

16-8712

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN
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CAUSE NO: 84 of 2012

6 BETWEEN:

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8 40 ACRES LTD
9

Plaintiff

10 AND:

11 WILLIAM MARK CASSIDY
12
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1st Defendant

14 SOUTHHAVEN DEVELOPMENTS LIMITED
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2nd Defendant

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21 Appearances:

Mr. A. Walters of Campbells for the Applicant (ex parte)

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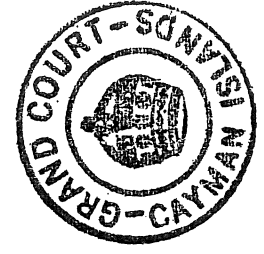
Mr. K. Farrow, QC of Bodden & Bodden attended on
notice for Patches Limited

28 Before:

Hon. Justice Henderson

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32 Heard:

March 5, 2012



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40 RULING

- 41 1. In what circumstances may a party, not being the applicant, which attends
- 42 an unsuccessful application for an injunction made "ex parte upon notice"
- 43 be awarded its costs?

1 2. The Plaintiff 40 Acres Ltd. (“the Applicant”) applied to me for an *ex parte*
2 order permitting the registration of an Inhibition against a certain property
3 which is the home of the First Defendant William Mark Cassidy. Title to
4 the property is registered in the name of Patches Limited (“Patches”).
5 Patches is not a party to the action itself but is, of course, entitled to all of
6 the procedural rights of a respondent on an application which seeks to
7 affect its property rights adversely. The two defendants did not appear. I
8 dismissed the application and Patches then applied for its costs on the
9 standard basis.

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11 3. The Applicant gave notice of its forthcoming *ex parte* application to
12 Patches. Counsel to Patches prepared and filed an affidavit of the
13 principal of Patches which he delivered to the Applicant shortly before the
14 hearing and was prepared to make a submission at the hearing if called
15 upon. At the outset of the hearing, I asked if Patches wished to proceed
16 on an *inter partes* basis. Counsel replied that he did not, presumably
17 because he had received only minimal notice of the hearing and wished to
18 preserve his client’s right to a review hearing. In the event, I did not feel it
19 necessary to hear from Patches and did not consider its affidavit.
20 Considered in isolation, the evidence and argument of the Applicant failed
21 to satisfy me of its entitlement to the requested order.

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1 4. A true *ex parte* application is one where the respondent is not present
2 and, in the usual case, has no knowledge that the application will be
3 made. If the application is unsuccessful the respondent has incurred no
4 cost. If the order is granted the respondent becomes entitled to an *inter*
5 *partes* review of the order. If the *ex parte* order is discharged upon the
6 review application the successful respondent will usually be awarded its
7 costs of the application as costs ordinarily follow the event. In the
8 alternative, an applicant may choose to apply *inter partes* in the first
9 instance in which case a successful respondent will ordinarily receive its
10 costs.

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12 5. An application which is made *ex parte* upon notice is a strange but useful
13 hybrid. As Megarry, J observed in *Pickwick International Inc (GB) Ltd v.*
14 *Multiple Sound Distributors Ltd and another* [1972] 3 All ER 384 (Ch. D.),
15 the phrase itself is a contradiction in terms. Nevertheless, the practice is
16 well established in the Cayman Islands as it provides a number of
17 potential advantages. Although the respondent has no procedural right to
18 make a submission or to adduce evidence, the court may gain assistance
19 from inviting a submission from the respondent or by considering any
20 evidence it has to offer. If the court decides that the applicant is entitled to
21 the order sought the parties may then agree upon the posting of security
22 by the respondent. The presence of the respondent at the hearing will
23 likely avoid any subsequent allegation of misleading disclosure or non-

1 disclosure by the applicant. If the parties agree, the application may
2 proceed as a true *inter partes* hearing with a consequent saving of time
3 and cost. These are advantages of significance. It is to be hoped that the
4 practice will continue.

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6 I accept that the court has jurisdiction to award costs to a respondent on
7 an application made *ex parte* upon notice. Such costs have been
8 awarded in the United Kingdom upon a number of occasions (see
9 *Pickwick*, supra) and should be permissible in the Cayman Islands in
10 appropriate cases. On *inter partes* applications, costs follow the event:
11 *Grand Court Rules*, O. 62 rr. 4(2) and 4(5). That is the bedrock principle
12 of the rules concerning costs. An *ex parte* application, whether upon
13 notice or not, results in no “event” because there is no immediate contest
14 between the parties. This means that the court’s discretion will be
15 exercised at large after a consideration of all of the circumstances. There
16 is no presumption that a respondent should receive its costs when the
17 application fails. Such a rule would be undesirable as it would serve as a
18 disincentive to applicants to provide notice to respondents, a course they
19 are entitled to take.

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21 7. Two considerations of importance in the exercise of discretion are the
22 amount of preparation done by the respondent and the extent to which the
23 respondent’s argument and evidence have influenced the result. The

1 respondent may sit silently at the hearing contenting itself with conducting
2 a watching brief. If called upon, the respondent may present argument or
3 evidence which may or may not influence the result. Where a respondent
4 has contributed something of significance to the resulting decision the
5 court will be more inclined to award to it the costs of the motion.

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7 8. In this case, Patches did not choose to enter into an *inter partes* hearing
8 so the proceeding was conducted *ex parte*. My decision was reached
9 without calling upon Patches for argument. Its affidavit, which I did not
10 take into account in reaching my decision, was sworn by Mr. Cassidy, the
11 First Defendant. Much of its content addresses the merits of the claim in
12 the Statement of Claim and is not specific to the request for an Inhibition.
13 In these circumstances, I exercise my discretion against an award of costs
14 to Patches.

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16 Dated this 16th day of April, 2012

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19 Henderson, J.
20 Judge of the Grand Court
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