

COMMONWEALTH OF THE BAHAMAS

2009/CLE/GEN/FP00054

IN THE SUPREME COURT

Common Law and Equity Division

IN THE MATTER of a contract and addendum to contract dated the 14th July 2007 and the 16th August 2007 respectively and made between (1) Zelee (Bahama) Development Limited and (2) OCL Investments Limited for the sale of freehold property known as Apartment No. 2, The Hamptons Condominium, Lot 4 Block 27, Bahamia Marina Subdivision, Freeport, Grand Bahama

AND IN THE MATTER of Section 4 of the Conveyancing and Law of Property Act

BETWEEN

ZELEE (BAHAMA) DEVELOPMENT LIMITED

Plaintiff

And

OCL INVESTMENTS LIMITED

Defendant

BEFORE: The Honourable Madam Senior Justice Estelle G. Gray Evans

APPEARANCES: Mr James R. Thompson for the plaintiff

Mr Gregory Moss for the defendant

RULING
(Costs in the Action)

Estelle G. Gray Evans, Sr J.

1. Upon delivering its decision on 24 July 2010, the court indicated that it would hear the parties as to costs. The court has now heard the parties.

2. It is accepted that no party is entitled to recover costs of or incidental to any proceedings except under the authority of the Court, which has sole discretion in granting costs. See section 30 of the Supreme Court Act, chapter 53, Statute Laws of The Bahamas; and Rules of the Supreme Court (RSC) Order 59, rules 3(1) and 3(2), the latter of which also provides that in the exercise of its discretion, the Court shall order the costs to follow the event, except 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.

3. Further, RSC Order 59 rule 3(4) provides that costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings.

4. While there is no dispute that as a general rule costs follow the event, that is, the winning party is entitled to costs, there is a dispute as to who is the winner in this case, each side arguing that it won and is, therefore, entitled to its costs.

5. In support of the plaintiff's position, counsel for the plaintiff makes, inter alia, the following observations and submissions:

- a. The action was started by the plaintiff seeking firstly a declaration that it had lawfully terminated the agreement for sale. Other declarations were requested;
- b. A close review of the judgment indicates that there was a fundamental disagreement between the parties on that issue, which was resolved in favour of the plaintiff with the result that the plaintiff has won its case;
- c. Contrary to counsel for the defendant's contention that the defendant had accepted the position contended by the plaintiff by letter dated the date of the action, the judgment says that it appears that this was not received until after the action had begun;
- d. There was no acceptance of this position as the judgment indicates, as this was a major issue in the judgment;
- e. Counsel for the defendant's indicated condition to his acceptance clearly was not acceptable by the plaintiff;
- f. The issue that was won by the defendant was not on any principle of law, but on the plaintiff retaining the deposit for rent which the court found unreasonable;
- g. The issue was a minor part of the judgment compared;
- h. Further, it could be said that the defendant won no issue at all but the plaintiff lost the deposit issue because it refused to give up the deposit and tried to apply it to the rent for amounts the court found unreasonable.

6. In support of the defendant's position, counsel for the defendant makes, inter alia, the following observations and submissions:

- a. The plaintiff failed in five of its six prayers as enumerated in its Originating Summons filed on 3 March 2009;

- b. The sole prayer upon which the plaintiff succeeded was the uncontested prayer by the plaintiff for a declaration that it had lawfully terminated the contract for purchase and sale on 20 February 2009;
- c. The termination of the contract for purchase and sale was accepted by the defendant on 3 March 2009 before the commencement of the action;
- d. As the plaintiff only succeeded in the declaration which was not contested in the action, it was the defendant who succeeded;
- e. In the alternative, in the event that the court were minded to see the plaintiff as having succeeded in an adversarial fashion in respect of one of its six prayers, the effect upon an order for costs would be the same;
- f. In that regard, a very useful summary of the law (cited with approval by Mr Justice Akenhead in *J Board of Trustees of National Museums and Galleries on Merseyside v AEW Architects and Designers Ltd and others* [2014] 1 Costs LO 39) is to be found in the judgment of Jackson, J (as he then was) in *Multiplex Construction(UK) Ltd v Cleveland Bridge, UK Ltd* [2008] EWHC 2280 (TCC) in which he summarized a number of principles from his detailed review of the authorities on costs at paragraph 72:

“[72] From this review of authority I derive the following eight principles:

- (i) In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.
 - (ii) In considering how to exercise its discretion the court should take as its starting point the general rule that the successful party is entitled to an order for costs.
 - (iii) The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.
 - (iv) Where the circumstances of the case require an issue-based costs order, that is what the judge should make. However, the judge should hesitate before doing so, because of the practical difficulties which this causes and because of the steer given by r 44.3(7).
 - (v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order.
 - (vi) In considering the circumstances of the case the judge will have regard not only to any Pt 36 offers made but also to each party's approach to negotiations (insofar as admissible) and general conduct of the litigation.
 - (vii) If (a) one party makes an order offer under Pt 36 or an admissible offer within r 44.3(4)(c) which is nearly but not quite sufficient, and (b) the other party rejects that offer outright without any attempt to negotiate, then it might be appropriate to penalise the second party in costs.
 - (viii) In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs.
- g. As was noted by Lord Wolff MR in *Phonographic Performance Ltd v AEI Re-diffusion Music Ltd* [1999] 2 ALL ER, the statement of the law on the matter of costs under the new UK CPR is merely a codification of the common law

position that had pertained before the introduction of the new CPR Rules. At page 313 and 314 of that Judgment Lord Wolff MR stated:

“I draw attention to the new rules because, while they make clear that the general rule remains, that the successful party will normally be entitled to costs, they at the same time indicate the wide range of considerations which will result in the court making different orders as to costs. From 26 April 1999 the 'follow the event principle' will still play a significant role, but it will be a starting point from which a court can readily depart. This is also the position prior to the new rules coming into force. The most significant change of emphasis of the new rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new rules are reflecting a change of practice which has already started. It is now clear that a too robust application of the 'follow the event principle' encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so.”

Accordingly, adopting the starting point that the “successful party is entitled to an order for costs and adding to that principle the further principle that “the party which ends up receiving payment should generally be characterized as the overall winner of the entire action” and should be awarded costs of the action, costs should follow the event and the plaintiff should be ordered to pay to the defendant the costs of the action, to be taxed if not agreed.

7. In this action, the plaintiff sought the following relief:
 - a. A declaration that the vendor/plaintiff lawfully terminated the above-mentioned contract on 20 February 2009;
 - b. A declaration that the vendor/plaintiff was entitled to vacant possession of Apartment 2, The Hamptons Condominium, Lot 4, Block 27 Bahamia Marina Subdivision, Freeport, Grand Bahama, as of 20 February 2009;
 - c. An Order that the purchaser/defendant deliver up immediate possession of Apartment 2, The Hamptons Condominium aforesaid;
 - d. A declaration that the vendor/plaintiff was entitled to mesne profits in respect of the purchaser/defendant's continued occupation of Apartment 2, The Hamptons Condominium, aforesaid, since 20 February 2009;
 - e. An Order that the purchaser/defendant pay mesne profits to the vendor/plaintiff;
 - f. An Order that the purchaser/defendant pay to the vendor/plaintiff the costs of these proceedings to be taxed if not agreed;
8. The defendant/purchaser counterclaimed for the following relief:
 - a. The plaintiff's application be dismissed with costs to the defendant;
 - b. A declaration that the deposit herein be returned to the defendant;
 - c. The plaintiff be ordered to return the defendant's deposit.
9. The court granted the following reliefs:
 - a. A declaration that the vendor/plaintiff lawfully terminated the above-mentioned contract on 20 February 2009;

- b. A declaration that the defendant is entitled to the return of its deposit less any unpaid maintenance fee for the period of the defendant's occupancy ending 15 April 2009 and less any reasonable repair costs, fair wear and tear excepted;
- c. An order that the plaintiff pay to the defendant the sum of \$50,000.00 paid as a deposit under the aforesaid agreement for sale and purchase less any unpaid maintenance fees for the period of the defendant's occupancy ending 15 April 2009 and less any reasonable repair costs, fair wear and tear excepted.

10. The court found that there were two contracts between the parties. One for the sale and purchase of the subject unit and the other whereby a periodic tenancy was created between the parties when the defendant was allowed into occupation thereof.

11. Consequent upon the lawful termination by the plaintiff of the contract for the sale and purchase, the defendant was entitled to the return of its deposit without deduction and the plaintiff was entitled to possession of the said premises. That was not disputed.

12. However, having been allowed into occupation of the said unit under a periodic tenancy agreement, the defendant was entitled to reasonable notice to vacate, while the plaintiff was entitled to payment of a reasonable sum for the defendant's continued use and occupation after the contract for sale had been terminated.

13. In my judgment, in respect to the contract for sale and purchase, the plaintiff won the event; while, in respect to the contract creating the periodic tenancy, the defendant won the event.

14. So, having regard to the foregoing, and having considered the submissions of counsel and the law and authorities cited, it seems to me, that in the circumstances of this case, each side should bear its own costs, and I so order.

15. To the extent that the court contributed to the delay in having this matter resolved, I apologize.

DATED this 23rd day of September A.D. 2019

Estelle G. Gray Evans
Senior Justice