COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMERCIAL DIVISION

2018/COM/com/00056

2009/COM/com/00019

IN THE MATTER OF the Companies Act 1992

BETWEEN

CLICO LIFE INSURANCE COMPANY SURINAME S.V

Plaintiff

AND

CLICO (BAHAMAS) LIMITED

Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: **Damian Gomez KC with Moreno Hamilton for the Plaintiff**
Stephen Smith KC with Marco Turnquest for the Defendant

DECISION

WINDER, CJ

1. On 24 April 2023 when I gave my decision in this action I invited the parties to provide written submissions on the appropriate order as to costs. Submissions were received from both parties. The plaintiff submits that it ought to be granted the costs principally on the basis of what they claim was the improper conduct of the official liquidator. The defendant submits that it is entitled to its costs of the action and that such costs ought to be certified, fit for two counsel.

2. ***Sterling Asset Management Ltd. v Sunset Equities Ltd. SCCivApp 152/2021***, provides helpful guidance on the Court's approach to the determination of costs. ***Sir Michael Barnett P.***, writing for the Court of Appeal, stated as follows:

> 5. The general principle is that whilst costs are in the discretion of the court, that discretion must be judicially exercised. The jurisprudence in this matter can be found in the judgment of Buckley, LJ in Scherer and another v Counting Instruments Ltd and another [1986] 2 All ER 529:
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>> "...we derive the following propositions. (1) The normal rule is that costs follow the event. That party who turns out to have unjustifiably either brought another party before the Court or given another party cause to have recourse to the Court to obtain his rights is required to recompense that other party in costs. But, (2) the judge has under s 50 of the 1925 Act an unlimited discretion to make what order as to costs he considers that the justice of the case requires. (3) Consequently, a successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party but has no right to such an order, for it depends on the exercise of the Court's discretion. (4) This discretion is not one to be exercised arbitrarily: it must be exercised judicially, that is to say in accordance with established principles and in relation to the facts of the case. (5) The discretion cannot be well exercised unless there are relevant grounds for its exercise, for its exercise without grounds cannot be a proper exercise of the judge's function. (6) The grounds must be connected with the case. This may extend to any matter relating to the litigation and the parties' conduct in it, and also to the circumstances leading to the litigation, but no further. (7) If no such ground exists for departing from the normal rule, or if, although such grounds exist, the judge is known to have acted not on any such ground but on some extraneous ground, there has effectively been no exercise of the discretion. (8) If a party invokes the jurisdiction of the Court to grant him some discretionary relief and establishes the basic grounds therefor but the relief sought is denied in the exercise of discretion, as in Dutton v Spink & Beeching (Sales) Ltd and

Ottway v Jones, the opposing party may properly be ordered to pay his costs. But where the party who invokes the Court's jurisdiction wholly fails to establish one or more of the ingredients necessary to entitle him to the relief claimed, whether discretionary or not, it is difficult to envisage a ground on which the opposing party could properly be ordered to pay his costs. Indeed, in Ottway v Jones [1955] 2 All ER 585 at 591, [1955] 1 WLR 706 at 715 Parker LJ said that such an order would be judicially impossible, and Evershed MR said that such an order would not be a proper judicial exercise of the discretion, although later he expressed himself in more qualified language (see [1955] 2 All ER 585 at 587, 588-589, [1955] 1 WLR 706 at 708, 711)..."

6. This statement has been approved by this Court in a number of cases: see Amber Murphy v Hot Pancakes et al SCCivApp. Nos. 95 of 2020 and 52 of 2021 and Polymers International Ltd. v Philip Hepburn SCCivApp. No. 8 of 2021.

3. The normal rule is therefore that the successful party ought to be paid their costs unless there are cogent reasons to depart from this rule. In this action the defendant was entirely successful and I therefore find that there is no basis to depart from the normal rule. The submissions that the conduct of the official liquidator ought to cause a departure from this normal rule did not find merit with the Court.

4. In the circumstances I find that the Defendants ought to be entitled to their reasonable costs of the action and that such costs ought to be certified as fit for two counsels. These costs ought to be assessed in default of agreement.

Dated this 20th day of July AD 2023

Sir Ian R. Winder Kt.

Chief Justice