COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2010/CLE/gen/01429

B E T W E E N

LIONEL FERGUSON

Plaintiff

AND

BERTRAM MORLEY
T/A CRYSTAL BUILDERS

Defendant

Before: The Hon. Chief Justice Sir Ian R. Winder

Appearances: Arthur Minns for the Plaintiff
Mario Gray 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 14 May 2024 in favor of the Plaintiff's claim. It is to be noted that this trial commenced prior to the **Supreme Court Civil Procedure Rules, 2022** coming into effect and, therefore, these proceedings are proceedings to which those rules of court do not apply.

[2.] In my judgment I indicated at para [19] that [the Plaintiff] shall have his reasonable costs which I indicated I would fix. I invited the parties to give submissions as to the appropriate sum to be awarded.

[3.] Submissions were received on behalf of the Plaintiff however nothing was received from the Defendant.

[4.] The award of costs are 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.

[5.] The discretion to fix costs must be exercised judicially in the circumstances of the case. The Plaintiff submitted an estimate of the costs in the amount of $21,735. No written representations on quantum were received from Counsel for the Defendant who was afforded a reasonable time within which to submit such representations. The failure to take up the opportunity to make representations does not relieve me of the need to execute my stated intention of fixing the costs of this action.

[6.] The task undertaken by the Court when it exercises its discretion under the **Rules of the Supreme Court** to order a gross sum in lieu of taxed costs is not the same as in a taxation within the province of the Registrar. The assessment is not an item-by-item assessment. Rather, it is a broad determination of what is fair and reasonable based on the submissions of counsel and the judge's own knowledge and experience and familiarity with the matter.

[7.] In **William Downie v Blue Planet Limited** SCCivApp & CAIS No. 188 of 2019 (5 March 2020), *Sir Michael Barnett P* had occasion to consider in some detail the jurisdiction of the Court to fix costs under the **Rules of the Supreme Court**. He said at paras [23] to [30]:

> 23 It is settled law that the court has a wide discretion as to costs. Section 30 of the Supreme Court Act provides:
>
> > **30. (1) Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.**
>
> 24 Order 59 Rule 2 of The Rules of The Supreme Court provides:
>
> > **(2) The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order**
>
> 25 These provisions give the court a wide discretion as to whether the costs are payable by one party to another; the amount of those costs; and when they are to be paid. This is specifically set out in the English Civil Procedure Rules Rule 44, but in my judgment represent the law as expressed in the Supreme Court Act and the Rules of The Supreme Court.
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> 26 As far back as *Wilmott v Barber* (1881) 17 Ch.D. 772 Jessell MR said:
> **'The judge has a large discretion as to costs.** He may make the defendant pay the costs of some of the issues in which he failed, although he may have succeeded on the whole action. Or he may say that both parties are wrong, but that he could not apportion the blame in a definite proportion, and therefore would dismiss the claim without costs. Or he might say that the plaintiff should have half the costs of the action, or some other aliquot part.
>
> **Or he may follow the course which I sometimes adopt, and I generally find that the parties are grateful to me for doing so, namely, <u>fix a definite sum for one party to pay to the other</u>, so as to avoid the expense of taxation, taking care in doing so to fix a smaller sum than the party would have to pay if the costs were taxed.** [Emphasis Added]
>
> 27The judge has a wide power to fix a definite sum that one party pays the other party instead of ordering costs to be taxed.
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> 28This is provided for in Order 59 Rule 9 which states:
>
> > **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, <u>instead of taxed costs</u>, that person shall be entitled —**

(b) to a gross sum so specified in lieu of taxed costs. [Emphasis Added]

29 The issue is how does the court go about fixing that sum?

30In *McAteer v Devine* [2016] NICA 46, the Court of Appeal of Northern Ireland had to consider an appeal from the exercise by a trial judge of his power to fix cost under the Irish Rule similar to our Order 59 Rule 9. After considering various authorities, including the decision in Leary v *Leary* (1987) 1 WLR 72 and the other authorities referred to in the intended appellant's skeleton submissions and relied upon by the intended appellant in this application, the court said:

> **[27] The principles which we have distilled are as follows:**
>
> **(i) The purpose of the rule is to avoid expense, delay and aggravation involving a protracted litigation arising out of taxation.** Such an aim would be achieved especially, though not exclusively, in complex cases.
>
> **(ii) The discretion vested in the judge is not subject to any formal restriction.**
>
> **(iii) The order does not envisage any process similar to that involving taxation.** The approach should be a broad one. A judge is not obliged to receive evidence on oath or anything **more than some evidence as to the estimated costs before making such an order.**
>
> **(iv) Although the discretion is unlimited, it must be exercised in a judicial manner.** An example of acting in an unjudicial manner would include eg "clutching a figure out of the air without any indication as to the estimated costs".
>
> **(v) The court will only interfere with the exercise of the discretion by the trial judge if he/she has erred or was plainly wrong.**
>
> **[Emphasis Added]**

[8.] In the present case, having reviewed the Plaintiff's claimed costs, and taking into account the circumstances of the case, including the time spent before me, the work reasonably expended, the seniority of counsel, the importance of the matter and the nature of the issues which required determination, I order that the Defendant pay the gross sum of $18,000 to the Plaintiff in lieu of taxed costs.

Dated this 19th day of July, 2024

Sir. Ian R. Winder
Chief Justice