

COMMONWEALTH OF THE BAHAMS
IN THE SUPREME COURT
Commercial Division
CLAIM NO. 00715 OF 2023

BETWEEN

CEM OKULLU'NUN YEMINLI BEYANI

Claimant

AND

(1) WEISER GLOBAL CAPITAL MARKETS LTD.
(2) KEITH KELTY
(3) SHELBY BRICE

Defendants

Before: The Honourable Madam Justice Camille Darville Gomez

Appearances: Mr. Sean Moree, KC and Mrs. Erin Hill and Mrs. Peteche Mitchell with him for the Claimant

Mr. Philip McKenzie, KC and Miss Glenda Roker for the Defendants

Hearing Date: March 27, 2024

Parties to be heard on costs – Civil Procedure Rules Part 71 – whether the usual rule of costs follow the event to apply – whether to depart from the usual rule - factors to be considered CPR, 2022, Part 71.6(4) and Part 71.6(5)

RULING - COSTS

Darville Gomez, J

- [1.] I already delivered my decision in relation to the application by the Claimant for committal of the Defendants for their failure to comply with the Order of Justice Neil Braithwaite dated June 30, 2023 and filed on July 4, 2023 (the “Disclosure Order”).
- [2.] For the reasons set out in that decision, I did not find the Defendants in willful contempt and indicated that I would hear the parties on the issue of costs. In order to consider the issue of costs, I set out a brief summary of the action.

- [3.] The Claimant by an Originating Application filed on August 23, 2023 (the “Application”) sought inter alia to hold Weiser Global Capital Markets Ltd, (‘Weiser or the “Company”) in contempt and to commit the director and officer of the Company following their failure to comply with the Disclosure Order granted by Justice Brathwaite in the action of Cem Okullu’ Nun Yemini Bevani v Weiser Global Capital Markets Ltd. et. al 2023/CLE/gen/452 (the “General Action”).
- [4.] The Disclosure Order contained a Penal Notice which provided that should it be disobeyed, Weiser may be held in contempt of court. It is undisputed that: (i) the deadline for disclosure was July 19, 2023 and (ii) no disclosure was made by that date in accordance with the terms of the Disclosure Order.
- [5.] The Application was made as a result of the First Defendant’s (i) failure to comply with the Disclosure Order’s deadline; and (ii) inadequate disclosure once certain disclosures were eventually made over a month after the deadline.
- [6.] The Application was heard on March 27, 2024 and an oral ruling delivered on April 11, 2024 with the written reasons handed down on April 23, 2024. Ultimately, I decided that despite being in breach of the Order that there was no willful non-compliance with the Disclosure Order by the Defendants. I indicated that I would hear the parties on the issue of costs.
- [7.] The general rule is that costs follow the event, viz., the successful party is generally entitled to costs. **Civil Procedure Rules (“CPR, 2022”) Part 71.6** However, the court may 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. **CPR, 2022 Part 71.6(2)**
- [8.] The Claimant referred to the CPR Practice Guide Notes on this rule at page 520 which stated as follows:

An overriding dynamic of the CPR is the use by the Court of the costs provisions as a management tool to achieve the overriding objective, e.g., to deter through the award of costs orders, any conduct of a party which is considered by the Court to interfere for instance with the expeditious disposal of the claim or the identification of issues at an early stage. The Court has always been able to take into account a party’s conduct when considering costs and has done so.....

- [9.] The court should when making a determination on who is entitled to costs must consider all the circumstances and all the factors inclusive of the conduct of the parties during all stages of the proceedings. **CPR, 2022 Part 71.6(4)(5)**
- [10.] Both Counsel cited a miscellany of cases that were insightful on how the Court ought to treat with costs including: **Scherer v Counting Instruments Ltd. [1986] 2 All ER 5292** referred to by then Senior Justice Indra Charles in **Monika Stubbs and another v Zamar Group Companies Ltd. [2022] 1 BS J. No. 11** where Buckley LJ stated:

“229. The judge was required to exercise his discretion judicially, i.e., in accordance with established principles and in relation to the facts of the case and on relevant grounds connected with the case, which included any matter relating to the litigation, the parties’ conduct in it and the circumstances leading to the litigation, but nothing else.”

230. *The principle to be applied by the Court or Judge when exercising this discretion is that of reasonableness. In McPhee (as Administrator of the Estate of Thelma Mackey) v Stuart [2018]1 BHS J.No. 18 at para 8, this Court enumerated some factors which would be reasonable for the Court to consider when deciding the issue of costs, namely:-*

1. *any order that has already been made;*
2. *the care, speed and economy with which the case was prepared;*
3. *the conduct of the parties before as well as during the proceedings;*
4. *the degree of responsibility accepted by the legal practitioner;*
5. *the importance of the matter to the parties;*
6. *the novelty, weight and complexity of the case; and*
7. *the time reasonably spent on the case.*

231. *The general rule is that, in civil proceedings, the successful party is entitled to his costs. The Court may depart from this general principle if there are good and compelling reasons to do so."*

- [11.] The Claimant highlighted the case of **Johnsey Estates (1990) Ltd v Secretary of State for the Environment Transport Regions** [2001] EWCA Civ 535 as authority for the proposition that the Court may deprive a party of costs of an issue on which they have been successful if satisfied that the party acted unreasonably in relation to that issue.
- [12.] Reliance was placed on CPR rule 1.3 which addressed the duty of the parties and highlighted the fact that in applying the Rules to give effect to the overriding objective the Court may take into account a party's failure to keep his duty under paragraph (1) which is to help the Court further the overriding objective.
- [13.] The Claimant referred to the CPR Practice Guide (supra) and submitted that "*cost orders ought to be used to achieve the overriding objective by deterring conduct which interferes with the expeditious disposal of the claim or the identification of issues at an early stage. Where a party fails to comply with the expeditious disposal of the claim or the identification of issues at an early stage. Where a party fails to comply with timetables ordered by the court the duty to ensure the achievement of the overriding objective is a shared duty that rests on each party with equal weight. Upon requesting that the breach be remedied expeditiously, if their attempts are unsuccessful the innocent party must apply for sanctions quickly (as a delayed application may be a factor in determining whether to grant sanctions):* **Financial Institutions Services Limited v Peter Crosswell et al Suit No. cl. 1997/C256**
- [14.] I set out below the reasons given by the Claimant's Counsel as to why the Court ought to depart from the usual principle that costs follow the event. However, his Counsel began by highlighting that the claim in the General Action concerns deceit and/or unlawful means conspiracy in relation

to a sham Master Loan Agreement worth over one million dollars. His Counsel submitted that the Claimant was awarded both injunctive relief and disclosure and:

- (i) Costs were awarded to the Claimants to be paid by the Defendants and they remain unpaid to date.
- (ii) Weiser's conduct and the manner in which they pursued the General Action, viz. their refusal to comply with the prescribed timelines without applying to vary the same and the dilatory filing of their relief from sanctions application) forced the Claimant to commence this Application in furtherance of his interest and the overriding objective of the Court.
- (iii) Before filing the Application, the Claimant made multiple attempts to communicate what was required of the Company by the Disclosure Order (both verbally and in writing) to counsel for the First Defendant in order to remedy the breach.
- (iv) the Company previously flouted a Court Order – reference was made to Weiser Asset Management Ltd v America 2030 Capital Limited & Anor 2018/CLE/gen/01498
- (v) the First Defendant was well informed and given reasonable notice of the Claimant's intention to pursue the Application should the breach not be remedied. In the circumstances, not only was it reasonable for the Claimant to bring this Application, but it was his duty to the court to do so and it was necessary to do so to ensure the First Defendant would comply with the terms of the Disclosure Order.

[15.] The Claimant's Counsel exhibited a Statement of Costs (Summary Assessment) for the Application in the sum of \$54,042.34 and \$17,000 for the submissions on costs.

[16.] The Defendants have responded to some of the factors which the Court must consider as set out in Part 71.6(4) and 71.6(5) as follows:

Conduct of the parties both before and during the proceedings

[17.] The Defendants submitted that after the Claimants had brought a claim for contempt against a Director and employee of Weiser they attempted on numerous occasions to comply with the Court's order by seeking the indulgence of the Claimant for time to fully comply. Further, that prior to commencement of the contempt application that they had written to the attorneys for the Claimants to obtain clarity on the scope of the Order however, they were ignored. Finally, they submitted that they filed and served their Affidavit of Compliance exhibiting the documents that they understood to be within the scope of the Disclosure Order prior to the service of the proceedings on them.

The manner in which a party pursued the case

[18.] They submitted that the Claimant's conduct was unreasonable given the circumstances and the Defendants' attempts to resolve the issues of compliance with the Disclosure Order. They submitted that it was unreasonable for the Claimant to have ignored the Defendant's request and suggestion to seek further clarity on the scope of the Order obtained. Further, the Defendants filed

a supplemental Affidavit seeking to provide additional information obtained in furtherance of their compliance with the said Order.

Whether the manner in which the party has pursued a particular allegation, issue or the case, has increased the costs of the proceedings.

[19.] The Defendants have relied on the fact that they filed an Affidavit and Supplemental Affidavit in compliance with the court's order. They submitted that the Claimant continued to pursue the contempt action after the relevant Affidavits were filed and despite the Defendants having demonstrated to the Claimant the disparity between the scope of the Disclosure Order and the information which they sought to obtain. Therefore, it was their submission that they were obliged to defend the contempt claim and thereby incur costs.

Analysis/Disposition

[20.] At the outset I had accepted that the Defendants successfully demonstrated their attempts to clarify the scope of the terms of the Order shortly after service upon them. Further, I applauded their swift efforts in attempting to comply with the contempt order while working through areas that they considered unclear. I found their willingness to comply laudable.

[21.] Despite this however, the reality remains that they failed to comply with the time deadline of the contempt Order in circumstances where it was clear that they would be unable to do so and where the Claimants refused to agree an extension. Hence the Defendants were in actual breach of the contempt order.

[22.] However, despite the filing of their Affidavits in compliance with the court's order (albeit late), the Claimant continued to pursue the Contempt action against the Defendants and caused additional costs to be incurred by both parties, including the Defendants.

[23.] I have considered the submissions of both parties. I adopt the submission of the Claimant that cost orders ought to be used to achieve the overriding objective by deterring conduct which interfere with the expeditious disposal of the claim or the identification of issues at an early stage.

[24.] Rule 71.6(2) of the CPR provides that: "*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.*" [my emphasis added]

[25.] I am persuaded that this is a proper case for the departure from the usual principle that the successful party is entitled to their costs and given the conduct of both parties, I make no order as to costs.

Dated this 10th day of March, 2025



Camille Darville Gomez
Justice