

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2021/CLE/gen/00969

BETWEEN

FIDGEN S.A.

(In the capacity of trustee of Piani 2020 3 Year Grat)

Claimant

AND

LYDDA CAPITAL LTD.

Defendant

Before: Hon. Chief Justice Sir Ian R. Winder

Appearances: Tara Archer-Glasgow with Trevor Lightbourn and Audley Hanna Jr for the
Claimant
Raynard Rigby, KC with Asha Lewis for the Defendant

Hearing Date(s) On the papers

DECISION ON COSTS

SIR IAN WINDER, CJ

[1.] On 25 April, 2025 I gave judgment in this action and indicated that I would hear the parties 3as to the appropriate order on costs, by written submissions within 21 days. Each party lodged written submissions, which I have considered and which I summarize below. This is my decision on costs.

[2.] At paragraphs 48 and 49 of the judgment it was stated as follows:

[48.] I am satisfied therefore that there is some contributory negligence on the part of Fidgen, albeit it has to be minimal in comparison to Lydda's. I assess this at 15%.

Conclusion

[49.] In all the circumstances I give judgment to Fidgen for the sum claimed of \$1,000,000 less 15%. Fidgen is therefore awarded a sum of \$850,000. The said sum shall bear interest at the rate of 3% from the date of the filing of the Statement of Claim to the date of judgment and thereafter at the statutory rate.

[3.] It is accepted by both parties that the Court has a 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.”

Rules 71.9 and 71.10 of the **Supreme Court (Civil Procedure) Rules 2022** provide:

“71.9 Court’s discretion to order costs.

(1) The Court has discretion as to —

- (a) whether costs are payable by one party to another;**
- (b) when to assess costs;**
- (c) the amount of those costs; and**
- (d) when they are to be paid.**

(2) Without limiting the Court’s discretion or the range of orders open to it, the Court may order a person to pay —

- (a) costs from or up to a certain date only;**

(b) costs relating only to a certain distinct part of the proceedings; or

(c) only a specified proportion of another person's costs.

(3) In deciding who, or if any person should be liable to pay costs, the Court must have regard to all the circumstances.

(4) Without limiting the factors which may be considered, the Court must have regard to —

(a) the conduct of the parties both before and during the proceedings;

(b) whether a party has succeeded on particular issues, even if not ultimately successful in the case, although success on an issue that is not conclusive of the case confers no entitlement to a costs order;

(c) the manner in which a party has pursued —

(i) a particular allegation;

(ii) a particular issue; or

(iii) the case;

(d) whether the manner in which the party has pursued a particular allegation, issue or the case, has increased the costs of the proceedings;

(e) whether it was reasonable for a party to —

(i) pursue a particular allegation; or

(ii) raise a particular issue; and

(iii) whether the successful party increased the costs of the proceedings by the unreasonable pursuit of issues; and

(f) whether the claimant gave reasonable notice of an intention to pursue the issue raised by the application.

71.10 Circumstances to be taken into account when exercising its discretion as to costs.

(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.

...

(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.**

(4) Where the Court would otherwise consider making an order under paragraph (3)(f), it must instead, if practicable, make an order under paragraph (3)(a) or (c).

...”

[4.] The Claimant submitted that, as a general rule, costs follow the event and that as the successful party, it should be awarded its costs. Further, they say that there have been no issues raised during the conduct of this instant litigation that suggests factual peculiarities that divorce the instant case from the scope of the general principles concerning costs.

[5.] The Defendant submitted that:

- “10. The Plaintiff was found to have contributed to the loss of the funds and hence should not benefit from its wrongdoing.**
- 11. The justice of the case lends to a decision where the Plaintiff is entitled to no more than 50% of the costs to be assessed.**
- 12. The Plaintiff should not have the full costs of the trial, and this case is one on the facts that justifies a departure from the general principles. It involved a fraud perpetrated by a third party against the Plaintiff and the Defendant in circumstances whereby both parties were innocent of the underlying facts of the fraud. This fact is material and relevant and should be taken into account by the Court in assessing the issue of costs.**
- 13. The Court is also invited to take into consideration that the Defendant was successful on its contributory claim, which too is material when determining the issue of costs.”**

Discussion

[6.] Costs are in the discretion of the Court, in which case it is a 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.

[7.] In *Re Elgindata (No 2)* [1992] 1 WLR 1207, the petitioners, shareholders in Elgindata Ltd, obtained an order that another shareholder in the company (the “purchasing shareholder”) purchase their shares in proceedings brought under section 459 of the *English Companies Act 1985*. The trial judge found most of the petitioners’ case failed, but found some conduct on the part of the purchasing shareholder was unfairly prejudicial. The trial judge therefore ordered that three-quarters of the purchasing shareholder’s costs be paid by the petitioners and one-quarter of the petitioners’ costs be paid by the purchasing shareholder. The English Court of Appeal substituted an order that the petitioners should be deprived of half of their costs. *Nourse LJ* said at pages 1213 and 1214:

In order to show that the judge erred I must state the principles which ought to have been applied. They are mainly recognized or provided for, it matters not which, by section 51 of the Supreme Court Act 1981 and the relevant provisions of R.S.C., Ord. 62, in this case rules 2(4), 3(3) and 10. They do not in their entirety depend on the express recognition or provision of the rules. In part they depend on established practice or implication from the rules. The principles are these. (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party’s costs. Of these principles the first, second and fourth are expressly recognized or provided for by rules 2(4), 3(3) and 10 respectively. The third depends on well established practice. Moreover, the fourth implies that a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party’s costs. It was because of his disregard of that principle that the judge erred in this case.

[Emphasis added]”

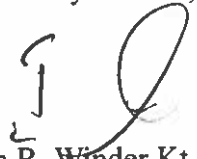
[8.] In *Beoco Ltd v Alfa Laval Company Ltd* [1995] QB 137, a case in which the plaintiff obtained judgment against the first defendant for an amount to be assessed reflecting the loss and damage which the plaintiff would inevitably have incurred in replacing or repairing a defective heat exchanger employed at its plant based on an amendment made by it to its statement of claim in the course of trial but failed on its primary claim that the defective heat exchanger caused an explosion at its plant, *Stuart-Smith LJ* (with whom the rest of the English Court of Appeal agreed) said at page 156:

“What then should be the result in this case? I can see no reason to deprive the first defendant of the costs down to the date of the amendment. Thereafter, they were essentially the winners, since the primary contest related to the damage caused by the explosion. Even on the basis of the judge's conclusion that the defendant would be liable for the hypothetical loss of production, it was a case in which the first defendant should have been awarded a proportion of their costs thereafter, for the reasons I have already given. As it is, in the light of our decision that the only damages that the plaintiff is entitled to recover is the cost of replacing the casing of the heat exchanger and such loss of production that occurred on 24 August as a result of the defect discovered on that day, this is likely to be no more than £21,574.28 now claimed in the Scott schedule and it may well be less. Although this sum cannot by itself be described as trivial, in the context of a claim for £1m. and the enormous expense of this action, it is trivial. It makes no commercial sense to incur costs of this sum to recover such a small sum. And it seems to me very probable that if the first defendant had had a proper opportunity to make a payment into court on the basis that its liability on the alternative claim was limited in the way we have held it to be, it would have done so. A payment in of £21,574, plus interest, would obviously not have been accepted and it would have made sound commercial sense to have made it. But for the reasons I have indicated, the first defendant had no chance to do so. Accordingly, in my judgment, although some discount should be made to reflect the very modest degree of success that the plaintiff achieved, it should not be a large one. I would award the first defendant 85 per cent of its costs after 24 February 1992.”

- [9.] In my judgment, it is the Claimant who ought to be regarded, as a matter of substance and reality, as the successful party in this litigation. The Claimant recovered \$850,000 in a money claim brought to recover the sum of \$1,000,000 in compensation for a claim for breach of statutory and contractual obligations and/or negligence arising from the transfer of Trustee funds.
- [10.] Having identified the Claimant as the successful party in this litigation, it is necessary also to consider whether there should be a departure from the general rule that the successful party's entire costs of the action should be paid by the unsuccessful party.
- [11.] In my view, there should be a modest departure. The Defendant was successful on several issues raised in the action, the issue of contributory negligence and the issue of whether the action was compromised by the payment of \$500,000. These contributed to the trial costs.
- [12.] The issue of contributory negligence resulted in the reduction of the Claimant's claim by \$150,000. I was not persuaded that the authorities advanced by the Claimant, in the context of a road traffic accident, ought to disentitle the Defendant from the benefit of its success on several issues at trial. These matters ought to be reflected in costs.

- [13.] I will therefore award the Claimant 80% of its costs, certified fit for two counsels. I propose to fix these costs. I therefore invite Counsel for the Claimant to provide a summary of its costs, within 14 days, to assist in the determination of the appropriate quantum of costs.

Dated the 30th day of June, 2025

A handwritten signature in black ink, consisting of a stylized 'I' followed by a large, flowing loop.

Sir Ian R. Winder Kt.
Chief Justice