

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
[CIVIL]

CLAIM NO. SLUHCV2013/0912
BETWEEN:

MOUNT DU CAP LIMITED

Claimant

and

BLUE HORIZON DEVELOPMENTS LIMITED

Defendant

consolidated with

CLAIM NO. SLUHCV2013/0913

BETWEEN:

MOUNT DU CAP LIMITED

Claimant

and

TERRYPAYNE INVESTMENTS (ST.LUICA) LIMITED

Defendant

Before:

Ms. Agnes Actie

Master

Appearances:

Ms. Shan Greer for the claimant

Mrs. Maureen John for the defendants

June: 21, 2018

On written submissions

1. **ACTIE M:** The claimant is a home owner association for a property development in which the defendants, Blue Horizon Limited and Terry Payne Investments (St Lucia) Limited are land owners within the development. A dispute arose between the parties as to the amount of Home Owners Association (HOA) fees due and owing by the defendants for the period 2009 to 2012.

2. The claimant filed a claim form and statement of claim against each defendant seeking (HOA) and costs due and owing in the sum of \$116,278.33 by Blue Horizon Limited and \$108,033.62 by Terry Payne Investments (St Lucia) Limited respectively.
3. The defendants admit that (HOA) fees were due and payable but contended that the sums claimed were excessive and unreasonable. At a case management conference, and with the consent of the parties, Ms Brenda Duncan was appointed a referee to determine the matter pursuant to CPR 2000 Part 40.
4. On 21st March 2014, the defendants paid into court as follows:- Terry Payne Investments (St Lucia) Limited, the sum \$18,279.79 and Blue Horizon Developments Ltd, the sum of \$17,388.16.
5. The referee's final report concluded that (HOA) fees were due and owing in the sum of \$48,284.34 by Blue Horizon Developments Ltd and \$56,508.43 by Terry Payne Investments, respectively.

APPLICATION FOR COSTS

6. Both the claimant and the defendants filed applications for an award of costs. The claimant avers that it should be awarded all its costs despite having only been partially successful in its claim.
7. The defendants on the other hand contend that they are entitled to recover their full costs against the claimant company and /or its's directing manager Mark Waters. The defendants aver that they were always ready and willing to pay reasonable (HOA) fees but refused to pay the grossly inflated fees demanded by Mark Waters and/or the claimant company.

Analysis

8. The general rule is that a successful party usually is entitled to costs¹, unless the court thinks otherwise. The court has a wide discretion to depart from that principle in appropriate circumstances and may order a successful party to pay all or part of the costs of an unsuccessful party².

¹ **CPR 64.6(1)**

² CPR 64.6(2)

9. The issue is who in the circumstances is entitled to a costs award. In deciding who should be liable to pay costs the court must have regard to all the circumstances³. In particular, CPR 64.6(6) requires the court to have regard to:-
- (a) the conduct of the parties both before and during the proceedings;
 - (b) the manner in which a party has pursued – (i) a particular allegation; (ii) a particular issue; or (iii) the case;
 - (c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;
 - (d) whether it was reasonable for a party to – (i) pursue a particular allegation; and/or (ii) raise a particular issue; and
 - (e) whether the claimant gave reasonable notice of intention to issue a claim⁴.
10. In the extant claim, the claimant claimed the sum of \$116,278.33 against Blue Horizon Limited and \$108,033.62 against Terry Payne Investments (St Lucia) Limited, but only recovered \$48,284.34 and \$56,508.43 respectively.
11. The text **Blackstone's Civil Practice**⁵ citing **Texaco Ltd. V Arco Technology Inc.** ⁶ states that a claimant who has claimed substantial damages but only recovered nominal damages will normally be ordered to pay the costs of the defendant.
12. The court in such an instance must take into consideration all the relevant factors. In **Anglo-Cyprian Agencies v. Paphos Industries**⁷, Devlin J (as he then was) said:-
- “ No doubt the ordinary rule is that where a plaintiff has been successful, he ought not to be deprived of his costs or, at any rate, made to pay the costs of the other side unless he has been guilty of some sort of misconduct. In applying that rule, however, it is necessary to decide whether the plaintiff really has been successful and I do not think that a plaintiff who recovers nominal damages ought necessarily to be regarded in the ordinary sense of

³ CPR 64.6 (5)

⁴ CPR 64.6(6)

⁵ para 66.10

⁶ (1989) *The Times*, 13 October 1989.

⁷ [1951] 1 All ER 873, 874

the word as a 'successful' plaintiff. In certain cases he may be, for example, where part of the object of the action is to establish a legal right, wholly irrespective of whether any substantive remedy is obtained. To that extent, a plaintiff who recovers nominal damages may properly be regarded as a successful plaintiff but it is necessary to examine the facts of each particular case."

13. The defendants asserted their willingness to have paid (HOA) fees for the upkeep and maintenance of the property but refused to pay the extortionate fees demanded by Mr. Mark Waters on behalf of the claimant company. The defendants aver that they had been engaged in active negotiations with Mr. Waters for an amicable settlement. They further aver that they were anticipating a reply from for an offer of settlement made via email correspondence. In a letter dated 4th September 2013 addressed to the claimant's attorney, Terry Payne Investments offered a sum of \$53,646,39 as a final settlement. The amount was close to the sum of \$56,508.43 awarded by the referee. The claimant rejected the offer and instead on 28th October 2013, filed the extant claim.

14. The defendants aver that the filing of the claim was preemptive and unnecessary as the defendants had been actively pursuing settling of the outstanding issues without the need to resort to legal proceedings. In light of the circumstances, the defendants are of the view that the claimant should bear the costs of the claim.

15. When considering who should bear the costs, the court is entitled to take into account the claimant's conduct overall. In **Rocahmel Construction Limited v National Insurance Corporation**⁸ Byron C.J (as he then was) states:-

The General Rule and Discretion

"8. CPR part 64.6 prescribes that where the Court decides to make an order about the costs of any proceedings, the general rule is that, it must order the unsuccessful party to pay the costs of the successful party. The Court is, however, given very wide discretionary powers to vary the application of the general rule. These include the power to order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs or to pay only certain

⁸ Civil Appeal No. 10 of 2003

portions of another person's cost. In exercising these discretions as to costs the Court is required to have regard to all the circumstances. Particular consideration must be given to the conduct of the parties both before and during the proceedings and the manner in which a party has pursued the case in general and particular issues within the case. Thus the order can be affected by whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings. The Court is also required to consider whether it was reasonable for a party to pursue a particular allegation or raise a particular issue and whether the claimant gave reasonable notice of intention to pursue a claim. The Court also has power to order costs against a person who is not a party, but only on giving prior notice and an opportunity to be heard."

16. The evidence clearly shows that the defendants made a number of offers of settlement including a payment into court. I am of the view that it was not unreasonable for the defendants to have contested the amounts claimed for (HOA) fees, especially having regard to the final awards made by the referee. I have considered the facts and circumstances of the case and am of the considered view that the claimant acted unreasonably in filing the claims against the defendants in light of the ongoing settlement discussions and the resulting award. Claimants should be discouraged from bringing proceedings or making allegations which are spurious, in the sense that they are unsupported by evidence⁹. Given the history of the matter, I am of the view that the facts of this case justify a departure from the normal rule and the claimant should bear the defendants' costs.
17. The issue now is to determine the appropriate measure of costs to be awarded to the defendants. The court in an assessment of costs will only allow costs which have been reasonably incurred in keeping with the **Lownds test**.
18. **CPR 2000 Part 65.2 (3)** provides a list of factors which the court must take into consideration in determining the reasonableness of the costs namely :- any order that has already been made; the care, speed and economy with which the case was prepared; the conduct of the parties before as well as during the proceedings; the degree of responsibility accepted by the legal practitioner; the

⁹ Per Byron CJ in *Rochamel Construction Ltd V NIS*

importance of the matter to the parties; the novelty, weight and complexity of the case; the time reasonably spent on the case.

19. The defendants in keeping with CPR 65.12(4) presented a schedule of costs comprising of legal fees and out of pocket expenses.
20. Both Defendants claim the sum of \$65,862.33 for legal fees comprising fees paid to Gordon and Gordon and Nelson Green Chambers together with payments made to the referee. The defendants contend that each party should recover their full costs as the claimant filed separate claims against the defendants.
21. CPR 2000 Part 64.7 provides that if two or more parties having the same interest in relation to proceedings are separately presented the court may disallow more than one set of costs.
22. The claimant filed two claims against the parties who were both represented by the same counsel. The two claims raised similar factual issues relating to (HOA) fees due and owing by the respective homeowners. The claims were consolidated with the appointment of a referee to determine the issues in dispute. The case was not complex and turned on the narrow issue of quantum.
23. I am of the view that the defendants had the same interest although represented separately in the proceedings. In keeping with CPR 64.7, I will disallow the amounts claim by both parties and instead make a single award for the payment for \$57,040.65 as legal costs.

Referee's fees

24. The defendants claim an award for the costs in the sum of \$8821.94 for the referee's fees. The order appointing the referee clearly provides that the fees would be paid equally between the parties. This order was not been set aside and there is no reason to depart from the terms. Accordingly no award is made under this head

Out of pocket expenses

25. Both directors of the defendants' company claim out of pocket expenses for air flights and hotel expenses from 2nd October 2013 to 11th August 2016. The defendants aver that the defendant

companies had two different directors who each had to travel to St Lucia at different times to give instructions and attend court proceedings.

26. The court notes that both defendants claim for air flight on 2nd October 2013 which predates the filing of the claim on the 28th October 2013. The court accepts that the defendants' representatives had to incur expenses to travel to brief counsel, attend case management conferences and brief the referee. However, the amounts claimed under this head are not substantiated by evidence from any of the defendants. In the absence of evidence the court is minded to award a nominal sum of \$15,000.00 to each defendant.

Costs against a third Party

27. The defendants' avow that Mark Waters, the directing mind of the claimant company, although not a party to the proceedings should be made to pay the costs of the proceedings.
28. The court has jurisdiction to order costs against a third party who is not a party to the proceedings. In **Re a company**¹⁰, the court awarded costs against directors of a company who improperly caused the other side to incur costs in a winding up.
29. An award of costs against a person who is not a party must be made on application and on notice to the person against whom the costs order is sought. The court accepts that the reprehensible conduct of Mark Waters in seeking extortionate fees from the defendants justified an imposition of costs on him personally. However, the defendants failed to comply with the procedural requirements of Rule 64.10 and in the circumstances costs shall be paid by the claimant company.

Order

30. In summary, the claimant shall pay the defendants the following :
- (1) Legal costs in the sum of \$57,040.65
 - (2) Out of pocket expenses in the sum of \$15,000.00 to each defendant.
 - (3) Interest on the global sum at the rate of 6 % from the date of judgment until payment in full.
 - (4) The costs awarded shall be paid on or before the 30th July 2018.

¹⁰ (1991) 1WLR 1003

31. I wish to express my sincerest apology to the parties for the delay in delivery this decision.

AGNES ACTIE

MASTER

BY THE COURT

REGISTRAR