COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2012/CLE/gen/1147

BETWEEN

SANDYPORT HOMEOWNERS' ASSOCIATION LIMITED

Plaintiff

AND

R. NATHANIEL BAIN

Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Kahlil Parker KC for the Plaintiff
Meryl O. Glinton for the Defendant

25 August 2023 (Defendant's written submissions)

1 September 2023 (Plaintiff's written submissions)

DECISION ON COSTS

WINDER, CJ

[1.] In my judgment in this matter dated 21 July 2023, I indicated that I would deal with the costs of the proceedings on written submissions and directed the parties to submit bills of costs and written submissions not exceeding 10 pages in length within 14 days. Written submissions having been lodged by the parties, this is my decision on costs. For convenience, in this decision, I adopt the definitions used in my judgment in this matter.

Submissions

The Association's Submissions

[2.] The Association contended for an order that Bain should pay its costs, to be taxed if not agreed, which costs are to be reduced by 15% or such other reasonable figure as the Court may determine, to reflect Bain's "limited success" on his damages claim.

[3.] Counsel for the Association submitted that the Association was largely successful in this action, as this case centered on Bain's wilful denial of the fact that he was bound by the Scheduled Restrictive Covenants enforceable by the Association. Counsel submitted that Bain failed on the principal issues in the case, as the Association succeeded in obtaining declaratory relief, in having Bain's counterclaim dismissed (save for an award of nominal damages) and the Court found that Bain was in breach of the Scheduled Restrictive Covenants.

[4.] Counsel for the Association submitted that the Association's claim primarily sought clarity and vindication by declaration as to the Association's rights pursuant to the Scheduled Restrictive Covenants, which declarations were granted by the Court. However, the Court's decision as to whether the Association was entitled to enforce the Scheduled Restrictive Covenants against Bain in the circumstances that transpired led the Court to refuse to grant the injunction sought, which was the only other substantive relief sought by the Association; therefore, the Association secured the principal relief it sought.

[5.] Counsel for the Association cited the general rule that the unsuccessful party will be ordered to pay the costs of the successful party. Counsel acknowledged, however, that costs are in the discretion of the Court, and the Court may make a different order if the circumstances of the case warrant some other order, as reflected in ***Order 59, rule 3(2)*** of the ***Rules of the Supreme Court, 1978***.

[6.] Counsel for the Association referred the Court to the case of ***Morrow v Shrewsbury Rugby Union Football Club Ltd [2020] Costs LR 569***, a costs decision of

the English High Court decided under the English ***Civil Procedure Rules 1998***, for guidance with respect to the factors the Court should consider when deciding what order to make about costs. The relevant factors identified in that case include the conduct of the parties, whether a party has succeeded on at least part of its case and any admissible settlement offers drawn to the Court's attention. The "conduct of the parties" includes conduct before as well as during the proceedings, whether it was reasonable for a party to raise, pursue or defend the case or a particular allegation or issue, and the manner in which the party pursued or defended the case or a particular allegation or issue.

[7.] Counsel for the Association also referred the Court to the New South Wales case of ***Larsen v Grace Worldwide (Aust) Pty Limited (no. 3) [2015] NSWSC 1706***. In that case, in which the New South Wales Supreme Court made an order that the claimant was not entitled to any costs as the defendant had successfully defended the dominant issue in the proceedings, *Schmidt J.* said at paragraphs 5 and 7:

> 5 Under s 98 of the Civil Procedure Act 2005 (NSW) the Court has wide power to determine the appropriate order as to costs. The usual order is that costs follow the event. The purpose of the exercise of the power is compensatory, not punitive (see *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534 at 566-7 and *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 at 97).
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> 7 Ordinarily, there is no apportionment between issues on which a successful party succeeds and those on which it fails, but that rule can operate unfairly and may not be appropriate in a case where, for example, the successful party failed on the dominant issue, or on clearly separable matters (see *Waters v PC Henderson (Aust) Pty Ltd* [1994] NSWCA 388; (1994) 254 ALR 328), or on issues unreasonably pursued (*Oshlack* at 122). Where costs are to be apportioned, an impressionistic discretionary evaluation is involved (see *James v Surf Road Nominees Pty Ltd (No 2)* [2005] NSWCA 296).

[8.] Counsel for the Association submitted that most of the evidence led in the proceedings was in relation to the Association securing the declaratory relief which it obtained. While the Association did not obtain the permanent injunction it sought, the permanent injunction was in reality ancillary to the declaratory relief. By contrast, Counsel submitted, Bain was unsuccessful in his counterclaim given the outcome of the trial.

[9.] The Association submitted that an order that Bain should pay its costs, to be taxed if not agreed, which costs are to be reduced by 15%, would fairly compensate each party based on the Court's judgment and their relative success in this matter.

Bain's Submissions

[10.] Bain contended for an order that his costs as the successful party in the action should be paid by the Association. Bain submitted that, in any event, he should be awarded the costs of and incidental to the Association's application for an interlocutory injunction, his application to vary or set aside that injunction and his application for an interlocutory injunction against the Association preventing the Association from interfering with his access to the Subject Property.

[11.] Counsel for Bain referred the Court to ***section 30*** of the ***Supreme Court Act***, ***rules 2(2)***, ***3(1)*** and ***3(2)*** of the ***Rules of the Supreme Court, 1978***, the oft-cited guidance of *Buckley LJ* in ***Scherer and another v Counting Instruments Ltd [1986] 2 All ER 529*** cited by the Court of Appeal in ***Sterling Asset Management Ltd. v Sunset Equities Ltd. SCCivApp 152/2021*** and the equally oft-cited four propositions stated by N*ourse LJ* in ***Re Elgindata (No. 2) [1992] 1 WLR 1207***, a case referred to by the Court of Appeal in *inter alia* ***Roscoe Ferguson v Rascals Limited SCCiv App No 140 of 2016***.

[12.] Counsel for Bain submitted that, taken as a whole, Bain was the successful party in this action as the action, at its core, was an action regarding the legal right of the Association to have Bain restrained from continuing construction subject to the Association's approval and Bain paying an application fee and, on that central issue, the Association's claim failed.

[13.] Counsel for Bain further submitted that, in substance, the Association's statement of claim pleaded one cause of action, namely, that Bain had continued construction, which had taken more than a year to complete, in breach of the terms of clauses 5 and 13 of the Scheduled Restrictive Covenants, which clauses the Association had the right to enforce against Bain. Under the umbrella of that cause of action, the Association claimed five heads of relief and succeeded on only two of them. Counsel submitted that any success the Association attained was "pyrrhic and *de minimis*".

[14.] In relation to Bain's counterclaim, Counsel for Bain submitted that Bain succeeded on it, as he was awarded damages arising out of the interlocutory injunction made against him that he sought to have discharged. Bain also says that he succeeded in his claims for damages for wrongful interference, nuisance and trespass. Counsel submitted that, while the Court declined to grant Bain the declaration and injunction against the Association he sought, the Court's judgment nevertheless operates as a declaration and injunctively in any event and should eliminate any threat of the Association continuing its opposition against Bain continuing his construction project.

[15.] Bain submitted that this is a matter in which the usual rule that costs follow the event should be applied and, whether approaching the question of who was successful

by looking at the central issue between the parties or tallying the parties' relative successes on the issues, he is the successful party.

Discussion

[16.] As I remarked recently in ***Hasten Charlton v The Lyford Cay Members Club Ltd. 2019/COM/lab/00062*** (unreported, 15 September 2023):

> ...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.

[17.] The foregoing principles are not in dispute between the parties.

[18.] Both parties made submissions on the basis that the costs of these proceedings should be awarded to the "overall winner", though neither party provided authority supporting such an approach being taken in circumstances where it is necessary for the Court to make an order in respect of both the costs of a claim and the costs of a counterclaim, a counterclaim being, of course, substantially a cross-action.

[19.] The ***Supreme Court Practice 1997 (Volume 1)*** discusses how the costs of a claim and counterclaim should be dealt with at paragraph 15/2/7 thusly:

> ...After the Judicature Act came into operation, it was the practice when the plaintiff recovered a sum of money on his claim and the defendant on his counterclaim, to enter one judgment only for the balance (*Lowe v. Holme* (1883) 10 Q.B. 286; *Westacott v. Bevan* [1891] 1 Q.B. 774; *Stumore v Campbell & Co.* [1892] 1 Q.B. 314, p.317). This rule is still adopted in some cases (see para. (4)). But the Court may give the plaintiff judgment on the claim and costs of the action, save in so far as they were increased by the counterclaim, and the defendant judgment on the counterclaim with costs solely referable to the counterclaim. And this course was approved by the Court of Appeal in *Provincial Bill Posting Co. v. Low Moor Iron Co.* [1909] 2 K.B. 344; *Sharpe v. Haggith* (1912) 106 L.T. 13; *Chell Engineering Ltd. V Unit Tool and Engineering Co.* [1950] 1 All E.R. 378. See also *Lowther v Lewin* (1964) 109 S.J. 33. Where both parties fail the same principle is applied (*James v. Jackson* [1910] 2 Ch. 92]. On the other hand, this form of order "does not always give a just result" (per *Denning L.J.* in *Chell Engineering Ltd. V Unit Tool and Engineering Co.*, above, p.383) and it is desirable that the Court should consider making a special order as to costs. ...
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> [Emphasis added]

[20.] The ***White Book 2010 (Volume 1)*** discusses the issue at paragraphs 48.15.2 and 48.15.3, which respectively provide:

> 48.15.2 Where claim and counterclaim are both dismissed with costs, upon assessment the rule is that the claim should be treated as if it stood alone and the counterclaim should bear only the amount by which the costs of the proceedings have been increased by it. No costs not incurred by reason of the counterclaim can be costs of the counterclaim. In the absence of special directions by the Court, there should be no apportionment. The same principle applies where both the claim and counterclaim have succeeded (*Medway Oil and Storage Co v Continental Contractors* [1929] A.C. 88, HL). But see *Millican v Tucker* [1980] 1 W.L.R. 640; [1980] 1 All E.R. 1083, where the Court of Appeal held it was well within the judge's discretion *inter partes* to order the apportionment of the costs of the claim and counterclaim equally. Costs can be awarded on the basis of the issues actually involved (see r. 44.3(4)) so as to encourage good litigation practice. It is relevant to good litigation practice to consider the ways in which both sides could have protected themselves with regard to costs. *Universal Cycles Plc v Grangebriar Ltd* [2000] C.P.L.R. 42,CA.
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> 48.15.3 In a building dispute in which both the claim and counterclaim succeeded, the Court of Appeal held that the judge was wrong to order the claimant to pay the costs of the counterclaim and the defendants to pay the costs of the claim, because the defendants were, in reality, the unsuccessful parties and a just award was that the claimant should recover 60 per cent of its costs of all the proceedings:
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> > 30.The most obvious and frequently most desirable option is that signposted in CPR 44.3 paragraph (6)(a), namely to order a proportion of the party's costs to be paid.... Ordering a proportion of costs obviates all the difficulties...in an assessment of how much is properly to be allocated to each and every issue considered in isolation. Better by far to decide, despite the difficulty and imprecision of the calculation, that the relevant issue or issues should bear a percentage of the costs taken overall.
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> > 33. How,...does one decide who the unsuccessful party is? This was, after all, a form of commercial litigation where each side was claiming money from the other. Costs following the event is the general rule and in this kind of litigation the event is determined by establishing who writes the cheque at the end of the case. Here the defendants do. They were the unsuccessful parties and my starting point is that the claimant is entitled to the costs of the proceedings, claim and counterclaim taken together.
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> > 34. The circumstances of the case may justify a departure from the general rule and so the conduct of the parties, and questions of whether they have not been wholly successful become relevant. CPR 44.3(5) identifies specific aspects of conduct for the court to consider including conduct before as well as during the proceedings, the reasonableness of the party's raising,

> pursuing or contesting particular allegations or issues, the manner in which he has done so and the extent to which, though successful, he has exaggerated his claim.
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> *Burchell v Bullard* [2005] EWCA Civ 358
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> [Emphasis added]

[21.] I considered how to deal with the costs of a claim and counterclaim in ***Wallace I Rolle and another v The Town Court Management Company [2022] 1 BHS J. No. 210***. In that case, I dismissed the plaintiffs' claim for declaratory relief, granted judgment on the plaintiffs' damages claim in the amount of $25,946.22 and, on the defendant's counterclaim for outstanding contributions to the common expenses of Town Court Condominiums, I ordered payment by the plaintiffs subject to the defendant making a proper accounting. In relation to the costs of the proceedings, I regarded the defendant as the successful party overall and deprived the defendant of 25% of its costs to reflect the fact that the plaintiffs had met with a degree of success as well.

[22.] But for the overwhelming need to bring a final resolution to these proceedings, I would have, like in ***Rolle***, ordered that a proportion of the "overall winner"'s costs be paid by the "overall loser". The "overall winner" is Bain. As Counsel for Bain submitted:

> [w]hilst other tangential issues were canvassed in the action, taken as a whole, this was an action regarding the legal right of [the Association] to have Bain restrained from continuing construction work, subject to the Association's approval, [and] to his payment of application [fees]…[o]n that central issue, the Association's claim failed.

[23.] Had I pursued that course, taking into account Bain's success, the limited success of the Association, and the fact that Bain ought to have conceded the issues of whether he was bound by the Scheduled Restrictive Covenants and whether the Association had *locus standi* earlier in the proceedings, I would have awarded Bain 70% of his taxed costs.

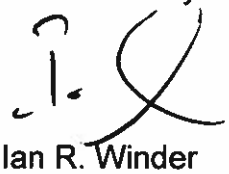
[24.] However, in the interest of concluding this matter and avoiding the additional expense and delay of a taxation, I will order that the Association pay Bain a gross sum in lieu of taxed costs in exercise of the wide discretion as to costs that is reposed in me.

[25.] Counsel for Bain filed a bill of costs on 25 September 2023 claiming professional fees in the amount of $162,722.00 and disbursements in the amount of $11,117.00.

[26.] Having reviewed the bill of costs, taking into account the circumstances of the case, including the time spent, the work reasonably expended, the seniority of counsel

and the importance of the matter to the client, looking at the matter in the round, I fix Bain's reasonable professional charges in this matter at $45,000 plus disbursements of $3,075. The Association must pay any Value Added Tax which arises on these sums.

Dated the 7th day of December, 2023



Sir Ian R. Winder
Chief Justice