

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION**

2016/CLE/gen/01295

BETWEEN

HONG KONG ZHONG QING DEVELOPMENT COMPANY LIMITED
Plaintiff

-and-

(1) SQUADRON HOLDINGS SPV0164HK, LTD
First Defendant

(2) MR. D. SEAN NOTTAGE
Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Christopher Jenkins with him Mr. Ra'Monne D. Gardiner of Lennox Paton for the Plaintiff
Mrs. Gail Lockhart-Charles and Mr. Rhyan Elliott for the Defendants

Hearing Dates: Heard on submissions

Costs – Section 30 (1) of the Supreme Court Act - Order 59 Rules 2(2) and (3)(2) considered – Applicable principles – Discretion – Reasonableness of costs – Factors to be considered - Complexity of case - Conduct of parties before and during litigation – Time reasonably spent – Numbers of lawyers required – Degree of responsibility by legal practitioner – Overriding duty of all parties to the Court

The present application concerns the vexing issue of costs and what is a reasonable amount to be paid to the Plaintiff after being successful.

HELD: Costs are awarded to the Plaintiff in the sum of \$75,000.

1. As a general rule, the unsuccessful party should pay the costs of the successful party. The Court may depart from this general principle if there are reasons to do so. In this case, there is no reason for the Court to depart from this well-established principle.

2. Costs are in the discretion of the Court and must be reasonable: see Section 30(1) of the Supreme Court Act; Order 59 Rules 2(2) and 3(2) of the Rules of the Supreme Court.
3. In determining what is reasonable costs, the Court must take into account all the circumstances including but not limited to (a) any order that has already been made; (b) the care, speed and economy with which the case was prepared; (c) the conduct of the parties before as well as during the proceedings; (d) the degree of responsibility accepted by the legal practitioner; (e) the importance of the matter to the parties; (f) the novelty, weight and complexity of the case and (g) the time reasonably spent on the case. *McPhee (as Administrator of the Estate of Thelma Mackey) v Stuart* [2018] 1 BHS J. No. 18 [unreported] applied.

RULING

Charles J:

The application

- [1] On 4 May 2017, I dismissed the Defendants' application to set aside an *ex parte* injunction which I had granted on 15 September 2016 with costs to the Plaintiff. The Plaintiff then claimed its costs of \$136,200 on an indemnity basis. On 15 May 2018, I heard the application seeking indemnity costs and on 8 November 2018, I ordered that the Defendants pay costs on a party to party basis.
- [2] The present application before me is to assess the costs of the Plaintiff. Both parties have provided written submissions. The Defendants are of the opinion that reasonable costs should not exceed \$30,250.

The law

- [3] In civil proceedings, costs are entirely discretionary. Section 30(1) of the Supreme Court Act provides:

"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 added]
- [4] The principle that costs are discretionary is further fortified in Order 59, rule 2(2) of the Rules of the Supreme Court ("RSC") which reads:

“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.”[Emphasis added]

[5] Then, costs must be reasonable. In determining what is reasonable, Order 59, rule 3(2) of the RSC is helpful. It provides:

“If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.”

Submissions by both Counsel

[6] Learned Counsel, Mrs. Lockhart-Charles was not the attorney who represented the Defendants in the application to set aside the ex parte injunction which was granted on 18 September 2016. The Defendants were represented by learned Counsel, Mr. Michael Scott and Mrs. Ferguson-Johnson. It was contentious from the inception as Mr. Scott even challenged the applications which were set to be heard on that day. The hearing took all day because of the dispute between the parties which included a Disputed Directions Order which could have been avoided had it not been for the position taken by the Defendants and/or their Counsel.

[7] Mrs. Lockhart-Charles submitted that the costs order presently being assessed is one of several as there are costs orders that have already been made in favour of the parties to these proceedings and there are costs order that are still to be made.

[8] She argued that, because of overlapping facts and applications yet to be determined, care ought to be taken to prevent multiple cost recovery for the same work or worse, costs recovery for work necessitated by applications in relation to which a party may prove ultimately unsuccessful in the event.

- [9] The suggestion by Counsel that there is an overlapping of costs with previous costs order is inaccurate and has no merit. The costs order which I am now considering arose out of an order made by the Court on 4 May 2017 whereby the Court dismissed the Defendants' application to set aside an *ex parte* injunction.
- [10] This Court is fully aware that Squadron commenced proceedings before Hilton J. in August 2016 seeking declaratory relief relating to the operation of section 70 of the International Business Companies Act ("the IBC Act").
- [11] This Court is also fully aware that in November 2016, Squadron commenced identical proceedings seeking the same declaratory relief before the late Stephen Isaacs, CJ.
- [12] This Court does not have a long arm jurisdiction to deal with costs issues arising in other matters before other judges. This Court is only concerned with the issue of costs arising out of its Ruling of 4 May 2017.
- [13] Mrs. Lockhart-Charles correctly submitted that the costs order presently being considered relates to the determination by the Court of two points namely:
- i. Whether the application to set aside the *ex parte* injunction on notice was moot; and
 - ii. Whether the commencement of the arbitration proceedings before Squadron was incorporated was null and void.
- [14] She submitted that the first issue turned on and was determined by the factual finding of the Court that the Defendants had submitted to the jurisdiction at an earlier hearing on 14 December 2016 and the second issue turned on the finding of fact by the Court as to the date of incorporation of Squadron and the application of the legal principles in **Freeport Licensees and Property Owners Association v The Grand Bahama Port Authority, Limited and others** [2009] 3 BHS J No. 125, CA. in which the Court of Appeal held that a company that does not exist cannot bring proceedings (which was held to be binding on the

Court). Learned Counsel also stated that a collateral issue which arose related to the conduct of the Defendants' Counsel with regard to the drawing up and perfecting of a directions order.

[15] At first blush, this appears to be a fair encapsulation of the issues and the findings of the Court but the scope of the costs award includes:

- i. The costs associated with the Injunction which turned out to be completely justified;
- ii. The various elements of the application to set the Injunction aside and
- iii. Addressing and reserving the Disputed Directions Order.

[16] There are certain factors that the Court must consider in determining what are reasonable costs. In **McPhee (as Administrator of the Estate of Thelma Mackey) v Stuart** [2018] 1 BHS J. No. 18 [unreported] at [8], this Court enumerated the factors as:

“In deciding what would be reasonable the Court must take into account all the circumstances, including but not limited to:

- a) any order that has already been made;**
- b) the care, speed and economy with which the case was prepared;**
- c) the conduct of the parties before as well as during the proceedings;**
- d) the degree of responsibility accepted by the legal practitioner;**
- e) the importance of the matter to the parties;**
- f) the novelty, weight and complexity of the case; and**
- g) the time reasonably spent on the case.”**

[17] I opine that, had the Defendants and/or their Counsel handled this matter properly, some precious judicial time would have been conserved.

Conclusion

[18] In civil proceedings, the successful party is entitled to its costs. Put another way, the unsuccessful party or parties should pay the costs of the successful party. The Court, having looked at the Annotated Schedule of Costs and, in the exercise of its discretion, order the Defendants to pay costs of \$75,000 to the Plaintiff which I consider to be reasonable.

Dated this 28th day of October, A.D., 2019

**Indra H. Charles
Justice**