IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
Claim No. 2024/CLE/gen/00487

BETWEEN:

ALPHA AVIATION LIMITED

Claimant

AND

RANDY LARRY BUTLER

First Defendant

AND

LARONA BUTLER

Second Defendant

Before:	The Honourable Mr. Justice Leif Farquharson
Appearances:	Marnique Knowles for the Claimant Ashley Williams for the Defendant
Hearing date:	23 October 2025, 31 October 2025

RULING

1. This action was commenced by claim form filed on 6 June 2024. The Defendants applied to strike out the claim on the grounds that it was frivolous, vexatious, scandalous and/or an abuse of process. That application was heard by Asst. Registrar Deal who, in a fully reasoned ruling dated 15 January 2025, dismissed the same with costs to the Claimant to be assessed if not agreed. There was no such agreement on costs. Asst. Registrar Deal accordingly summarily assessed the Claimant's costs of the strike out application on 28 May 2025, awarding it the sum of $19,000.00. To date, those costs have not been paid.

2. By Notice of Application filed on 8 October 2025, the Claimant brought the current application seeking (i) an order pursuant to CPR 71.15(2) that the Defendants' Defence be struck out for failure to comply with the outstanding costs order of 28 May 2025, (ii) alternatively, such sanction or further order as the Court deems just to address the Defendants' non-compliance with the outstanding costs order. The stated grounds for the application include (i) the Defendants failed to comply with the said costs order, (ii) the

Defendants failed to acknowledge and/or respond to the Claimant's written requests for payment pursuant to the order, and (iii) the Defendants are in continuing breach of the costs order and the sanction sought is appropriate under CPR 71.15(2).

Background

3. The background to this action is addressed in the ruling of Asst. Registrar Deal on the strike out application. I do not propose to repeat the facts at length here. For immediate purposes, it suffices to note that the Claimant sues the Defendants for sums allegedly due and owing pursuant to two loans. The first loan was made in 2005 in the amount of $279,000.00, which was to be repaid over a 20-year period at a 4% annual rate of interest. The second loan was made in 2007 in the amount of $120,000.00, which was also to be repaid over a 20-year period at a 4% annual rate of interest. Repayment of both loans was to be secured by a mortgage and further charge over Lot 5, Block 13 (the "***Property***"), situated in Winton Heights Estates Subdivision. The mortgage and further charge were recorded. As at the date of commencement of this action, the Claimant maintained that the principal balance owed pursuant to the two loans amounted to $170,313.43 and outstanding interest amounted to 34,147.80, with daily interest charges of $18.66 continuing to accrue.

4. According to the Statement of Claim, in December of 2008 the Defendants attempted or purported to convey their fee simple estate in the Property to certain third party purchasers for the sum of $420,000.00. The mortgage and further charge in favour of the Claimant were still subsisting at the time. Some years later, in March of 2017, a Deed of Release was executed for and on behalf of the Claimant by its then manager and director releasing its mortgage interest in the Property, thereby resulting in the two loans effectively becoming unsecured. This was all done without the approval of the beneficial owner of the issued shares of the Claimant.

5. In an earlier action commenced in 2021,[1] the Claimant sued its former manager and director along with the Defendants for conspiracy to defraud and other wrongs arising from execution of the Deed of Release in circumstances where sums were still due and owing under the two loans. That action was heard by Card-Stubbs J., who by a Judgment dated 15 April 2024 held: (i) the Claimant had not proved conspiracy to defraud; (ii) the former manager and director committed breaches of his fiduciary duties and statutory duties of care, diligence and skill owed to the Claimant; (iii) the Claimant nonetheless did not suffer any recoverable loss as a result of the manager and director's breaches of duty. As a consequence, no damages were awarded to the Claimant. The Court nevertheless indicated that the Claimant had an entitlement to sue in debt for the sums outstanding under the two loans.

6. Shortly afterwards, the Claimant filed the present action. The Defendants applied unsuccessfully to strike out the claim, essentially arguing that it could have and should have been brought within the confines of the 2021 action, and was therefore an abuse of process and barred by the well-known rule espoused in ***Henderson v. Henderson***.[2] As indicated, this argument did not find favour with the Assistant Registrar who dismissed the strike out application with costs, which were subsequently assessed in the sum of $19,000.00. This sum has remained outstanding since 28 May 2025.

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[1] *Alpha Aviation Ltd. v. Turnquest, Butler and Anor.* 2021/CLE/gen/00354

[2] (1843) 3 Hare 100

7. For completeness, I would mention that the Defendants have filed a Defence in this action. The thrust of the same is that the loan and mortgage arrangements concluded by the parties (which are seemingly not disputed) were illegal and incapable of enforcement due to lack of requisite regulatory approvals required by law. The Defendants also dispute the sums the Claimant asserts to be due and owing.

Affidavit Evidence

8. The current application is supported by an affidavit sworn by Sharon Kelly, an employee with the law firm of Scott & Co., attorneys for the Claimant, filed on 6 October 2025. Ms. Kelly materially deposes as follows:

> *"3. By a decision rendered on the 28th day of May, 2025, Assistant Registrar Jonathan Deal ordered the Defendants to pay costs to the claimants in the sum of Nineteen Thousand Dollars ($19,000.00). Annexed hereto and marked "Exhibit SK-1" is a true copy of the said Ruling.*
>
> *4. Pursuant to Part 71.14 of the Rules of the Supreme Court, the Defendants were required to comply with the said Costs Order within twenty-one days (21) of the date of the Order, namely on or before the 18th June, 2025.*
>
> *5. The Defendants have wholly failed, neglected, and/or refused to pay the said costs, notwithstanding the expiry of the twenty-one (21) day period mandated by the Rules.*
>
> *6. The Claimants, through their Attorneys, have made repeated and reasonable demands of the Defendants for payment. The last such demand was by way of formal letter dated the 10th September, 2025. As of the date hereof, no response has been received from the Defendants, and the debt remains unsatisfied. Annexed hereto and marked "Exhibit SK-2" is a true copy of the said letter.*
>
> *7. The continued failure of the Defendants to comply with the Cost Order amounts to a wilful disregard of the authority of this Honourable Court and undermines the administration of justice.*
>
> *8. The Claimants remain deprived of monies to which they are lawfully entitled pursuant to the Court's Order.*
>
> *9. The Defendants have advanced no explanation, excuse, or justification for their non-compliance, nor have they made any application to vary, suspend, or extend time for compliance with the said Order."*

9. Notably, no affidavit evidence was filed by the Defendants in opposition to the application. Counsel for the Defendants nonetheless strenuously opposed the application.

Rival Arguments

The Claimant's Submissions

10. The Claimant's position is straightforward. It asserts that CPR 71.14 requires compliance with an order for the payment of costs within 21 days of *"the date of the judgment or order if it states the amount of those costs".* The order of Asst. Registrar Deal dated 28 May 2025 directed that the Defendants pay costs of $19,000.00 arising from the strike out

application. That order was obviously issued well over 21 days ago. No alternative date for payment was specified. The Defendants are therefore in breach of the requirements of Rule 71.14. This potentially engages the Court's powers to address non-compliance.

11. Ms. Knowles commended the case of ***Michael Wilson & Partners Ltd. v. Sinclair***[3] for its discussion of the considerations to be taken into account when determining whether or not to make an order debarring a party from continuing to participate in litigation by reason of non-payment of a costs order made in the course of the proceedings. In this regard, Sir Richard Field observed:

> *"29. In my judgment, the following principles are applicable when dealing with an application that a party to ongoing litigation should be debarred from continuing to participate in the litigation by reason of having failed to pay an order for costs made in the course of the proceedings:*
>
> *(1) The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion pursuant to the court's inherent jurisdiction.*
>
> *(2) The court should keep carefully in mind the policy behind the imposition of costs orders made payable within a specified period of time before the end of the litigation, namely, that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.*
>
> *(3) Consideration must be given to all the relevant circumstances including: (a) the potential applicability of Article 6 ECHR; (b) the availability of alternative means of enforcing the costs order through the different mechanisms of execution; (c) whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings in question; and where no such submission was made whether it ought to have been made or there is no good reason for it not having been made.*
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> *(4) A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice and/or in breach of Article 6 of ECHR should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.*
>
> *(5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.*
>
> *(6) If the court decides that a debarring order should be made, the order ought to be an unless order except where there are strong reasons for imposing an immediate order."*

12. Ms. Knowles also relied on the cases of ***Blockchain Optimization SA and Anor. v. LFE Market Ltd. and Ors.***[4] and ***Ceto Shipping Corp. v. Savory Shipping Inc.***[5] to provide

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[3] [2017] 5 Costs LR 877

[4] [2020] EWHC 3656 (Comm)

[5] [2024] EWHC 1897 (Comm)

further elucidation on the governing principles to be applied and to support her position. In this vein, the judges in both cases followed the general approach outlined by Sir Richard in ***Michael Wilson & Partners Ltd.*** in determining the applications before them. Whilst the specific terms of the final order made in ***Ceto Shipping*** are not clear from the report, it appears that in each of the three cases cited the court issued an unless order requiring payment of the outstanding costs within a certain period of time, failing which the defaulting party was to be debarred from further prosecuting its claim or defence as the case may be.

13. Ms. Knowles observed that the Defendants have provided no reasonable excuse as to why they failed to comply with the striking out costs order and have simply failed to engage with the Claimant's requests and the Court's process. She also pointed out that the Defendants have offered no evidence of impecuniosity, made no application for an extension of time to comply and provided no alternative proposal to address payment of the costs order.

14. In conclusion, Ms. Knowles invited the Court to immediately strike out the Defendants' Defence. Alternatively, she suggested that the Court issue an unless order requiring payment of the outstanding costs within 14 days, failing which the Defence stand struck out. She had originally requested a stay of the proceedings as a further alternative relief, but she resiled from this.

The Defendants' Submissions

15. Mr. Williams submitted that the Claimant's application is premature, disproportionate and contrary to the overriding objective, which requires the Court to deal with cases justly and at proportionate cost and to ensure that the parties are on an equal footing. Referring to CPR 26.3(1)(a) and 26.7(3), he asserted that striking out or debarring is a measure of last resort, only appropriate for intentional, contumelious or persistent default that renders a fair trial impossible.

16. Mr. Williams further submitted that the Defendants have not acted contumeliously and that "*Any delay or default arose from logistical or financial constraints, not willful defiance of the Court's authority*", describing this as a "*procedural faux pas*". He maintained that the Claimant's recourse lay in ordinary enforcement mechanisms and not "*punitive procedural exclusion*". He urged the Court to consider that "*the Defendants have shown ongoing engagement and willingness to comply, consistent with their duty under CPR 1.3 to help the Court further the overriding objective*". He pointed to various factors to be considered by the Court on an application for relief from sanctions, including the interests of justice, whether the failure was intentional, whether there is good explanation, the promptness of the application and whether the party generally has complied with the rules. He submitted that on the basis of these factors, debarment would be disproportionate and contrary to the Defendants' Article 20 right to a fair hearing. He originally proposed an extension of 30 days for compliance with the outstanding costs order as an alternative to striking out, but seemingly resiled from that position during oral argument.

17. Mr. Williams placed heavy reliance on the Jamaican case of ***FirstCaribbean International Bank (Jamaica) Ltd. v. Attorney General and Anor.***[6], in which the Court of Appeal upheld the decision of Sykes J. (as he then was) refusing to strike out the

[6] [2005] JMCA Civ 96/2004

respondent's claim for want of prosecution and inordinate delay. Whilst on his feet, he also commended to my consideration the case ***Raynor Russell and Anor. v. Strachan***,[7] a decision of our Court of Appeal.

18. He went on to add that the Defendants have "*at all times engaged with the process and have provided a bona fide explanation for any delay or partial non-compliance*"; no evidence has been adduced by the Claimant to suggest that a fair trial cannot be had; the Court's records generally reflect the impecuniosity of the First Defendant; and proffered that a more proportionate course of action would be to permit compliance with the outstanding costs order within a reasonable period. He also observed that the three cases cited by the Claimant arose in the English commercial context and, whilst instructive, may not support the grant of the relief sought in the present case. He also purported to distinguish each of those cases from the present case factually.

Analysis and Disposition

19. CPR 71.14 and 71.15[8] relevantly provide:

> *"**71.14 Time for complying with an order for costs.***
> *A party must comply with an order for the payment of costs within twenty-one days of —*
> *(a) the date of the judgment or order if it states the amount of those costs;*
> *(b) if the amount of those costs, or part of them, is decided later in accordance with this Part, the date of the certificate which states the amount; or*
> *(c) in either case, such later date as the Court may specify.*
>
> *"**71.15 Failure to comply to pay costs ordered during proceedings.***
> *(1) ….*
> *(2) Where, in the course of proceedings, an order for costs has been made against a defendant who fails to pay the costs so ordered when those costs become due, the Court may —*
> *(a) strike out the defence or any counterclaim or third party proceedings; or*
> *(b) make such other order as it thinks fit."*

20. Pursuant to CPR 71.9, the Court has a discretion as to when costs are to be paid. Unless otherwise stipulated, Rule 71.14(a) provides that they become payable within 21 days of the date of the judgment or order provided it states the amount of such costs.

21. I accept the Claimant's submission that the Defendants are in breach of their obligation to comply with the costs order of Asst. Registrar Deal arising from the strike out application. As indicated, that order was made on 28 May 2025. Those costs were quantified. Well over 21 days has elapsed since the date of the order. As such, the Court's powers under Rule 71.15(2) are potentially engaged. The Court also has the ability to impose sanctions for non-payment of a costs order in the exercise of its inherent jurisdiction.[9] Mr. Williams did not seek to argue otherwise, instead focusing his energies on the appropriateness and terms of any such order to be made.

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[7] SCCivApp No.179 of 2023

[8] See *Supreme Court Civil Procedure (Amendment) Rules, 2023*

[9] See e.g. *Michael Wilson & Partners Ltd.,* paras.23 and 29(1)

22. The purpose behind Rules 71.14 and 71.15, when exercised in conjunction with the Court's other powers, would appear to be to instill a greater measure of discipline and responsibility on parties when making (or resisting) applications during the course of ongoing litigation. This also serves to avoid a commonplace occurrence which frequently arose under the previous procedural regime whereby parties would sometimes file or oppose interlocutory applications with little concern as to the immediate cost consequences, comforted that these would often fall to be addressed only at the conclusion of the substantive matter or at some stage much later on a formal taxation.

23. The judgment in ***Michael Wilson & Partners Ltd.*** is obviously not binding upon this Court. With this being said, the principles articulated by Sir Richard therein provide instructional guidance on a number of the considerations which, in my view, invariably impact upon the exercise of the Court's discretion when confronted with a debarment application arising from a party's non-compliance with a costs order in ongoing litigation. Moreover, they attempt to strike an appropriate balance between securing compliance with the Court's costs orders on the one hand and not unfairly depriving a litigant of access to justice on the other. I also do not regard them as being confined purely to commercial cases. In this vein, I merely note in passing that the case is cited in the ***2024 White Book*** in the commentary on the English CPR Rule 44.7,[10] from which the Bahamian Rule 71.14 is likely derived, with no suggestion that the principles identified by Sir Richard are confined purely to commercial cases. It is also cited in the general commentary on Rule 71.14 appearing in the ***Supreme Court Civil Procedure Rules, 2022 Practice Guide*** **(2024)**[11] published in this jurisdiction.

24. Having considered the submissions of both sides in their entirety, I am not minded to strike out the Defendants' Defence immediately, as requested by the Claimant in the first instance. I do however believe that this is an appropriate case for an unless order to be issued. As indicated, there has unquestionably been non-compliance with the Court's order requiring payment of costs arising from the strike out application. That order was issued just over five months ago. There is no evidence before me establishing impecuniosity. The authorities suggest that this would need to be supported by detailed, cogent evidence providing full disclosure of the paying party's financial position, including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability. The Defendants' failure to file any affidavit evidence at all is in my view fatal to such an argument. With all due respect, it is also no answer to suggest, as Mr. Williams did, that the Court seemingly carry out an inventory of its files involving one or the other of the Defendants (and presumably a subsequent accounting exercise) to determine their ability to satisfy or raise funds to cover an earlier costs order made against them.

25. The complaint that an unless order would give rise to a breach of the Defendants' rights under Article 20 is wholly unsupported by evidence. Nothing more needs to be said on this.

26. Equally, the suggestion that the Claimant effectively be compelled to avail itself of other enforcement options before relief in the form of an unless order may be issued is not accepted. There are likely to be cost and time considerations associated with such a course. Ms. Kelly has also deposed that the Claimant made "*repeated and reasonable*

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[10] 2024 White Book, Vol.1, para.44.7.1

[11] *Supreme Court Civil Procedure Rules, 2022 Practice Guide* (2024), published Bahamas Judicial Education Institute, at p.527

demands of the Defendants for payment" before filing the current application, which seemingly generated no response.[12] There has also been no disclosure of any assets against which the costs order could potentially be enforced or proposal to facilitate payment.

27. The two cases cited by the Defendants - ***FirstCaribbean International Bank (Jamaica) Ltd.*** and ***Raynor Russell*** – offer limited assistance in the resolution current application. As indicated, the underlying issue before the Jamaican Court of Appeal in ***FirstCaribbean*** was whether the lower court had erred in refusing to strike out a claim on the grounds of inordinate delay and want of prosecution. The issue before the Court in ***Russell*** was whether the applicants' appeal ought to be restored and an extension of time granted where they had failed to include certain video-recordings ordered to be included in the record of appeal. Whilst both cases contain useful statements of general principle, they did not address the specific situation of a party's non-compliance with a costs order in ongoing litigation and the exercise of the Court's discretion to enforce compliance with the same. For similar reasons, the Defendants' reliance on general principles of law relating to applications for relief from sanctions and striking out offer limited assistance.

28. In my view, the Defendants when making the strike out application in the present case ought to have appreciated that if unsuccessful there was a risk of a costs order against them becoming payable within a relatively short period of time. They certainly could not expect to ignore the Court's order and continue to litigate with impunity. Such a result would be at odds with the overriding objective which, in addition to the factors mentioned by Mr. Williams, also envisions compliance with the Court's orders.

29. Taking into account all the circumstances, I shall order that unless the Defendants pay $19,000.00 to the Claimant as directed within forty-five (45) days from the date hereof, their Defence shall be struck out. I shall also award the Claimant its reasonable costs of the present application, which I propose to summarily assess unless otherwise agreed.

L. Farquharson

FARQUHARSON, J.

[12] Affidavit of Sharon Kelly, para.6