(4), 3(3) and 10 [of R.S.C., Ord. 62] respectively. The third depends on well-established practice. Moreover, the fourth implies that a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's costs."



³ [1999] 1 WLR 1507

1 19. In the Grand Court case of *Sagicor General Insurance (Cayman) Limited and Proprietors of*
2 *Strata Plan No. 151v. Crawford Adjusters (Cayman) Limited and Six Others*⁴, Henderson J.
3 referred with approval to the principles discussed in the said case of *In re Elgindata Ltd*⁵. The
4 learned Judge stated that the Plaintiffs in the former case could be denied part or even all of its
5 costs if they caused a significant increase in the length or cost of the proceedings. In referring
6 to the width of the discretion, the learned Judge stated:

7 “29. I accept that I have a broader jurisdiction as well. I am entitled to deny
8 costs to a successful party, or even to award costs against it, where
9 the justice of the case demands that. This broader jurisdiction is exercised
10 only rarely, and only in the clearest of cases. Some examples are given
11 in the White Book (1 The Supreme Court Practice 1999, para. 62/2/11, at
12 1119):

- 13 a. “A successful party may be deprived of his costs if he
14 presents a false case or false evidence, or acts
15 oppressively in the action (*Baylis Baxter Ltd. v. Sabath*
16 *[1958] 1 W.L.R. 529; [1958] 2 All E.R. 209, CA*). See also
17 *Anglo-Cyprian Trade Agencies Ltd. v. Paphos Wine*
18 *Industries Ltd. [1951] 1 All E.R. 873 and Jones v. McKie*
19 *and Mersey Docks and Harbour Board [1964] 1 W.L.R.*
20 *960, CA; [1964] 2 All E.R. 842, CA, where a successful*
21 *defendant was deprived of costs and in Hobbs v. Marlowe*
22 *[1978] A.C. 16; [1977] 2 All E.R. 241 the costs of a*
23 *successful plaintiff were cut because the action had been*
24 *continued not for the benefit of the plaintiff, but so that*
25 *the A.A., of which he was a member, could recover full*
26 *costs, but in Smith v. Springer [1987] 1 W.L.R. 1720;*
27 *[1987] 3 All E.R. 252, the Court of Appeal allowed an*
28 *appeal against striking out proceedings where there had*
29 *been an offer to pay the claim in full but a refusal to pay*
30 *costs. In Cable v. Dallaturca (1977), 121 S.J. 795 a*
31 *successful defendant was deprived of half the costs of the*
32 *hearing because of his solicitor’s failure to secure a copy*
33 *of his expert’s report in accordance with O.38, rr. 36 and*
34 *40; and in Blue Bell Inc. v. Falmer International Ltd*
35 *(1980) 130 New L.J. 5948, CA, the plaintiffs were*
36 *deprived of their costs of a motion because before its issue*
37 *they knew that steps were being taken by the defendants*



⁴ 2011 (2) CILR 474

⁵ (No. 2) [1992] 1 W.L.R. 1207

1 to remedy the complaint; and see also *Knight v. Clifton*
2 [1971] Ch. 700; [1971] 2 All E.R. 378, CA, where it was
3 held that the court had jurisdiction to award costs of a
4 proceeding against a wholly successful defendant but
5 such order should only be made in exceptional cases. In
6 *Polydodr Ltd. v. Sandu* (1980) 130 New L.J. 18, the Court
7 of Appeal held that the judge erred in principle when he
8 made no order for costs as a result of considering an issue
9 which did not fall to be considered. A trial judge who
10 wished to reflect disapproval of the way in which a
11 plaintiff (who recovered more than nominal damages)
12 had conducted the litigation, by ordering him to pay the
13 defendants' costs, erred in principle. In that case justice
14 could be done by making no order as to the costs of the
15 action (*Gupta v. Klito* (1989) *The Times*, November 23,
16 CA)."

- 17 30. In argument, the Crawford parties cited *Ottway v. Jones* (3) and
18 *Knight v. Clifton* (2).
19 31. *Ottway* (3) involved a landlord and tenant dispute governed by the
20 "very special provisions" of the Rent Acts (see [1955] 1 W.L.R.
21 at 714). The plaintiff proved the facts he was asserting and
22 established an entitlement to possession. The court, however,
23 exercised a discretion to withhold the relief because it seemed to
24 be overly harsh in the circumstances. An order that the successful
25 defendant pay the costs of the unsuccessful plaintiff was upheld by
26 the Court of Appeal. The court observed that in the "ordinary
27 case" such an order would not be a proper exercise of judicial
28 discretion.
29 32. In *Knight* (2), the plaintiffs were unsuccessful in establishing their
30 allegation that the third defendant had breached an injunction
31 and committed a civil contempt. The trial judge awarded costs
32 against the successful defendant, who then appealed. The Court
33 of Appeal reversed the costs order because it was "not a proper
34 exercise of judicial discretion." The third defendant conceded on
35 the appeal that he was not claiming his costs from the plaintiffs, a
36 fact which was noted with approval by two members of the court.
37 33. The decisions in *Ottway* (3) and *Knight* (2) confirm that I have
38 jurisdiction to award costs to an unsuccessful party but it is a
39 jurisdiction to be exercised only in "the most exceptional cases"
40 (per Russell, L.J., in *Knight* (2) ([1971] 1 Ch. at 713)) or in
41 "occasional rare cases" (per Sachs, L.J., *ibid.*). An order which
42 simply denies a successful party its costs is more common but still
43 exceptional."
44



1 20. In the instant case, the Defendant has been partially successful on an interlocutory application.

2
3 21. The Defendant submits that having served the Plaintiff with a copy of the draft Summons on
4 the 9th July 2019, it was open to the Plaintiff to have the witness statements corrected. The
5 Summons detailed the various paragraphs which were of concern. The Defendant submits
6 further that the Plaintiff has been unreasonable and/or negligent. It was urged that while a
7 smaller number of amendments were to be made than those in the Summons, the principle that
8 costs should follow the event should apply. The amendments to be made were those in respect
9 of which there were grave concerns.

10
11 22. The Plaintiff in reply submitted that neither party had been entirely successful and that costs
12 should be in the cause. Of the 27 paragraphs highlighted by the Defendant only a small number
13 of them were required to be amended. Further the witness statements had been filed in the
14 matter since 2016 and 2017 and no complaint had been previously raised. They were filed in
15 the context of the case as it then was and in order to deal with a number of aspects including
16 disclosure as well as liability.

17
18 23. I have considered whether as the Plaintiff suggests, costs should be ordered to be in the cause.
19 I am concerned however that the costs in these proceedings are being unnecessarily exacerbated
20 by the inability of the parties to reach common ground on the requirements of the applicable
21 Rules where such are plain.

22
23 24. I do not consider that the conduct of the Plaintiff with respect to the witness statements rises to
24 the level such that indemnity costs should be ordered. Particularly so when a number of the
25 points raised by the Defendant were arguable such that the Defendant did not succeed in respect
26 of a number of paragraphs highlighted. I have in mind the Judgment of the Court in *Helbrecht*



1 *and Chapman and Others*.⁶ In that Judgment the Court noted the long established practice
2 that costs on the indemnity basis should only be awarded in exceptional cases. The Court said
3 that examples in which the awarding of such costs may be appropriate include when the paying
4 party's conduct is considered to have been wholly unmeritorious or oppressive or in contempt
5 of Court. The Court referenced the case of *Kiam v. MGN Ltd*⁷ for the reasoning of the Court
6 of Appeal that the conduct would need to be unreasonable to a high degree, rather than merely
7 wrong or misguided.

8
9 25. I also note that these statements have been on file for some two years with the concern not
10 having been raised until July 2019.

11
12 26. Counsel on behalf of the Defendant indicated that the recent judgment in the case of *Paula*
13 *Foster v Junior Davis* would have provided clear direction to the Plaintiff as to the applicable
14 rules. Further that it was following receipt of that judgment that it was determined to proceed
15 with the Summons in this matter.

16
17 27. Having considered all the submissions and the circumstances, my view is that it was plain on
18 the face of it that the references to opposing counsel in the witness statements were at the very
19 least irrelevant. In preparation for the forthcoming trial, this issue should have been addressed
20 by the Plaintiff and could have been addressed in a timely manner when brought to Counsel's
21 attention in July 2019 and thus well before the hearing date for the Summons.

22
23 28. It follows that I do not see a basis for other than the general principle to apply which is that
24 costs should follow the event. However the costs recoverable by the Defendant should be
25 limited to 50 % which is approximately reflective of the extent of her success.

⁶ Cause 59 of 2013, Judgment of Williams J. of 14th March 2014

⁷ [2002] 1 WLR 2810

1 29. Thus the order is for the Plaintiff to pay fifty percent (50%) of the costs of the Defendant of
2 this Summons on the standard basis to be taxed if not agreed.

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5 **Dated this the 8th November 2019**

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7
8 **Honourable Justice Cheryll Richards Q.C.**
9 **Judge of the Grand Court**
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