

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

**COMMON LAW AND EQUITY DIVISION
2021/CLE/gen/No.00863**

BETWEEN

TYSON STRACHAN

Claimant

AND

ANTHONY SIMON

First Defendant

AND

YORKSHIRE HOLDINGS LTD

Second Defendant

AND

FIRSTCARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED

Third Defendant

AND

MCKAY CULMER & ASSOCIATES

Fourth Defendant

**Before: Her Ladyship The Honourable Madam Senior Justice
Deborah Fraser**

**Appearances: Mrs. Yvette Rahming and Ms. Gabriel Rahming for the
Claimant**

**Mr. Sidney Cambridge Jr. for the First and Second
Defendants**

**Mr. Ferron J.M. Bethell K.C. and Ms. Camille A. Cleare
for the Third Defendant**

Mr. Norwood Rolle for the Fourth Defendant

Judgment Date: 01 March 2024

**Costs in Interlocutory Applications – Civil Procedure Rules, 2022 – Part 71 –
Court’s Discretion as to an award of Costs – Success in part – Appropriate Order
as to Costs**

DECISION ON COSTS

Re: Ruling on Interim Relief dated 11 October 2023

1. This is my decision on the issue of costs emanating from my ruling dated 11 October 2023 (“**Interim Relief Ruling**”).

BACKGROUND

2. I rely on the background facts as outlined in my Interim Reliefs Ruling and thus will not repeat them here. I will only highlight aspects that are salient to this costs ruling.
3. On 26 July 2023, the Claimant brought an application pursuant to Part 17 of the Civil Procedure Rules, 2022 (“**CPR**”) requesting the following reliefs:
 - (1) *An injunction to restrain the 1st Defendant, the 2nd Defendant and the 3rd Defendant whether by themselves or by their employees, servants or agents or otherwise howsoever from entering or crossing or otherwise dealing with the Property;*
 - (2) *Possession by the Claimant;*
 - (3) *A Declaration that the Claimant is the owner;*
 - (4) *A Declaration that the 1st Defendant, the 2nd Defendant and the 3rd Defendant whether by themselves or by their employees, servants, or agents, be restrained from building upon selling or entering into any agreement disposing of or otherwise dealing with the Property;*
 - (5) *That the Property be appraised;*
 - (6) *An equitable lien over the premises to secure the appraised market value of the Property;*
 - (7) *The Defendant pay to the Claimant the sum equivalent to that quotes as the market value of the Property;*
 - (8) *That the Claimant, upon receipt of the requisite funds from the Defendants, transfer title to the 1st and or 3rd Defendants;*
 - (9) *The Defendants bear all costs associated with the satisfaction of the outstanding Mortgage; or the 1st Defendant be ordered to vacate the Property upon reasonable notice from the Claimant;*
 - (10) *Mesne profits from 16 March 202 until possession delivered up or transfer of the Property to the 1st Defendant or 3rd Defendant*
 - (11) *Damages*
 - (12) *Civil Procedure (Award of Interest) Act 1992 at such rate and for such period as the Court considers appropriate; and*
 - (13) *Costs.*

4. In my Interim Relief Ruling, I granted the Claimant, Mr. Strachan, one of the reliefs he sought – being an interim injunction. Thus, he was only successful in obtaining one of the myriad of interim reliefs sought under part 17 of the CPR.
5. In paragraph 99 of the Interim Reliefs Ruling, I directed the parties to provide the Court with written submissions on the appropriate order as to costs, which all parties have done.

ISSUE

6. The Court must determine the appropriate order as to costs.

DISCUSSION AND ANALYSIS

7. Having read and considered the submissions of counsel, I will now outline the relevant law and apply it to the case. I also acknowledge in Mr. Strachan's submissions that he attempted to settle the matter prior to bringing this application. I, however, am unaware of the scope, reasonableness, or the terms of the settlement offer.

8. Rule **71.6 of the CPR** provides:

“(1) 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.

“(2) The Court may, however, make no order as to costs or, in an exceptional case, order a successful party to pay all or part of the costs of an unsuccessful party.”

9. There are several factors the Court must bear in mind when awarding costs. Such factors are outlined under **Rule 71.10 of the CPR. Rule 71.10 (1), (2) and (3)** states:

“(1) In deciding what order, if any, to make about costs, the Court must have regard to all the circumstances, including —

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful;

(c) any payment into court or admissible offer to settle made by a party which is drawn to the Court's attention and which is not an offer to which costs consequences under Part 35 and 36 apply.

“(2) For the purposes of paragraph (1)(a), the conduct of the parties includes

(a) conduct before, as well as during, the proceedings;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim; and

(e) unreasonable conduct of any kind by any party in relation to the inclusion or exclusion of documents or authorities in any bundle and whether a joint bundle or otherwise.

(3) *The Court may make an order that a party must pay —*

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct issue in or part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment (emphasis added)."

10. Further factors that the Court must bear in mind can be found at **Rule 71.11 of the CPR**, which reads:

"71.11 Factors to be taken into account in deciding the amount of costs.

(1) The Court is to have regard to all the circumstances in deciding whether costs were —

(a) proportionately and reasonably incurred; or

(b) were proportionate and reasonable in amount.

(2) In particular, the Court must give effect to any orders which have already been made.

(3) The Court must also have regard to —

(a) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case;

(g) the place where and the circumstances in which work or any part of it was done...”

11. In the UK Court of Appeal decision of **Scherer and another v Counting Instruments Ltd and another [1986] 2 All ER 529**, Buckley LJ opined:

“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 Section 50 of the Judicature 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 upon 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 therefore but the relief sought is denied in the exercise of discretion, as in *Dutton v. Spink* and *Otway 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 *Otway v. Jones* at page 715, Lord Justice Parker said that such an order would be judicially impossible, and Sir Raymond Evershed, Master of the Rolls, at page 708, said that such an order would not be a proper judicial exercise of the discretion, although later, at page 711, he expressed himself in more qualified language. (9) If a judge, having relevant grounds upon which to do so, has upon those grounds, or some of them, made an order as to costs in the exercise of his discretion, his decision is final unless he gives leave to a dissatisfied party to appeal. (10) If, however, he has made his order having no relevant grounds available or having in fact acted on extraneous grounds, this court can entertain an appeal without leave and can make what order it thinks fit (emphasis added).”

12. I also note the pronouncements of Clarke J at paragraphs 10 to 13 from the UK decision of **Travelers Casualty and Surety Co of Canada and others v Sun Life Assurance Co of Canada (UK) Ltd and another [2006] All ER (D) 221 (Nov)**:

"10 In Fleming v The Chief Constable of the Sussex Police Force [2004] EWCA Civ 643 Potter, LJ, as he then was, described the rationale of the "issues" approach as being the necessity to "discourage litigation in respect of inessential issues, which are either bound to fail, or are irrelevant to the central and essential issues necessary to be decided between the parties in the resolution of the dispute". I do not, however, regard Potter, LJ, as having intended to state that it is only in respect of issues of that description that such an approach can be taken; particularly since, in the immediately succeeding paragraph, he referred to the AEI Rediffusion case as an exposition of principles too well known to require to be set out in detail.

11 The Court is thus given a wide discretion and enjoined to take into account a number of factors including those specified in CPR 44.3. (4). The aim must always be to make an order that reflects the overall justice of the case.

12 The cases illustrate how this may work out in practice 1. If the successful claimant has lost out on a number of issues it may be inappropriate to make separate orders for costs in respect of issues upon which he has failed, unless the points were unreasonably taken. It is a fortunate litigant who wins on every point.

13 On the other hand, if a party raises a discrete issue which involves very substantial costs, and upon which he fails, justice may require that he should bear his costs and pay those of his opponent on the issue. CPR 44.3 (4) specifically provides that:

"(4) In deciding what order (if any) to make about costs the court must have regard to all the circumstances, including:

(a) the conduct of the parties;

(b) whether a party has been successful on part of his case, even if he has not been wholly successful"

13. Bearing in mind the above principles and authorities, I will now address each interim relief sought by the Mr. Strachan and refer to each as a sub-issue.

(i) *The Interim Injunction*

14. I rely on the reasoning enunciated by the Court in **Quay House Admirals way Land Ltd v Rockwell Properties Ltd [2022] EWHC 742 (Ch)**:

"12 The fundamental point made in Wingfield Digby was that the rule that the unsuccessful party must pay the successful party's costs is inapplicable in interim proceedings because of the difficulty of establishing who the successful party actually is (para 41). The point made in this regard was that where an interim injunction is granted, the "success" of the applicant is

a provisional one, which may well be reversed when the merits of the case are finally established. "Success" of this kind is temporary and reversible, and therefore should not be a ground for the making of an immediate costs order."

15. In my view, making an order as to costs at this stage may be slightly premature as I have not heard the merits of the case from each counsel in the substantive trial of this action. On that basis, I rule that costs shall be in the cause in relation to this aspect of the matter.

(ii) *The Interim Declaration*

16. I recall that no counsel provided any case law to assist the Court in its determination on this aspect of the application. I therefore rely heavily on the factors as enunciated under **Rule 17. 10 (1) and (2) of the CPR**. I highlight the excerpt which I wish to rely on:

“(1) In deciding what order, if any, to make about costs, the Court must have regard to all the circumstances, including —

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful;

(c) any payment into court or admissible offer to settle made by a party which is drawn to the Court’s attention and which is not an offer to which costs consequences under Part 35 and 36 apply.

(2) For the purposes of paragraph (1)(a), the conduct of the parties includes —

(a) conduct before, as well as during, the proceedings;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim”

17. Mr. Strachan was unsuccessful on this ground, did not provide the Court with any relevant authority on the matter and submissions were laid over to all parties late. Opposing Counsel had to address this issue on their feet. This is not fair conduct and I do not wish to encourage such in this court.

18. Accordingly, I order that Mr. Strachan pay the costs of the First through Third Defendants for this aspect of the application, to be assessed if not agreed. As the Fourth Defendant’s counsel merely adopted the submissions of all other Defendants’ counsel, and provided no arguments on the point orally, I order that it only receive 25% of its costs for this aspect of the matter, to be assessed if not agreed.

(iii) An Order authorizing a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out an order under subparagraph (h)

19. Again, no authorities were provided to the Court on this point. I will allow the costs of the First through Third Defendants' costs for this part of the application, to be assessed if not agreed. The Claimant shall pay the costs of the First through the Third Defendants, to be assessed, if not agreed.

20. I adopt the same reasoning as above in relation to the Fourth Defendant.

(iv) An order for the — (iv) payment of income from relevant property until a claim is decided

21. Though I did not grant this relief, I granted a relief that was not directly sought by Mr. Strachan that is similar (that is, ordering the First and Second Defendants to provide an accounting of all profits made in relation to the Property). On that basis, I make no order as to costs in relation to this sub-issue.

(v) A "freezing order", restraining a party from — (i) dealing with any asset whether located within the jurisdiction or not

22. It is unclear why Mr. Strachan was seeking this order. I understand and follow the reasoning behind the interim injunction sought, however, this aspect of the application was redundant.

23. This is essentially covered under the interim injunction heading. Accordingly, I make no order as to costs on this aspect of the application.

(vi) An "order for interim payment" under rules 17.14 and 17.15 for payment by a defendant on account of any damages, debt or other sum which the Court may find the defendant liable to pay

24. I dismissed this aspect of the application. This was not expressly requested in Mr. Strachan's application - only in submissions.

25. As this was not directly asked for in his application nor did any party directly address this issue, I will make no order as to costs on this sub-issue.

(vii) Requests for Possession of the Property, Mesne Profits, Interest and other forms of relief

26. I recall agreeing with the Third Defendant's counsel on this aspect of the application. These are essentially substantive reliefs being sought in an interlocutory application.

27. Mr. Strachan's counsel did not direct the Court to any relevant authorities on the matter, yet counsel for all Defendants (save and except counsel for the Fourth Defendant) addressed it on their feet.

28. I order that Mr. Strachan pay the costs of the First to Third Defendants on this aspect of the application, to be assessed if not agreed.

29. Again, the Fourth Defendant's counsel merely adopted the submissions of all other Defendants and did not directly address the Court during the application. Accordingly, I order that it obtain only 25% of its costs for this aspect of the application, to be assessed if not agreed.

CONCLUSION

30. Based on the principles of law and my application to the instant case, I am prepared to award costs to the defendants in this matter for sub-issues (ii), (ii) and (vii). This means that they were successful in 3 of the 7 sub-issues (approximately, 40% of the issues). I also acknowledge and reiterate the fact that the Fourth Defendant merely adopted the submissions of other Defendants' counsel. I will therefore, make an order as to costs accordingly.

31. In the exercise of my discretion under the CPR, I make the following Order:

- (a) Costs in relation to the interim injunction shall be costs in the cause.
- (b) The Claimant shall pay the First to Third Defendant's costs for sub-issues (ii), (iii) and (vii), in the amount of 40% of their total costs for this application, to be assessed, if not agreed.
- (c) In relation to sub-issues (iv), (v), and (vi), I make no order as to costs.
- (d) The Claimants shall pay 25% of the Fourth Defendants costs of sub-issues (ii), (iii) and (vii), to be assessed if not agreed.

32. This is my decision on costs.

33. The matter can now proceed to case management.

Senior Justice Deborah Fraser

Dated this 01st day of March 2024