COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

2019/COM/lab/00062

BETWEEN

HASTEN CHARLTON

Plaintiff

AND

THE LYFORD CAY MEMBERS CLUB LTD.

Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Obie Ferguson Jr. KC with Alva Stuart-Coakley for the Plaintiff
Ferron Bethel KC with Viola Major for the Defendant

31 August 2023

# DECISION ON COSTS

**WINDER, CJ**

[1.] On 17 August 2022, I dismissed the Plaintiff's claim for wrongful dismissal and unfair dismissal but found that the Plaintiff was entitled to accrued vacation pay in the amount $1,001.60. In that judgment, I indicated that I would hear the parties as to the appropriate order or costs by written submissions within 14 days. Each party lodged written submissions, which I have considered and which I summarize below, and this is my decision on costs.

**Submissions**

[2.] The Plaintiff submitted that, as a general rule, costs follow the event. As judgment was in favour of the Plaintiff and the Plaintiff specifically pleaded vacation pay as due and owing, the Plaintiff submitted he is entitled to the costs associated with and incidental to the action. The Plaintiff submitted that the Defendant should pay two-thirds of the costs associated with the matter with interest at 6.25% from the filing of the Writ of Summons on 12 September 2019 until payment.

[3.] The Defendant submitted that the starting point is that costs are in the discretion of the Court. However, while costs usually follow the event, there are circumstances which may lead a court to make some other order. The Defendant cited ***Douglas Ngumi v The Hon. Carl Bethel and others [2022] 2 BHS J. No. 2*** and ***Re Elgindata (No 2) [1992] 1 WLR 1207*** in support of this submission.

[4.] The Defendant submitted that the Plaintiff received nothing more than he was originally offered and did not obtain what he asked for from the Court. The Defendant contended, citing ***Garvey v Cable Beach Resorts Limited (d/b/a Sheraton Nassau Beach Resort) [2014] 3 BHS J. No. 36*** as illustrative, that there is an analogy between the present case and *Calderbank* offers and payments into court, where costs principles generally indicate that a party who does not receive an award higher than the offer made or the payment in ought only to receive their reasonable costs up to the date they should have accepted the offer or payment in.

[5.] The Defendant submitted that, in the present case, the Plaintiff's case for wrongful dismissal failed, the Plaintiff's case for unfair dismissal failed, the Plaintiff did not succeed on his breach of contract claim (strictly construed) and the Plaintiff was awarded $1,001.60 in connection with his accrued vacation pay, which was incorporated into the cheque the Defendant offered the Plaintiff upon his termination but which the Plaintiff refused. As the Defendant unnecessarily suffered time and expense in defending an action which ought not to have been brought, the Defendant should be awarded its reasonable costs in connection with the action.

**Discussion**

[6.] As the Defendant correctly submitted, costs are in the discretion of the Court. That discretion must be exercised judicially, i.e., in accordance with established principles and in relation to the facts of the case. The starting point is the general rule that costs follow the event and, therefore, the successful party ought to be paid their costs. That general rule falls to be applied unless there are cogent reasons to depart from it.

[7.] ***Order 59, rule 3(2)*** of the ***Rules of the Supreme Court, 1978*** which then applied to this dispute, provides:

> If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when 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.

[8.] In ***Douglas Ngumi v The Hon. Carl Bethel and others [2022] 2 BHS J. No. 12***, *Sir Michael Barnett P*, (as he then was) delivering the decision of the Court of Appeal on the costs of that appeal, considered the principles relevant to the award of costs in the Court of Appeal where the principles do not materially differ from the principles applied by this Court under the ***Rules of the Supreme Court, 1978***. *Barnett P* said at paragraphs 12 and 13:

> 12. The general principle is that whilst costs are in the discretion of the court, that discretion must be judicially exercised.
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> 13. In *Scherer and another v Counting Instruments Ltd and another* [1986] 2 All ER 529 Buckley, LJ said:
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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)..."

[9.] In ***Re Elgindata (No 2) [1992] 1 WLR 1207***, the petitioners, shareholders in Elgindata Ltd, obtained an order that another shareholder in the company (the "purchasing shareholder") purchase their shares in proceedings brought under section 459 of the ***English Companies Act 1985***. The trial judge found most of the petitioners' case failed but found some conduct on the part of the purchasing shareholder was unfairly prejudicial. The trial judge therefore ordered that three-quarters of the purchasing shareholder's costs be paid by the petitioners and one-quarter of the petitioners' costs be paid by the purchasing shareholder. The English Court of Appeal substituted an order that the petitioners should be deprived of half of their costs. *Nourse LJ* said at pages 1213 and 1214:

> In order to show that the judge erred I must state the principles which ought to have been applied. They are mainly recognised or provided for, it matters not which, by section 51 of the Supreme Court Act 1981 and the relevant provisions of R.S.C., Ord. 62, in this case rules 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 on established practice or implication from the rules. The principles are these. (i) Costs are in the discretion of the court. (ii) 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. (iii) 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. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may 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 recognised or provided for by rules 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.
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> [Emphasis added]

[10.] The principal question for the Court to determine in exercising its discretion as to costs is which party is to be regarded as the successful party in this case. In ***Roache v News Group Newspapers Limited and Others [1992] Lexis Citation 2472*** (reported as ***[1998] EMLR 161***), a libel action, *Sir Thomas Bingham MR* said:

> Two principles, habitually applied in exercising the discretion to award costs, are of relevance for present purposes. The first is that in the ordinary way costs follow the event. This means that the winner of the action recovers his costs, taxed if not agreed, which the loser has to pay. In a simple case this rule raises no problem, but more complex cases may arise in which it is necessary to investigate with some care who is really the winner and who is really the loser or, as it is sometimes put, to identify the event which costs are to follow. Other legal systems observe quite different rules, but in our system this principle is of fundamental importance in deterring plaintiffs from bringing and defendants from defending actions they are likely to lose.
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> The judge must look closely at the facts of the particular case before him and ask: who, as a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?

[11.] In ***Roache***, Sir Thomas Bingham MR conducted a review of authorities and among the authorities to which he referred was ***Alltrans Express Ltd v CVA Holdings Ltd [1984] 1 WLR 394***, a case in which the plaintiff claimed £82,500 in damages for breach of contract but was awarded nominal damages in the amount of £2 after liability for breach of contract was admitted. In that case, *Stephenson LJ* said at pages 401 to 403:

> I think that the weight to be given first of all to an award of nominal damages and secondly to the absence of any payment into court depends on all the circumstances of the case...the event of an award of £2 was not the event at which the plaintiffs were aiming. They were aiming at £82,500, and the mere fact that they ultimately got something — token or nominal damages — does not enable me to regard them as remaining successful plaintiffs.
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> To have paid £2, or possible £5 or £10, into court in this case would have been very near to a "ritual' act. It would not have been taken out; the plaintiffs would have gone on with their mouth opened wider for a much larger sum; they did go on, having established a breach of contract, in the hope of getting a large sum of damages for that breach; in pursuit of that object they took up the time of the court and, more important from the point of view of this appeal, put themselves and the defendants to considerable expense over, as I have said, 15 working days; and at the end they came

away empty-handed, because I cannot think that £2 in the hand disqualifies them from that description.

[12.] In ***Beoco Ltd v Alfa Laval Company Ltd [1995] QB 137***, a case in which the plaintiff obtained judgment against the first defendant for an amount to be assessed reflecting the loss and damage which the plaintiff would inevitably have incurred in replacing or repairing a defective heat exchanger employed at its plant based on an amendment made by it to its statement of claim in the course of trial but failed on its primary claim that the defective heat exchanger caused an explosion at its plant, *Stuart-Smith LJ* (with whom the rest of the English Court of Appeal agreed) said at page 156:

> What then should be the result in this case? I can see no reason to deprive the first defendant of the costs down to the date of the amendment. Thereafter, they were essentially the winners, since the primary contest related to the damage caused by the explosion. Even on the basis of the judge's conclusion that the defendant would be liable for the hypothetical loss of production, it was a case in which the first defendant should have been awarded a proportion of their costs thereafter, for the reasons I have already given. As it is, in the light of our decision that the only damages that the plaintiff is entitled to recover is the cost of replacing the casing of the heat exchanger and such loss of production that occurred on 24 August as a result of the defect discovered on that day, this is likely to be no more than £21,574.28 now claimed in the Scott schedule and it may well be less. Although this sum cannot by itself be described as trivial, in the context of a claim for £1m. and the enormous expense of this action, it is trivial. It makes no commercial sense to incur costs of this sum to recover such a small sum. And it seems to me very probable that if the first defendant had had a proper opportunity to make a payment into court on the basis that its liability on the alternative claim was limited in the way we have held it to be, it would have done so. A payment in of £21,574, plus interest, would obviously not have been accepted and it would have made sound commercial sense to have made it. But for the reasons I have indicated, the first defendant had no chance to do so. Accordingly, in my judgment, although some discount should be made to reflect the very modest degree of success that the plaintiff achieved, it should not be a large one. I would award the first defendant 85 per cent of its costs after 24 February 1992.

[13.] In ***Oksuzoglu v Kay [1998] 2 All ER 361***, *Brooke LJ* (with whom the rest of the English Court of Appeal agreed) referred to, among other cases, ***Alltrans Express Ltd*** and ***Beoco***, and said at paragraph 58:

> 58. In this line of cases, where the plaintiff only recovers between 1% and 3% of his original claim (sometimes, but not always, after a late amendment) the court is entitled to ask itself: 'Who was essentially the winning party?' It will not be distracted from making a just order as to costs by the absence of a payment into court which the plaintiff obviously would not have accepted (see Alltrans Express Ltd v CVA Holdings Ltd [1984] 1 All ER 685 at 692, 693, [1984] 1 WLR 394 at 403, 404 per Stephenson and Griffiths LJJ), or where the defendants did not have a proper opportunity to make a payment into court which obviously

would not have been accepted (see Beoco Ltd v Alfa Laval Co Ltd [1994] 4 All ER 464 at 479–480, [1995] QB 137 at 156). Although all these cases are different, in the present case the substantive lis between the parties on the trial of the preliminary issues related to the big claim on which the plaintiff wholly failed.

[14.] Adopting the approach reflected in the authorities cited in paragraphs 10 to 13 above, in my judgment, it is the Defendant who ought to be regarded as a matter of substance and reality as the successful party in this litigation. The Plaintiff ultimately recovered $1,001.60 in a money claim brought to recover, according to the Plaintiff's re-amended statement of claim, the sum of $180,397.31 in compensation for wrongful and unfair dismissal, damages for breach of contract, interest and costs. The Plaintiff's claim for accrued vacation pay was peripheral or marginal when compared to the Plaintiff's other claims. No reasonable litigant in the position of the Plaintiff would have pursued trial to recover only what the Plaintiff recovered, which sum had been voluntarily tendered by the Defendant prior to the commencement of proceedings.

[15.] Having identified the Defendant as the successful party in this litigation, it is necessary also to consider whether there should be a departure from the general rule that the successful party's entire costs of the action should be paid by the unsuccessful party. In my view, there should be a modest departure. In this regard, I give no weight to the fact that the Defendant failed to make a Calderbank letter or a payment into court to protect its position. Had a reasonable offer been made by the Defendant, it is clear from the pre-action correspondence in evidence that any such offer would not have been accepted by the Plaintiff as the Plaintiff was seeking to recover a six-figure sum plus costs. However, the Plaintiff was not completely unsuccessful and it was unreasonable for the Defendant to have resisted the Plaintiff's claim to accrued vacation pay as vigorously as it did. These matters ought to be reflected in costs. I will therefore award the Defendant 90% of its costs.

**Conclusion**

[16.] In all the circumstances, I order the Plaintiff to pay 90% of the Defendant's costs, such costs to be taxed if not agreed.

Dated the 15th day of September, 2023

Sir Ian R. Winder Kt.
Chief Justice