COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2019/CLE/gen/01594

B E T W E E N

HNR COMPANY LIMITED

Plaintiff

AND

PALM CAY DEVELOPMENT COMPANY LIMITED

Defendant

Before: The Honourable Chief Justice Sir Ian R. Winder

Appearances: Eugeina T. Butler and Nadia Wright for the Plaintiff

Dion Smith 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 6 February 2024 allowing HNR's claim and PCDL's counterclaim in part and giving judgment in favour of HNR for the balance in its favour. It is to be noted that the trial of the matter was conducted under the **Rules of the Supreme Court, 1978**. I therefore deal with the costs of the proceedings under those rules of court. Nothing in this decision affects the costs order made on 28 July 2020.

[2.] In my judgment dated 6 February 2024, at para [221], I stated that, unless the parties requested an oral hearing, the Court would hear the parties on costs by written submissions to be delivered and exchanged within 14 days or such other further period as the parties might agree. HNR requested an oral hearing on costs but also lodged written submissions dated 29 February 2024. Those submissions satisfied me that an oral hearing on costs was unnecessary. PCDL lodged written submissions on costs on 9 April 2024.

[3.] HNR submitted that it is a well-established legal principle that costs follow the event and that the party who ultimately prevails in litigation is entitled to costs. Counsel for HNR referred the Court to **Straker v Tudor Rose** [2007] EWCA Civ 368, in which the English Court of Appeal held that a court should have at the forefront of its mind that the general rule is that the unsuccessful party will pay the costs of the successful party. Counsel submitted on the strength of that authority that the Court must therefore first decide who was the successful party and then apply the general rule, unless there are circumstances which lead to a different result.

[4.] HNR submitted that it should be regarded as the victor at trial as PCDL was condemned to pay a net sum of $63,046.96 to it. Counsel for HNR referred the Court to **Barnes v Time Talk (UK) Ltd** [2003] EWCA Civ 402 in which *Longmore LJ* said, at para [28], that "in what may generally be called commercial litigation... the disputes are ultimately about money. In deciding who was the successful party the most important thing is to identify the party who is to pay money to the other. That is the surest indication of success and failure."

[5.] Counsel for HNR also referred the Court to para [72] of the English High Court decision **Multiplex Construction (UK) Limited v Cleveland Bridge UK Limited (No. 7)** [2008] EWHC 2280 (TCC), where *Jackson J* (as he then was) said *inter alia*:

> (i) In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.
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> (ii) In considering how to exercise its discretion the court should take as its starting point the general rule that the successful party is entitled to an order for costs.
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> (iii) The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.

[6.] HNR submitted that PCDL should be ordered to pay its full costs in the amount of $175,000 on the basis that the total award to it in the sum of $310,283.86 significantly exceeded the sum awarded to PCDL on its counterclaim of $247.236.90 and PCDL is the party that ultimately has to "write the cheque".

[7.] Counsel for HNR also referred the Court to the decision of the English Court of Appeal in **Burchell v Bullard** [2005] EWCA Civ 358, which Counsel described as an authority espousing a "different approach". In that case, the claimant, a builder, brought proceedings to recover £18,318 after the defendants refused to pay a stage payment because they had complaints about the work done. The defendants counterclaimed for £100,815 and, in response, the claimant brought a Part 20 claim against a sub-contractor who had done some of the work. The judge gave judgment for the claimant for £18,318 plus VAT and interest, judgment for the defendants on the counterclaim for £5,025 and ordered the claimant to pay the Part 20 defendant £79. The judge ordered that the defendants should pay the claimant's costs of the claim and the claimant should pay the defendants' costs of the counterclaim and the costs of the Part 20 claim. The English Court of Appeal held that the judge had erred: the defendants would be ordered to pay 60% of the claimant's costs of the claim, counterclaim and Part 20 proceedings and 60% of the claimant's liability to pay the Part 20 defendant's costs. HNR did not endorse this "different approach".

[8.] PCDL submitted that the general rule is that the successful party in litigation is entitled to costs, or the unsuccessful party has to pay the costs of the successful party. PCDL submitted that it won the greater percentage of its claim and, therefore, it can be considered the more successful party and should have its costs paid by HNR. Counsel for PCDL highlighted that the amount awarded to HNR of $310,283 was approximately 22.99% of the amount HNR claimed, i.e., $1,349,880, while the amount of $247,236 awarded to PCDL was approximately 25.21% of the amount for which PCDL counterclaimed, i.e., $980,669.

[9.] PCDL further submitted that, in deciding who should pay costs, the Court must have regard to all the circumstances and the Court should have regard to the manner in which HNR pursed the case, whether HNR increased the cost of the proceedings by the unreasonable pursuit of issues and the unreasonable amount of its claim.

[10.] In addition, PCDL submitted that the Court should take into account that HNR claimed substantial damages but was only awarded nominal damages on most issues. Counsel for PCDL referred the Court to the case of **Texaco Ltd v Arco Technology Inc.** (1989) The Times 13 October 1989, in which it was held that a claimant who has claimed substantial damages, but has only recovered nominal damages, will normally be ordered to pay the defendant's costs.

[11.] There appears to be no dispute between the parties that the general principle is that costs are in the discretion of the Court. The discretion of the Court 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.

[12.] In **Sterling Asset Management Ltd. V Sunset Equities Ltd** SCCivApp No 152/2021, the Court of Appeal explained at para [5]:

> 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)..."

[13.] Both parties have claimed to have been the "successful party" in this action. HNR has done so on the basis that it recovered more than PCDL and is entitled to be paid a net amount. PCDL has done so on the basis that it obtained judgment for a greater percentage of what it claimed than HNR did with respect to its claim and HNR recovered only nominal damages on a number of its heads of claim or loss.

[14.] In my view, applying *Longmore LJ*'s dictum in **Barnes v Time Talk (UK) Ltd**, quoted at para [4] above, HNR is to be regarded as the overall successful party. *Prima facie* then, HNR is entitled to its costs of the proceedings. However, in my judgment, Counsel for HNR was correct to refer the Court to the decision of the English Court of Appeal in **Burchell v Bullard**. The appropriate approach to costs here is an order for a proportion of costs.

[15.] The outcome of these proceedings can be summarized as follows:

(i) HNR succeeded in establishing that PCDL breached the A4 and OM contracts by failing to provide fully stamped and approved plans. HNR failed to establish that PCDL breached the A4 or OM contracts by deducting retention. HNR succeeded in establishing that PCDL breached the A4 and OM contracts by failing to pay the Architect of Record's last certificates for payment but did not succeed in recovering the claimed full amounts of both certificates. HNR recovered reimbursement for structural and design fees for OM but not A4.

(ii) HNR succeeded in establishing that PCDL wrongfully terminated the A4 contract but, up to trial, HNR's case was that the A4 contract was continuing. HNR failed to establish that PCDL wrongfully terminated the OM contract. The issue of the Architect of Record's authority did not arise. HNR failed to establish that it had its tools appropriated or seized by PCDL or that it was wrongfully excluded from the A4 or OM jobsites by PCDL. HNR recovered nominal damages for unbilled work and nominal loss of profits. HNR was awarded $310,283.86 on its claim overall. HNR failed to obtain declaratory or injunctive relief.

(iii) HNR successfully resisted most of PCDL's allegations of breach of the A4 or OM contract but PCDL succeeded on its claim for defective work in relation to both projects, which was the most significant aspect of PCDL's counterclaim, and in relation to a payment of $22,624 it had made to HNR for the OM contract. PCDL was found to have established its counterclaim to the extent of $247,236.90. Judgment was entered in favour of HNR for the net balance.

[16.] Taking into account HNR's mixed success on both the claim and counterclaim, I will order that HNR should have 50% of its costs of the claim and the counterclaim, to be paid by PCDL and to be taxed, if not agreed. In arriving at this percentage, I have taken into account the extent of HNR's success and the complexity and importance of the issues on which HNR succeeded and failed respectively.

Dated this 7 day of May, 2024

Sir. Ian R. Winder
Chief Justice