

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2014/CLE/gen/FP/00542

B E T W E E N

BANK OF THE BAHAMAS LIMITED

Claimant

AND

(1) PHILIP KENDAL FRANKS

(2) BONNIE VALERIE FRANKS

Defendants

Before: The Honourable Justice Andrew Forbes

Appearances: Mr. Edwin Knowles c/o Defendants
Ms. Sydney Rolle c/o Claimant

Hearing Dates: 6 May 2023; 13 May 2023; 1 June 2023; 8 June 2023;
20 June 2023; 11 August 2023; 11 October 2023;
30 November 2023; 31 January 2024

RULING ON COSTS

Forbes J,

INTRODUCTION

[1.] On the 8 June, 2024 the Court reserved its decision on costs blow is its judgement.

BACKGROUND

[2.] Though this matter began in 2014 the procedural background is not complex nor lengthy.

[3.] On 30th December 2014 the Claimants filed an action against the Defendants seeking vacant possession of the mortgaged property and payment of the amount due and owing pursuant to a demand dated 27 May 2009. This mortgage between the Claimant and Defendant is recorded in the Registry of Records in the City of Nassau on the Island of New Providence in Volume 9416 at pages 146 to 163 over the property known as Lot Number Twenty-Five (25) in Block Nine (9) in Section Eleven (11) Bahama Reed Yacht & Country Club, Freeport, Grand Bahama ("Mortgaged Property").

[4.] Years passed with parties seemingly cooperating until the eventual breakdown in communication led to the action being heard in May 2022. After which this Court granted an order for the vacant possession of property. This order was perfected in June 2022.

[5.] In December 2022, the Claimants elected to exercise its right of power of sale pursuant to the mortgage and on 15 February 2023 entered into a binding agreement to sell the property for \$200,000 to a third party.

[6.] In May 2023 the Claimant obtained a writ of possession perfected on the 11 May, 2023 for the Mortgaged Property. Moreover, the Defendants filed a Notice of Application to restrain the sale of the Mortgaged Property on the 18 May, 2023. Further, the Claimants filed a Cross Notice of Application on the 30 May, 2023.

[7.] The Defendants were successful in their application to restrain the sale of the Mortgaged Property and substitute nominees to which the Mortgaged Property was to be sold.

[8.] Specifically, on the 8 June, 2023 the Court heard both the Defendant's Notice of Application and the Claimant's Cross Notice of Application and made certain findings and

indemnified the Claimants concerning the 13 February, 2023 Agreement for Sale. On the 22 June 2023, the Order of the Court was perfected which required the Defendants to place 10% of the \$250,000 purchase price in escrow and obtain a letter of pre-approval for financing the balance of the purchase price from the relevant Bahamian Banking institution.

[9.] At the 8 June, 2024 hearing the Court reserved its decision on costs.

SUBMISSIONS

[10.] The Court invited Counsel to lay over submissions for it to consider when awarding costs. Counsel for the Claimants laid over its Submissions on 29 April, 2024 and the Defendants filed their submissions on 25 April 2024. Counsel for the Claimants, in part, submitted the following:

- a. Costs are within the discretion of the Court (see section 30 (1) of the Supreme Court Act, 1996);
- b. The general rule with relation to costs is that Costs follows the event (see Part 71.6 of the Supreme Court Civil Procedure (Amendment) Rules, 2023);
- c. That Part 71.9(4) is a non-exhaustive list of factors which may affect the incidence of costs;
- d. That the operation of the general rule was explained in the case of **Stirling Asset Management Ltd. V. Sunset Equities Ltd.** SCCivApp No.152 of 2021 by Barnett P;
- e. That the Claimant, at all times, acted in good faith; notwithstanding, the unreasonable length of delay elapsed between the filing of the action and the recovery. That the Defendants continually breached the terms of the Mortgage and of the Order made in June of 2022; and
- f. The Defendants have frustrated every attempt made by the Claimant to recover sums owed.

[11.] The Defendants, in part, submit:

- a. That the Claimants, in their haste failed to sell the property under their legal duty to obtain "the true market value of the mortgaged property". Therefore, the Defendant had to force the Claimant to accept the best price reasonably obtainable by filing their Notice;
- b. That due to the banks breaching it's duty to take reasonable precautions to obtain the true market value of the mortgage property the Defendants are entitled to costs.

[12.] The Court would like to thank Counsel for the submissions laid over and the relevant law referred to.

LAW

[13.] This matter began in 2014; however, much of this process was completed after the 2023 CPR. Nonetheless, the Court when exercising its discretion concerning matters heard before the introduction of the CPR, per section 2 (3) of the CPR, has the power to look to the CPR with regard to Part 1 and Part 25. Specific section 2 (3) states:

[14.] Where in proceedings commenced before the date of commencement of the Rules, the Court has to exercise its discretion, it may take into account the principles set out in these Rules and, in particular Part 1 and Part 25.

(3) Where in proceedings commenced before the date of commencement of the Rules, the Court has to exercise its discretion, it may take into account the principles set out in these Rules and, in particular Part 1 and Part 25.

[Emphasis mine]

[15.] The General rule is costs follow the events pursuant to Part 71.6(1), which states:

(1) Where the Court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.

This Principle is exemplified time and time again in the cases referred to by both the Claimant and the Defendants' Counsel. Moreover, Part 71.6 (2) states may make no order as to costs:

(2) The Court may, however, make no order as to costs or, in an exceptional case, order a successful party to pay all or part of the costs of an unsuccessful party.

[Emphasis mine].

[16.] Further, Part 71.9(4) of the Supreme Court Civil Procedure (Amendment) Rules, 2023 gives a non-exhaustive list of considerations for the Court to take into account when weighing costs. Part 71.9(4) states:

- (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.

[Emphasis mine]

[17.] However, a decision on costs is at the discretion of the courts according to section 30 (1) of the Supreme Court Act, 1996 which states:

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.

[Emphasis mine].

[18.] Thus, costs being a discretionary power the Court turns to consider Part 1.2 states:

- (1) **The Court must seek to give effect to the overriding objective** when —
 - (a) **exercising any powers under these Rules;**
 - (b) **exercising any discretion given to it by the Rules;** or
 - (c) interpreting these Rules.
- (2) **These Rules shall be liberally construed to give effect to the overriding objective** and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits.

[Emphasis mine]

[19.] The overriding objective is stated in Part 1.1 of the CPR as follows:

(1) The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost.

[1.] Dealing justly with a case includes, so far as is practicable:

- a. ensuring that the parties are on an equal footing;
- b. saving expense;
- c. dealing with the case in ways which are proportionate to —
 - i. the amount of money involved;
 - ii. the importance of the case;
 - iii. the complexity of the issues; and
 - iv. the financial position of each party;
- d. ensuring that it is dealt with expeditiously and fairly;
- e. allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases; and
- f. enforcing compliance with rules, practice directions and orders.

ANALYSIS AND DISCUSSION

[20.] Therefore, in every exercise of the Court's power, it is necessary to view the rules with the lens of doing what is just in the proceedings. Moreover, when considering the conduct of the parties during the proceedings it cannot be just to follow the general principle as established in Part 71.6 of the Supreme Court Civil Procedure (Amendment) Rules, 2023).

[21.] The Claimants mentioned an "unreasonable length of time that elapsed between the bringing of this action and any recovery". Agreeably for several years, the Defendants chose to make themselves unavailable to continue with the process to facilitate the movement of this action or feigned cooperating with the Claimants. Likewise, for a number of years the Plaintiffs chose to sit on their hands and do nothing to move this matter along and in essence aided in this delay. The Claimants in this matter seem to have been aware of the higher bid by the Defendants' nominees from 27 March 2023. This led to the Application made by the Defendant and seemingly further delays.

[22.] The cases submitted by the Defendant are most helpful. The Court is of the view that the Claimant as mortgagee had the obligation to see the most fair market value for the home and that attempting to sell the home for less than the \$250,000 that they eventually agreed to

was improper. The Defendants were right in restraining the proposed sale and the Application was necessary.

[23.] In essence, each party throughout this matter has done something to delay the process and incur unnecessary costs. Therefore, arguments on the length of time this matter took cannot be accepted by this Court when the delay in part or whole was caused by both parties' actions. Further, this matter was not a complex matter and had no need to take some nearly 10 years to be completed.

DISPOSITION

[24.] Therefore, in consideration of all the relevant laws and circumstances as mentioned above. There is no order as to costs. Parties must bear their own costs.

[25.] Parties at liberty to appeal within the statutory time frame.

Dated the 25th October, 2024

A handwritten signature in black ink, appearing to read 'A. Forbes', is written over a horizontal line.

Andrew Forbes
Justice of the Supreme Court