

Commonwealth of The Bahamas
In the Supreme Court
Common Law and Equity Division
2019/CLE/gen/00289

B E T W E E N

GARY A. RITCHIE

Plaintiff

AND

DELORES VICTORIA CARTWRIGHT

Defendant

Before: The Honourable Chief Justice Sir Ian R. Winder

Appearances: Norwood Rolle for the Plaintiff
Lisa Fox 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 19 December 2023 dismissing the Plaintiff's claim. It is to be noted that I reserved my judgment after trial 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 dated 19 December 2023, I indicated at para [108] that I saw no basis to depart from the usual rule that costs follow the event. However, before making any order as to costs, I permitted the Plaintiff 7 days to lodge written submissions on costs which were not to exceed 5 pages should he have wished to contend for some other costs order to be made. I also indicated that I was inclined to fix the costs of the action. Consequently, I directed the Defendant to file and serve a bill of costs within 7 days. I granted the Plaintiff a right to lodge and serve written representations on quantum within 7 days thereafter.

[3.] No submissions seeking some other order for costs were received by or on behalf of the Plaintiff within the prescribed period of 7 days nor was any request for an extension of time made. In the absence of any suggestion from the Plaintiff, for some other order as to costs, and there being no obvious circumstances demonstrating that some other costs order should be made, I will faithfully adhere to the general principle enshrined in **Order 59, rule 3(2)** of the **Rules of the Supreme Court** and so the costs of the action follow the event.

[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.] There is no rule of law that the Court must obtain the consent of counsel before fixing costs: **Vishnu Narine Sarju v Felix Walker (No 1)** (1973) 21 WIR 86 per *Crane JA* at page 109. The discretion to fix costs must be exercised judicially in the circumstances of the case. The mere fact that a matter is not a simple one does not mean that costs cannot be fixed. In **Leary v Leary** [1987] 1 All ER 261, at page 265, *Purchas LJ* remarked about **Order 62, rule 9**, the corresponding provision of the English **Rules of the Supreme Court**, as follows:

The unlimited discretion given by Ord 62, r 9 must be exercised in a judicial manner. How the powers are to be used varies widely from case to case and each case must be considered on its own merits. It is easy to envisage cases where a judge could be said to have acted unjudicially: eg by clutching a figure out of the air without having any indication as to the estimated costs;

receiving such an estimate without the details being made available to the other side; or refusing a request to hear submissions on such a schedule if the party against whom the order is to be made makes, on reasonable grounds, an application to be heard. There will be many cases in which the judge may well feel that he or she would be assisted by submissions from counsel on whether (a) a gross figure should be assessed under Ord 62, r 9 at all, and (b) if so, at what figure. There is, however, no statutory obligation on the judge to receive such submissions provided that he observes the rules of natural justice. ... There is, in our judgment, no justification either in law or in precedent for the contentions of counsel for the husband that the process provided in Ord 62, r 9 should only be used in simple cases, or cases involving small amounts; indeed, from the information provided by counsel for the wife rather the contrary.

[6.] Under the **Rules of the Supreme Court**, if the Court indicates that it intends to fix costs and the receiving party indicates that they wish to “try their luck” in a taxation instead of having their costs fixed, it appears that, as a general rule at least, they should be permitted to pursue their right to a taxation: **Bain v Family Guardian Insurance Co Ltd** (2023) 101 WIR 32 at paras [43] to [45]. Here, neither party objected to the Court fixing costs after I indicated my intention to do so. Quite to the contrary, the Defendant acted pursuant to the directions that I gave and filed a bill of costs on 11 January 2024.

[7.] By the bill of costs filed on behalf of the Defendant, Counsel for the Defendant claims professional fees in the amount of \$105,075 net of VAT, VAT on professional fees totaling \$23,116.50, total disbursements of \$3750 and VAT on expenses totaling \$375. No written representations on quantum were received from Counsel for the Plaintiff but the Plaintiff was afforded a reasonable time within which to submit such representations. The Plaintiff’s 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.

[8.] 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.

[9.] In **William Downie v Blue Planet Limited** SCCivApp & CAIS No. 188 of 2019 (5 March 2020), a decision refusing an extension of time to appeal the decision that I made fixing the costs payable to the intended appellant at first instance, *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.

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, fix a definite sum for one party to pay to the other, 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]

27 The judge has a wide power to fix a definite sum that one party pays the other party instead of ordering costs to be taxed.

28 This 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, instead of taxed costs, 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?

30 In *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.

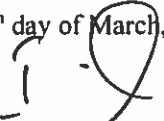
(iv) Although the discretion is unlimited, it must be exercised in a judicial manner. An example of acting in an unjudicial manner would include eg “clutching a figure out of the air without any indication as to the estimated costs”.

(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]

[10.] In the present case, having reviewed the Defendant’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, the nature of the issues which required determination, and the fact that I made no order for costs on the strike out application and the injunction application in these proceedings, I order that the Plaintiff pay the sum of \$45,000 to the Defendant in lieu of taxed costs.

Dated this 11th day of March, 2024


Sir. Ian R. Winder
Chief Justice