

**Commonwealth of The Bahamas
In the Supreme Court
Common Law and Equity Division
2021/CLE/gen/00949**

B E T W E E N

ESTHER MILLER

1st Plaintiff

AND

JAMES MILLER

2nd Plaintiff

AND

GREGORY HIGGS

(Trading as G & H Enterprises)

Defendant

Before: The Honourable Chief Justice Sir Ian R. Winder

Appearances: Byran Woodside for the Plaintiffs
Richette Percentie for the Defendant

Hearing date(s): Hearing on the papers

DECISION ON COSTS

WINDER, CJ

[1.] This is my decision on costs arising from my judgment dated 25 March 2024 granting the Plaintiffs judgment in the amount of \$111,990 with interest at the statutory rate of 6.25% from the date of judgment to the date of payment, and finding the Defendant’s counterclaim to be without merit. The trial took place on 13 July 2023, which was the date fixed at a case management conference held on 4 July 2022. I therefore deal with the costs of the proceedings under the **Rules of the Supreme Court**.

[2.] In my judgment dated 25 March 2024, I granted the Plaintiffs their costs and indicated at para [54] that I would fix those costs on the papers. I directed the Plaintiffs to lodge and serve a statement of costs within 14 days and permitted the Defendant to lodge and serve any representations on quantum which they may have wished for the Court to consider within 7 days thereafter. Counsel for the Plaintiffs duly filed a bill of costs on 8 April 2024 but no representations on quantum were received from the Defendant by 15 April 2024.

[3.] The award of costs is in the discretion of the Court and, in accordance with **Order 59, rule 9** of the **Rules of the Supreme Court**, such discretion extends to the fixing of costs. According to **Order 59, rule 9**:

9. (1) Subject to this Order, where by or under these Rules or any order or direction of the Court costs are to be paid to any person, that person shall be entitled to his taxed costs.

...

(4) The Court in awarding costs to any person may direct that, instead of taxed costs, that person shall be entitled — (a) to a proportion specified in the direction of the taxed costs or to the taxed costs from or up to a stage of the proceedings so specified; or (b) to a gross sum so specified in lieu of taxed costs.

[4.] The Plaintiffs seek to recover professional charges for work done by three attorneys in the amount of \$44,050 before VAT and total disbursements of \$2,928. The hourly rates billed are \$700 (23 years called), \$600 (20 years called) and \$500 per hour (5 years called) and the hours of work billed totals approximately 75 hours. The claim for disbursements, which comprises a filing fee of \$500, service fees of \$325, a notary fee of \$100, transcripts of \$34 and printing and related fees of \$1969, is supported by an affidavit made by Indira La’Vonne Dennise Gaitor filed on 8 April 2024.

[5.] “Item 10” of the Collateral Agreement dated 6 February 2019 agreed between the parties provided in pertinent part that:

DEFAULT CLAUSE

...

In the event, the Purchaser shall fail for a period of THIRTY (30) days after they become due to pay any of the sums in this Agreement to be paid by the Purchaser, either as installments or on account of interest, taxes, or insurance or should the Purchaser fail to comply with any of

the covenants or conditions of this Agreement on his part to be performed, or should any action or proceeding be filed in any court to enforce any judgment on or claim against the said hereditaments seeking to reach the interest of the Purchaser, then:

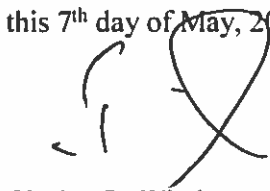
...

6. Any and all legal fees incurred resulting in default of this Agreement by the Purchaser shall be due and payable from the Purchaser.

[6.] A literal approach to the construction of Item 10 of the Collateral Agreement leads to a nonsensical result. “Item 10” clearly ought to have read “Any and all legal fees incurred resulting ~~in~~ from the default of this Agreement by the Purchaser shall be due and payable from the Purchaser”. In **East v Pantiles (Plant Hire) Ltd** [1982] 2 EGLR 111, *Brightman LJ* articulated the conditions required for the “correction of mistakes by construction without obtaining a decree in an action for rectification” thusly: (i) there must be a clear mistake on the face of the instrument and (ii) it must be clear what correction ought to be made in order to cure the mistake. Both conditions are, in my judgment, satisfied here.

[7.] Under the Collateral Agreement, which I found in my judgment dated 25 March 2024 was terminated on 7 February 2021 by the Plaintiffs accepting the Defendant’s repudiatory breach, the Defendant agreed to pay “Any and all legal fees incurred resulting from the default of this Agreement by the Purchaser...”. This action was commenced on 24 August 2021 because of failures by the Defendant to perform the Collateral Agreement. The Defendant has not submitted that the costs claimed by the Plaintiffs were not reasonably incurred or are unreasonable in amount. Against this background, I will exercise my discretion conformably with the parties’ agreement and order that the Defendant pay the gross sum of \$51,675.80 to the Plaintiffs in lieu of taxed costs.

Dated this 7th day of May, 2024

A handwritten signature in black ink, appearing to read 'Sir Ian R. Winder', written over a circular stamp or mark.

Sir. Ian R. Winder
Chief Justice