IN THE GRAND COURT OF THE CAYMAN ISLANDS

CIVIL DIVISION

CAUSE NO: G0019 OF 2015

BETWEEN:

JOY HOPE ANN VERNON

PLAINTIFF

AND:

EILEEN JENNIFER GREEN

DEFENDANT

Appearances:	**Mr. Clyde Allen of Clyde H. Allen Chambers for the Plaintiff**
	Mr. Paul Keeble and Mr. Andrew Woodcock of Hampson and Co. for the Defendant
Before:	**The Hon. Justice Cheryll Richards Q.C.**
Heard:	**25th September 2019**
Draft Judgment:	**25th October 2019**

HEADNOTE

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

JUDGMENT

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.

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

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

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

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

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

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

[1] (G 239 of 2016 14th May 2019)

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

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

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

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

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

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

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

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

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

14. The Affidavit filed by the Defendant in support of the Summons is that of Dale Edwards dated 7th August 2019. He produces correspondence[2] which indicates that on 12th July 2019 Counsel for the Plaintiff was invited to review his client's witness statement and to identify objectionable material. It does not appear that this was done or that there was any attempt to reach agreement on this matter.

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

[2] Page 14 of Exhibit DE 4

"*24. (1) Subject to the provisions of this or any other Law and to rules of court, the costs of and incidental to all civil proceedings in-*

a. the Court of Appeal; and

b. the Grand Court,

shall be in the discretion of the relevant court.

(2) Without prejudice to any general power to make rules of court, such rules may make provisions for regulating matters relating to the costs of those proceedings including, in particular, the entitlement to costs, the taxation of costs, the powers of taxing officers and the powers of judges to review decisions of taxing officers.

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.

(4) In any criminal or civil proceedings, the court may disallow or (as the case may be) order the attorney-at- law or foreign lawyer concerned to meet the whole of any wasted costs or such part of them as may be determined in accordance with the rules of court.

(5) ..."

16. GCR O. 62 r. 4 provides *inter alia*:

"*(2) 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.*

(5) 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.

(6) The amount of the costs which a successful party shall be entitled to recover from any other party is -

a. the fixed costs prescribed in rule 7;

b. the amount assessed by the Judge in accordance with rule 8;

c. the amount allowed after taxation on the standard basis; or

d. the amount allowed after taxation on the indemnity basis.

(7) The orders which the court may make under this rule include an order that a party must pay –

a. a proportion of another party's costs;

b. a stated amount in respect of another party's costs;

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 f*ollow 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

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

> *"29. I accept that I have a broader jurisdiction as well. I am entitled to deny costs to a successful party, or even to award costs against it, where the justice of the case demands that. This broader jurisdiction is exercised only rarely, and only in the clearest of cases. Some examples are given in the White Book (1 The Supreme Court Practice 1999, para. 62/2/11, at 1119):*
>
> *a. "A successful party may be deprived of his costs if he presents a false case or false evidence, or acts oppressively in the action (Baylis Baxter Ltd. v. Sabath [1958] 1 W.L.R. 529; [1958] 2 All E.R. 209, CA). See also Anglo-Cyprian Trade Agencies Ltd. v. Paphos Wine Industries Ltd. [1951] 1 All E.R. 873 and Jones v. McKie and Mersey Docks and Harbour Board [1964] 1 W.L.R. 960, CA; [1964] 2 All E.R. 842, CA, where a successful defendant was deprived of costs and in Hobbs v. Marlowe [1978] A.C. 16; [1977] 2 All E.R. 241 the costs of a successful plaintiff were cut because the action had been continued not for the benefit of the plaintiff, but so that the A.A., of which he was a member, could recover full costs, but in Smith v. Springer [1987] 1 W.L.R. 1720; [1987] 3 All E.R. 252, the Court of Appeal allowed an appeal against striking out proceedings where there had been an offer to pay the claim in full but a refusal to pay costs. In Cable v. Dallaturca (1977), 121 S.J. 795 a successful defendant was deprived of half the costs of the hearing because of his solicitor's failure to secure a copy of his expert's report in accordance with O.38, rr. 36 and 40; and in Blue Bell Inc. v. Falmer International Ltd (1980) 130 New L.J. 5948, CA, the plaintiffs were deprived of their costs of a motion because before its issue they knew that steps were being taken by the defendants*

[4] 2011 (2) CILR 474
[5] (No. 2) [1992] 1 W.L.R. 1207

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

30. *In argument, the Crawford parties cited Ottway v. Jones (3) and Knight v. Clifton (2).*

31. *Ottway (3) involved a landlord and tenant dispute governed by the "very special provisions" of the Rent Acts (see [1955] 1 W.L.R. at 714). The plaintiff proved the facts he was asserting and established an entitlement to possession. The court, however, exercised a discretion to withhold the relief because it seemed to be overly harsh in the circumstances. An order that the successful defendant pay the costs of the unsuccessful plaintiff was upheld by the Court of Appeal. The court observed that in the "ordinary case" such an order would not be a proper exercise of judicial discretion.*

32. *In Knight (2), the plaintiffs were unsuccessful in establishing their allegation that the third defendant had breached an injunction and committed a civil contempt. The trial judge awarded costs against the successful defendant, who then appealed. The Court of Appeal reversed the costs order because it was "not a proper exercise of judicial discretion." The third defendant conceded on the appeal that he was not claiming his costs from the plaintiffs, a fact which was noted with approval by two members of the court.*

33. *The decisions in Ottway (3) and Knight (2) confirm that I have jurisdiction to award costs to an unsuccessful party but it is a jurisdiction to be exercised only in "the most exceptional cases" (per Russell, L.J., in Knight (2) ([1971] 1 Ch. at 713)) or in "occasional rare cases" (per Sachs, L.J., ibid.). An order which simply denies a successful party its costs is more common but still exceptional."*

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

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

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

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

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

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

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

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

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

28. It follows that I do not see a basis for other than the general principle to apply which is that costs should follow the event. However the costs recoverable by the Defendant should be 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

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

Dated this the 8th November 2019

Honourable Justice Cheryll Richards Q.C.
Judge of the Grand Court