



CAUSE NO: G 0196 of 2019

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

BETWEEN:

GLOBAL MARKETING ASSOCIATES LLC

Plaintiff

-and-

THE PROPRIETORS, STRATA PLAN No. 44

Defendant

Appearances: **Mr James Kennedy and Matthew Harders of KSG for the Plaintiff**
Mr Richard Parry and Jonathan Stroud of Bedell Cristin for the Defendant

Before: **The Honourable Justice Jalil Asif KC**

Heard: **On the papers**

Judgment: **17 October 2024**

Costs—principles to be applied—who is the successful party—whether court should disallow part of costs for “conduct” reasons

JUDGMENT ON COSTS

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A. Introduction

1. I gave judgment on the substantive issues in this case on 18 September 2024. I do not repeat any of the content of that judgment here, which should be read to provide the background context. The judgment provided the parties with the option of a further hearing to determine consequential matters and costs or the filing of written submissions on those issues. The parties opted to file written submissions. In giving the parties that option, my intention was that such submissions should be short and to the point.
2. The Plaintiff took this approach, filing 12-pages of submissions and three authorities in support of its position on costs. In contrast, the Defendant submitted lengthy submissions and extensive supporting materials. The submissions ran to 21 pages, with 66 paragraphs and 54 footnotes. Only four paragraphs addressed the question of consequential orders, the remainder concerned costs. In addition, the Defendant relied on a further bundle containing over 215 pages of a mixture of Rules, case law from the Cayman Islands and England & Wales, pleadings from the action, the Plaintiff’s opening submissions in reply for the trial, evidence already in the trial bundle, evidence that I previously refused to permit the Plaintiff to adduce, a copy of my judgment and 67 pages of *inter partes* correspondence. It may be that the Defendant thought that producing a bundle of this kind would be helpful. However, the majority of the material in this bundle was unnecessary or duplicative of material already before the Court.

3. Bearing in mind the material on which it intended to rely in support of its contentions on costs, I consider the Defendant should have given more careful thought to whether it was necessary to compile the additional bundle and what should be its contents, and, more significantly, whether it remained appropriate to deal with the costs issues by way of written submissions or whether it would be a better use of the court's resources to fix a short further hearing.

B. The Plaintiff's position

4. The Plaintiff contends that I should make the following orders consequential upon my judgment:
 - 4.1 a declaration that the Defendant breached its obligations under the Strata Titles Registration Act (2013 Revision) and clause 3.11.6 of its byelaws in failing to make its books of account available to the Plaintiff for inspection;
 - 4.2 an order requiring the Defendant to provide the Plaintiff with inspection of its books of account, redacted as necessary to comply with data protection principles;
 - 4.3 an order requiring the Defendant to provide the Plaintiff with copies of its documents from its books of account if so requested, upon payment by the Plaintiff of the Defendant's reasonable costs of preparing such copies;
 - 4.4 an order dismissing paragraph 1.2 of the originating summons, which sought a declaration that the Defendant had failed to keep minutes of Exco's meetings; and
 - 4.5 an order for the costs of the action in its favour, on the basis that it has been the successful party overall and that costs ought to follow the event.
5. On the issue of allocation of costs between the parties, the Plaintiff relies on
 - 5.1 *Re Sina Corporation* (unreported, FSD 128/2021 (RPJ), 5 July 2024) at paragraphs [6]-[10];
 - 5.2 *Scully Royalty Ltd v Raiffeisen Bank International AG* (Unreported, CICA (Civil) Appeal No. 21/2020, 8 April 2022) at paragraphs [25]-[28]; and
 - 5.3 *Maso Capital Investments Limited v Trina Solar Limited* (Unreported, CICA (Civil) Appeal No. 009/2021, 4 August 2023) at paragraphs [23]-[24].

6. Based on these authorities, the Plaintiff contends that it is overwhelmingly the “successful” party for the following reasons:
 - 6.1 The main area of argument at trial related to the issues regarding inspection of the Defendant’s “*books of account*,” what is comprised within that term, and whether the Defendant is required to provide copies of documents or merely to permit inspection.
 - 6.2 On those issues, the Plaintiff was the winner in establishing: a legal right to inspection, the breadth of the meaning of “*books of account*” for which it contended, and that the Defendant is obliged to provide copies of documents on payment of a reasonable fee, not merely inspection. The Plaintiff states that it always accepted that it would have to pay for copies, referring to its opening submissions and correspondence exhibited and included in the hearing bundle.
 - 6.3 The issue whether the Defendant prepared and kept minutes of Exco’s meetings, on which the Plaintiff lost, did not cause a significant increase in the length or cost of the hearing. The only relief sought was declaratory. The determination was a simple binary question of fact that did not involve citation of authorities or any point of law. The evidence was limited and did not involve associated discovery. The basis for rejecting the Plaintiff’s claim was the evidence of Ms Lee MacNeil, which was only served by the Defendant on 9 April 2024, very shortly before trial, and depended on the contemporaneous documents exhibited by her, which the Defendant had failed to disclose at any earlier stage.

C. The Defendant’s position

7. The Defendant raises two points consequential on the judgment. First, the Defendant contends that the Order should specify that the Plaintiff should pay for the copies of the documents which the Defendant voluntarily disclosed in 2020 and 2023, as described later in this judgment. Linked with this, the Defendant proposes that the Order should include a mechanism by which the Plaintiff should provide an estimate for the costs of providing copies of any further documents requested by the Plaintiff, with provision of those copies being dependent on the Plaintiff making payment.
8. Secondly, and of more significance, is that the Defendant seeks an Order that the Plaintiff must execute a non-disclosure agreement before being provided with access to unredacted documents

containing personal data, within the meaning of the Data Protection Act (2021 Revision). The Defendant annexes a draft form of non-disclosure agreement to its draft Order.

9. As to costs, the Defendant says that the starting point is that it should pay the Plaintiff's costs of the issue concerning the books of account and the Plaintiff should pay the Defendant's costs of the issue regarding the keeping of minutes. The Defendant makes the implicit assumption that the costs of the two issues are likely to be roughly the same in quantum and suggests that these costs should be netted off against each other and that the Court should therefore depart from the starting point by making no order for costs overall.

10. The Defendant additionally argues for this outcome on the following grounds:

10.1 Whilst the Defendant maintained the formal position that it was not obliged to provide the breadth of documents sought by the Plaintiff, in fact it had offered to provide inspection and copies of such documents before the Plaintiff commenced its claim and voluntarily provided copies of documents during the course of the proceedings, initially in October and November 2020 with further documents being provided in May 2023. In particular:

- (a) The Defendant's financial statements are provided to all proprietors annually in advance of the Defendant's AGM.
- (b) The Defendant provided the Plaintiff with relevant documents, primarily its ledgers, on 30 October 2020 for the period from 2015 to 2019 and on 26 November 2020 for the period from 2010 to 2014.
- (c) The Defendant provided redacted copies of its bank statements on 29 May 2023.

The Defendant submits that it was unjustified for the Plaintiff to continue the litigation after the voluntary production by the Defendant in November 2020, and certainly from June 2023 onwards.

10.2 The Defendant asserts that the Plaintiff has never raised any queries regarding the documents provided nor followed up on any of the complaints that were said to have been the foundation for its desire to review the Defendant's books of account. Thus, it contends that I should conclude that the Plaintiff was not genuinely interested in obtaining the documents and

unreasonably continued to pursue its claim after the Defendant disclosed sufficient material to provide the Plaintiff with a true and fair view of the Defendant's financial status.

- 10.3 The Plaintiff failed to engage with the Defendant's proposals for ADR and was seemingly determined to have its day in Court. The Defendant suggested adjudication of the issues on multiple occasions from March 2021 onwards. The Plaintiff did not respond until March 2023, when it said that it was unwilling to pursue ADR. The Plaintiff's first indication of a willingness to negotiate was in March 2024, when it proposed a WP meeting. In these circumstances, the Defendant says the Plaintiff acted unreasonably. It relies on the English authority of *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 to support an argument that the Court can take into account an unreasonable refusal to engage in ADR when deciding costs issues.
- 10.4 The Plaintiff unreasonably delayed in progressing the case, with the result that it had to serve a Notice of Intention to proceed.
- 10.5 The Plaintiff failed to persuade the Court that Exco's minutes formed part of the Defendant's books of account.
11. The Defendant disputes that the Plaintiff has always accepted that it should pay for copies of documents. It refers to correspondence from the Plaintiff in May 2022 when the Plaintiff's position was that the cost of such copies was part of the Defendant's general administrative expenses and should be borne by the Defendant. The Defendant argues that the Plaintiff has never reimbursed it for the costs it incurred in making voluntary disclosure, as outlined earlier in this judgment, and that this demonstrates that the Plaintiff's true position has always been that it has refused to pay.
12. Separately, the Defendant contends that the Plaintiff should not recover any costs in relation to the preparation of Mr Keim's third affidavit and the affidavit of Mr Gordon Fordeczka, the attempts to adduce those affidavits into evidence and my refusal of permission for the Plaintiff to do so.
13. The Defendant also relies on the contents of that evidence as being relevant to the Plaintiff's conduct, in that the evidence sought to suggest that the Defendant's attorneys had been involved in or had enabled money laundering or had otherwise breached their ethical and professional conduct obligations – without foundation, the Defendant says.

14. On the issue of the minutes, the Defendant says that it is the successful party and therefore, in principle, it should recover its costs. However, having regard to the overall justice of the case, it suggests the Court should make no order for costs overall.
15. Pre-emptively, the Defendant says that I should reject a threatened application by the Plaintiff to seek that any costs payable should be taxed on the indemnity basis. In fact, the Plaintiff has not made such an application.

D. The Plaintiff's response regarding the proposed non-disclosure agreement

16. In response to the Defendant's submission regarding the proposed non-disclosure agreement, the Plaintiff contends that this question was not raised or addressed before or during the trial and is not necessary in light of paragraph 121.1 of my judgment, which states the Defendant can redact the books of account as necessary to comply with data protection principles. The Plaintiff continues that, to the extent that there may be disagreement as to the extent of the redactions, the parties have liberty to apply to the Court.

E. Decision on form of Order

17. The first issue I will address is the form of the Order. Generally, I prefer the Plaintiff's approach to the drafting of the Order, which more closely reflects the terms of the judgment.
18. I disagree with the Defendant's submission that I should now order the Plaintiff to pay the Defendant for the copies of documents from the Defendant's books of account which it disclosed to the Plaintiff in October and November 2020 and in May 2023. The Defendant provided those documents voluntarily, in an effort to compromise or deflect the Plaintiff's claim. There was no indication in October or November 2020 that the Defendant would subsequently seek to recoup payment from the Plaintiff for doing so. In May 2023, the Defendant did seek to reserve its position regarding charging. However, the Defendant's letter expressly recorded that the Plaintiff had not accepted the Defendant's previous offers to receive documents in return for payment of a reasonable fee, and unilaterally sent the documents to the Plaintiff nonetheless. In those circumstances, it would not be fair to require the Plaintiff to pay for the documents that the Defendant chose to disclose in 2020 or in May 2023.

19. I also reject the Defendant's proposal that I should impose a non-disclosure agreement on the parties at this stage. First, this was not raised by the Defendant during the course of the trial before me. This is important because the correspondence shows that there is a difference of opinion between the parties as to whether the Plaintiff's intended use of data provided to it would involve legitimate processing of personal data, which is permitted by the Act, or would require protection of personal data. I am not prepared to assume, as the Defendant wishes, that that question has to be answered in its favour when I have not heard any argument. There is therefore a live question whether any protection of personal data is legally necessary, on which the parties have not addressed me.
20. Secondly, I am conscious that on 1 December 2022 Walters AgJ ordered the parties to agree a form of non-disclosure agreement within 42 days and to execute it within a further 7 days, but they clearly failed or were unable to reach agreement. This is not a promising foundation on which to invite me summarily to approve the specific form of non-disclosure agreement put forward by the Defendant and without the Plaintiff having had any opportunity to comment on it.
21. Thirdly, it seems to me to be unnecessary to order that the parties should execute a non-disclosure agreement, given that my judgment provided that the Defendant was entitled to redact any documents disclosed so far as necessary to comply with data protection principles.
22. Subject to what I now say about costs, I have therefore finalised the form of Order based on the draft provided to me by the Plaintiff.

F. The applicable law and practice regarding costs

23. The principles on which the Court acts in deciding questions of costs are well established and are not seriously in issue in this case. I can summarise them as follows:
 - 1) The Court has a broad discretion as to costs.
 - 2) Generally, the successful party should recover their reasonable costs, but the Court can make a different order in an appropriate case.
 - 3) The mere fact that a party does not win on every issue is not sufficient to displace the general rule, particularly because modern litigation is increasingly complex and so it has become more

likely that a party will not succeed on every issue in play, hence the reason that the Court looks to see who is the successful party overall.

- 4) In determining whether to disallow recovery of costs or to order costs to be paid to the other side (i.e. to the losing party), the court should look at the reasonableness of taking the point that failed, and the extra costs associated with it.
- 5) The conduct of the parties, before and during the proceedings, may also be relevant.
- 6) The court should stand back and look globally at matters and consider to what extent it is fair to deprive the winning party of costs. Where the court decides to do so, it is usually better to estimate a percentage reduction, rather than to make an issues-based order, which is likely to require a taxation before the amount to be paid by each party is capable of being ascertained, involving further time and expense.

G. The Defendant's intended reliance on the Plaintiff's refusal to engage in ADR

24. Following receipt of the Defendant's written submissions indicating its reliance on *Halsey*, I raised with the parties that *Halsey* does not appear to have been considered by the Grand Court. I noted that the Defendant's discussion of *Halsey* in its submissions on costs does not address its later consideration in England & Wales or in the wider Caribbean jurisdictions, in particular in *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416. I also noted that the Plaintiff does not appear to have been given any notice of the Defendant's intended argument. I said that if I were to consider its possible application in this case, the point should be fully argued and gave directions for further skeleton arguments in that eventuality.
25. The Defendant responded that it no longer wishes to rely on *Halsey*. However, at the same time, it made a further submission that it seeks to continue to run the same argument that I should take into account the Defendant's refusal to engage in ADR, this time based on the general provisions of the overriding objective and the discretion provided by GCR O.62, r.4(5) to make an order other than that costs follow the event based on the "circumstances of the case". The position remains that the Plaintiff has not yet addressed this point in its submissions as it was not foreshadowed in the discussions between counsel regarding the orders that each intended to seek.

26. It seems to me that the Defendant is seeking to have its cake and to eat it too. It wishes me to apply the principles to be derived from *Halsey* without properly presenting the argument as to their content and that I can and should apply them. I do not consider that it is sufficient simply to say that the Court has a broad discretion pursuant to GCR O.62, r.4(5) to make a different order for costs having regard to the “circumstances of the case”. Whilst there is such a discretion, it is to be exercised on a principled basis. In my view, it would be wrong to embark on an exercise of determining what are those principles where there is an alleged failure to engage in ADR without the benefit of full argument taking into account *Halsey*, so far as it may be relevant to the situation of litigants in the Cayman Islands. I therefore decline to entertain this aspect of the Defendant’s argument on costs.

H. Decision on costs

27. Applying the guidance on allocation of costs summarised earlier, in my judgment:

27.1 The Plaintiff is the successful party on the “*books of account*” issue.

27.2 The Defendant is the successful party on the issue regarding Exco’s minutes.

27.3 I do not consider it is appropriate simply to set off the costs on one issue against the costs on the other – there is no material before me to support the conclusion that roughly equal sums were spent on each side on those two issues. My own perception, based on the materials in the trial bundle, the submissions for trial and the time spent on the issues at trial, is that about 75-80% of the time related to the “*books of account*” issue and about 20-25% to the issue of Exco’s minutes. I also agree with the Plaintiff that the Defendant’s success on this issue was dependent on its service of Ms MacNeil’s affidavit on 29 April 2024, shortly before trial.

27.4 Accordingly, I consider the Plaintiff is the successful party overall and I do not consider that it is necessary or appropriate to make a percentage reduction in the overall extent of the Plaintiff’s recovery of costs to reflect the extent of its success and failure.

27.5 The Defendant is right to criticise the Plaintiff regarding its conduct of the action on the basis that most of the documents it has been seeking were provided in October and November 2020 and the Defendant’s bank statements were then provided at the end of May 2023. From about June 2023 onwards, if not earlier, this litigation has essentially been about the Plaintiff achieving a vindication of its legal rights, rather than having any substantial practical utility.

Whilst the Plaintiff may consider that vindication to have some value, it is difficult to see why the Defendant should pay for that when, in practical terms, it had provided all, or the vast majority of the relief sought by the Plaintiff by no later than 29 May 2023.

27.6 I therefore determine that the Defendant should pay the Plaintiff's costs up to 30 June 2023 to be taxed on the standard basis, if not agreed, thus allowing a reasonable period for the Plaintiff to have re-assessed its position following production of the Defendant's bank statements on 29 May 2023. From 1 July 2023 onwards, I make no order for costs.

28. I do not consider there is any mileage in the Defendant's complaint that the Plaintiff allowed the claim to stagnate and had to serve a Notice of Intention to Proceed. The Defendant has not sought to demonstrate how this led to any increase in the costs incurred on either side (other than the minimal costs of serving the Notice itself).

29. Finally, I consider that the Plaintiff should not be permitted to recover any costs in relation to the preparation of Mr Keim's third affidavit and the affidavit of Mr Gordon Fordeczka, the attempts to adduce those affidavits into evidence and my refusal of permission for the Plaintiff to do so. That material was wholly unnecessary for the proper advancement and determination of the matters in issue. I appreciate that, in light of my decision above regarding the allocation of costs from June 2023 onwards, it is no longer strictly necessary to decide this particular issue.

Dated 17 October 2024



**THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT**