IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G 88 of 2020

1. **NEIL PURTON**
2. **MICHELLE PURTON**

Plaintiffs

AND

1. **DAVID HOLDEN**
2. **MICHELLE HOLDEN**

Defendants

IN OPEN COURT

Appearances: **Mr. James Kennedy of KSG for the Plaintiffs and Mr. Anthony Akiwumi of Etienne Blake for the Defendants**

Before: **Hon. Mr. Justice Alistair Walters (Actg.)**

Trial Heard: **17, 18, 19 November 2021**

Judgment on Costs Delivered: **31 December 2021**

HEADNOTE

Costs, GCR Order 62, exercise of discretion, factors to take into consideration if departing from normal rule that costs follow the event

JUDGMENT ON COSTS

1. The trial of this matter concluded on 19 November 2021, I handed down my judgment on 20 December 2021 (the "Judgment") and gave the parties 7 days to file submissions on costs. Both parties have filed submissions.

2. The Judgment awarded the sums of US$65,000 and US$147,101.22 plus interest to the Plaintiffs which was essentially what they claimed in their Writ and Statement of Claim. In the Judgment I expressed my view that neither party was shown in a good light in the proceedings and indicated my reservations about making the normal order that costs follow the event. Despite the Plaintiffs having been successful with their claim, it was the conduct of Mr. Purton in particular that gave me cause to question whether the normal costs order should be made. He acted in an unprofessional

and untruthful manner when dealing with the Defendants and, in my view, that conduct precipitated the breakdown in their relationship and lead to these proceedings being commenced.

3. Order 62, rule 4 of the Grand Court Rules ("GCR") sets out the general principles on costs in the Grand Court. Rule 4(2) states:

> *"The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court."*

4. GCR Order 62, rule 5 provides:

> *"If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."*

5. GCR Order 62, rule 10 sets out matters to be taken into account when exercising the discretion to award costs:

> *"The Court in exercising its discretion to make an order for costs shall take into account -*
> *(a) any offer of contribution brought to its attention in accordance with Order 16, rule 10* (which is not applicable in this case)*;*
> *(b) any payment of money into court and the amount of such payment;*
> *(c) any written offer made under Order 33, rule 4A(2)* (dealing with an offer on liability which is also not applicable to this case)*; and*
> *(d) any written offer made under Order 22, rule 14" (*Written offers "without prejudice save as to costs"*).*

6. The Plaintiffs' submissions refer to a summary of the principles with respect to the exercise of judicial discretion which was set out by Buckley LJ in ***Scherer and another v Counting Instruments Ltd and another*** [1986] 2 All ER 529 [38]:

> *"(1) The normal rule is that costs follow the event. That party who turns out to have unjustifiably either brought another party before the court or given another party cause to have recourse to the court to obtain his rights is required to recompense that other party in costs. But,*

(2) the judge has under s 50 of the 1925 Act an unlimited discretion to make what order as to costs he considers that the justice of the case requires.

(3) Consequently, a successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party but has no right to such an order, for it depends on the exercise of the court's discretion.

(4) This discretion is not one to be exercised arbitrarily: it must be exercised judicially, that is to say in accordance with established principles and in relation to the facts of the case.

(5) The discretion cannot be well exercised unless there are relevant grounds for its exercise, for its exercise without grounds cannot be a proper exercise of the judge's function.

(6) The grounds must be connected with the case. This may extend to any matter relating to the litigation and the parties' conduct in it, and also to the circumstances leading to the litigation, but no further."

7. In my view, the first question to ask is whether there was a "successful party" in this case. The Plaintiffs' Counsel has referred to the case of ***A L Barnes Ltd v Time Talk (UK) Ltd*** [2003] EWCA Civ 402 [22], in which Longmore LJ set out at paragraph 28 a formulation that the trial judge ought to adopt to determine the identity of the successful party:

"In deciding who is the successful party the most important thing is to identify the party who is to pay money to the other. That is the surest indicator of success and failure."

8. He indicated that if the trial judge had asked himself this question:

"…he would in my judgment have had to answer that it was the claimants who recovered more than the defendants had ever offered and thus it must be the claimants who the successful party were."

9. This approach was endorsed by Ward LJ in ***Day v Day*** [2006] EWCA Civ 415 at paragraph 17 [28]:

"I would go further and say that in a case like this, the question of who is the unsuccessful party can easily be determined by deciding who has to write the cheque at the end of the case."

10. The Plaintiffs submit that both on the claim and the counterclaim, they can be seen as the successful parties. They say that they have in reality been awarded all they ever sought in monetary terms on their claim and they have successfully defended the counterclaim in full. On that analysis they are the successful party and the normal order for costs should be made unless there are factors which, in my discretion, displace that presumption.

11. For the purposes of the question of costs, the Plaintiffs' submissions note that no payment was made into Court by the Defendants under Order 22. Order 22, rule 14 reads as follows:

> *"(1) A party to proceedings may at any time make a written offer to any other party to those proceedings which is expressed to be "without prejudice save as to costs" and which relates to any issue in the proceedings.*
> *(2) Where an offer is made under paragraph (1), the fact that such an offer has been made shall not be communicated to the Court until the question of costs falls to be decided and the Court shall take into account any offer which has been brought to its attention when making an order for costs.*
> *Provided that the Court shall not take such offer into account if, at the time it is made, the party making it could have protected his position as to costs by means of a payment into Court under Order 22."*

12. There was open correspondence in evidence at trial which indicated that the parties had made some attempts to resolve matters prior to proceedings being commenced. For the purposes of the question of costs, the Plaintiffs' Counsel has also referred the Court to correspondence written on a "without prejudice" basis. The details of the correspondence do not need to be repeated here, suffice to say, that in 2019 the Plaintiffs appear to have put forward a further basis for settling the dispute between the parties.

13. The Defendants responded to that by way of email dated 8 March 2019 and part of that response confirmed that if the Plaintiffs obtained after-the-fact planning permission ("ATF Approval") for the Carport at their cost the Plaintiffs would be paid US$65,000. This is what eventually happened. In the absence of ATF Approval it was proposed that the Defendants' contractors would remove the Carport and make good any damage caused to the house and the area covered by the Carport at the Plaintiffs' cost. A payment of US$50,000 was offered by the Defendants to the Plaintiffs in relation to the Master Bedroom Extension. This was rejected by the Plaintiffs.

14. Apparently, despite providing evidence of the ATF Approval to the Defendants, the US$65,000 was not paid and no further response was received from the Defendants in connection with those negotiations.

15. No payment into Court was made by the Defendants pursuant to GCR Order 22.

16. The Defendants' positon is that they have been partially successful with their defence. I found in their favour that a term was to be implied into the Contract that obtaining planning permission and BCU approval was necessary prior to commencing the Carport and Master Bedroom Extension. I also found that the Plaintiffs had breached that term. However, beyond that, the Defendants were unsuccessful with their defence of the Plaintiffs' claims and, as mentioned above, have been ordered to pay essentially what the Plaintiffs sought in these proceedings.

17. GCR Order 62, rule (7)(a) provides that the orders that the court may make under Order 62, rule 4, include an order that a party must pay a proportion of another party's costs. The question of apportionment of costs between parties was considered by Quin J in ***T. Farrell and C. Farrell v. Bodden*** [2013 (2) CILR 411] in the context of the extent to which costs might be apportioned between parties in a personal injury case where the plaintiff was successful in arguing for a reduction in liability for contributory negligence. In reaching his decision to apportion costs in that case, Quin J cited with approval the guidance from the learned Chief Justice, Smellie CJ in the case of ***AB Jnr. v. MB*** Grand Ct., Financial Servs. Div., 16 June 2013, unreported. In the latter case the Chief Justice cited the English Court of Appeal decision of ***In re Elgindata (No. 2)*** [1992] 1 W.L.R. 1207 which stated as follows:

> "*The principles on which costs were to be awarded were (1) the costs were in the discretion of the court, (2) that costs should follow the event except when it appeared to the court that in the circumstances of the case some other order should be made, (3) that the general rule did not cease to apply simply because the successful party raised issues or made allegations that failed, but he could be deprived of his costs in whole or in part where he had caused a significant increase in the length of the proceedings, and (4) where the successful party raised issues or made allegations improperly or unreasonably, the court could not only deprive him of his costs, but could also order him to pay the whole or part of the unsuccessful party's costs.*"

18. The Chief Justice in ***AB Jnr. v MB*** also referred to the case of ***R.* v. *Immigration Bd., ex p. Kirk Freeport Plaza Ltd.*** (1996 CILR *N* 1) in which further recognition of the power to award costs on the basis of a proportionate order is found. The Chief Justice confirmed the wide discretionary nature given in the GCR notwithstanding the mandate of GCR Order 62, rule 4(5) that costs shall follow the event and confirmed that the real task for the court is to identify what the real event or outcome was and to reflect that in terms of a fair award of costs and it is in that regard that the rules are meant to be flexible, allowing for a wide discretion.

19. Having considered all of those factors, I am satisfied that although the Plaintiffs may be said at face value to be the successful parties there are factors which, in my view, displace the normal order that costs follow the event. As I have explained above, it is the unprofessional and untruthful conduct of Mr. Purton and the Plaintiffs' breach of the Contract in relation to the Carport that precipitated the dispute with the Defendants and had a material part to play in the way that these proceedings were conducted. Having said that, the Defendants took no steps to protect themselves against costs, and maintained defences that were based on out of date pleadings and which ultimately were unsuccessful.

20. The Plaintiffs submit that an order that each party pays their own costs would be disproportionate and unfair to them. The damages awarded in relation to the Carport are approximately 30% of the total damages awarded to the Plaintiffs. It is in relation to the Carport that the unprofessional and untruthful conduct of Mr. Purton occurred and, in the exercise of my discretion and for the reasons set out above, I order that the Defendants only pay 70% of the Plaintiffs' costs on the standard basis, to be taxed if not agreed. I regard that as a fair award of costs in the circumstances of this case.

Honourable Mr. Justice Alistair Walters, (Actg.)
Judge of the Grand Court