IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO G 413 of 2013

BETWEEN

CARL CLAPPISON AND SEA GRAPE ESCAPE LIMITED

PLAINTIFFS

AND

(1) THE PROPRIETORS, STRATA PLAN No.381
(2) THOMPSON RESORTS LIMITED
(3) CASTAWAYS' TIMESHARE LIMITED

DEFENDANTS

UPON THE CONSIDERATION OF WRITTEN SUBMISSIONS

The Ruling of Mangatal J.

Plaintiff's Written Submissions Received by E-mail: **7 June 2016**

Second Defendant's Submissions Received by E-mail: **7 June 2016**

Delivered: **28 June 2016**

HEADNOTE

Costs - Discretion of the Court - Plaintiff succeeding on one issue, but failing on another - Whether distinct and separate issue - Whether appropriate for Court to order reduction of costs - Whether appropriate to order separate assessment of costs in relation to each issue.

RULING ON COSTS

1. On the 17 May 2016, I delivered a written judgment in respect of this matter. The Plaintiff was successful on what I will term, the *ultra vires* point, but was unsuccessful on

its application for the appointment of an administrator to act in place of the Executive Committee of The Proprietors, Strata Plan No. 381.

2. At paragraph 156 of the judgment I stated the following in relation to the issue of costs:

> *"In my judgment, the Plaintiffs have substantially succeeded. They succeeded on the main issue of* ultra vires, *but not on the issue of appointing an administrator. However, these are distinct and separate issues. My preliminary view is that the Plaintiffs should recover costs from TRL and CTL on a reduced percentage basis - See* ***Seepersad v. Persad*** *[2004] UKPC 19, paragraph 24 where these costs principles are discussed. I am minded to order 70% costs to the Plaintiffs against the Second and Third Defendants to be taxed if not agreed. If the parties are not in agreement with this Costs order, they have liberty to apply within 14 days of the date of delivery of this Judgment, seeking a different order."*

3. The Plaintiffs have indicated that they do seek a different order; they seek their full costs on a standard basis to be taxed or agreed.

4. The 1st Defendant took a neutral stance overall in the litigation and has not taken any position or made submissions in relation to the issue of costs.

5. The 2nd Defendant Thompson Resorts Limited ("TRL") has made submissions which are supported by the 3rd Defendant Castaways Timeshare Limited ("CTL").

The Plaintiffs' Submissions

6. Essentially, the Plaintiffs' Counsel Mr. Kennedy states that although I commented in the written judgment in my preliminary view on costs, that the issues were distinct and

separate, he respectfully disagreed, and submits that there was significant overlap between these issues. Reference was made to paragraphs 53-55 of the affidavit evidence of Carl Clappison. Mr. Kennedy also drew attention to paragraphs 140, 152, 154, and 155 of the earlier judgment.

7. Counsel indicated that on the Plaintiffs' view of the judgment, the Court's decision to grant the relief by way of declaring bye-law 2 as *ultra vires* and invalid, and ordering it to be deleted was in part responsible for the decision determining that at this time the "*extreme remedy*" of an administrator was not necessary. Counsel submits that effectively the Court would be punishing the Plaintiffs in a "*costs sense*", for successfully mounting the challenge to the bye-laws. Counsel submits that if the Court had ruled against the Plaintiffs on the *ultra vires* point, it was entirely possible that the ruling on the administrator application might have been otherwise.

8. Mr. Kennedy also appropriately examined the issue from another tack. He submits that the only alternative to the two-pronged approach adopted by the Plaintiffs was to apply only for the *ultra vires* relief and if successful on that point, to then seek to have an administrator appointed. He submits that the costs and time of taking the alternative approach would have been significantly greater and accordingly, the course taken by the Plaintiffs was prudent.

9. Reference was made to the decision of the English Court of Appeal in ***Re Elgindata Ltd. (No. 2)*** [1993] 1 All E.R. 232, which was a decision referred to by the Judicial Committee of the Privy Council in ***Seepersad.*** At page 237 Nourse LJ. provides useful guidance as follows:

"In order to show that the judge erred I must state the principles which ought to have been applied. They are mainly recognized or provided for (it matters not which) by s. 51 of the Supreme Court Act 1981 and the relevant provisions of RSC Ord. 62, in this case rr 2(4), 3(3) and 10. They

do not in their entirety depend on the express recognition or provision of the rules. In part they depend upon established practice or implication from the rules. The principles are these. (1) Costs are in the discretion of the court. (2) 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. (3) 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. (4) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but 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 recognized or provided for by rr 2(4), 3(3) and 10 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. It was because of his disregard of that principle that the judge erred in this case."

10. Relying upon ***Elgindata Ltd (No. 2)***, it was the Plaintiffs' submission that in all of the circumstances the relief was not so discrete as to depart from the general rule that the successful party should obtain his costs.

TRL's Submissions

11. Mr. Huskisson, on behalf of TRL submits that, although most of the legal argument and consequently the larger part of the judgment is devoted to the bye-laws issue, most of the written evidence was devoted to the issue over the appointment of an administrator. Further, that the Plaintiffs adduced very detailed "line by line" commentary on the

Strata's accounts, in relation to which TRL says that it incurred considerable time and expense responding. Likewise, a substantial part of the trial and virtually all of the cross-examination was directed to this issue.

12. The submission continues, that although TRL agrees that the order for costs should reflect the Plaintiffs' success on the bye-laws issue, the order for costs should however equally reflect TRL's success on the administrator issue. It was Counsel's position that the two issues were completely free-standing, as evidenced by the separate representation of TRL and CTL on the two issues. Mr. Huskisson further argued that the Plaintiffs lost on the administrator issue because they failed to meet the test of substantial misconduct, and that the decision on the bye-laws issue had no bearing on this decision.

13. Mr. Huskisson went on to submit that there are a number of ways in which a fair balance between the relative success of the parties on the issues can be achieved. The one that is suggested by TRL is that the Court order that the Plaintiffs recover a percentage of their costs and that TRL also recover a percentage of its costs, both to be taxed if not agreed. It was pointed out that this approach would lead to two taxations, but would, Counsel submits, be the best way to ensure that the successful parties recovered what they were entitled to on the "loser pays" principle. Further, TRL suggests that this approach may also promote settlement in that both sides could produce their draft bills and then seek to negotiate a compromise with the benefit of the actual numbers.

14. Alternatively, the submission is that if the Court prefers to make a percentage reduction in the Plaintiffs' costs to avoid the need for two taxations, then TRL suggests the Plaintiffs should recover no more than 25% of their taxed costs. It was submitted that the reduction needs to be substantial so that it reflects, not only the fact that the Plaintiffs should not recover costs in respect of an issue upon which they failed, but also the fact that they should pay TRL's costs of the administrator issue, which are substantial given the heavy factual content.

Resolution of the Issues

15. Upon reflecting on the submissions by the Plaintiffs as to whether the issues of *ultra vires* and appointment of an administrator were really separate and distinct, I take Mr. Kennedy's point that there was some inter-relationship between the decision on the issue of *ultra vires* and the decision whether to appoint an administrator. The decision I arrived at on the *ultra vires* issue, to my mind, had significant bearing on the question of whether to order appointment of an administrator. However, the two issues were separate and distinct issues, in the sense, as described in ***Seepersad***, at paragraph [24, that *"[a]n issue for these purposes must be something so distinct and separate in itself that the decision of it constitutes an "event"."* The decision on either of the issues of *ultra vires* or appointment of an administrator would each constitute an event. (My emphasis).

16. I appreciate, that as stated in ***Re Elgindata Ltd (No. 2)***, the general rule that costs should follow the event does not cease to apply simply because the successful party raises issues or makes allegations on which he fails. But the raising of the issue of the appointment of an administrator did in my judgment cause a significant increase in the length or cost of the proceedings. These are circumstances in which it may be proper to make a reduction in the Plaintiffs' costs.

17. However, in my judgment, the fourth principle discussed in ***Re Elgindata*** , i.e. that where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but order him to pay the whole or part of the unsuccessful party's costs, is not applicable in the instant case. The Plaintiffs are successful parties who neither improperly nor unreasonably raised the issue of the appointment of an administrator, and therefore, although not succeeding on that issue, the Plaintiffs ought not to be ordered to pay any part of the unsuccessful party, TRL's costs.

18. In my judgment, a fair and proper exercise of my discretion entails ordering costs in the Plaintiffs' favour. Having regard to the length of time and amount of expense involved in dealing with the issue of appointing an administrator, I am confirmed in my preliminary

view that reducing the Plaintiffs' costs by 30 %, and ordering that the Plaintiffs recover 70% costs against the 2nd and 3rd Defendants, on a standard basis, to be taxed if not agreed, is appropriate in all of the circumstances. It is to be noted, that although Counsel for TRL took the lead on the administrator issue, and Counsel for CTL took the lead on the *ultra vires* issue, each party adopted the other's positions and submissions. Thus, in my view, it is appropriate to order costs against both of these parties in favour of the Plaintiffs. I order accordingly.

GRAND COURT · CAYMAN ISLANDS

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT