

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2016/CLE/gen/01355

BETWEEN

BLUE PLANET GROUP LIMITED

Plaintiff

AND

WILLIAM DOWNIE

Defendant

AND BETWEEN

WILLIAM DOWNIE

Plaintiff for Counterclaim

AND

BLUE PLANET GROUP LIMITED

Defendant to Counterclaim

Before Hon. Mr. Justice Ian R. Winder

Appearances: Tara Archer with Audley Hanna Jr for the Plaintiff

Metta MacMillan-Hughes with Chizelle Cargill and McFalloughn
Bowleg for the Defendant

JUDGMENT

WINDER, J.

1. On 12 February 2019, following my decision to set aside subpoenas duces tecum issued in this action by the Registrar, I indicated my intention to fix the costs arising from the defendant's Summons. I invited the parties to provide submissions on the amount of the costs, so as to get a fair and reasonable view of the amount of work said to have been done on the defendant's behalf.
2. In the past I have remarked on the unfairness and inadequacies of the present system of determining reasonable amounts of costs in litigation. For what its worth, I repeat it again, *the present system of determining reasonable amounts of costs in litigation matters cry out for reform. The potential for cost orders in these massive sums against litigants in simple disputes must frighten litigants from pursuing their legal rights and could ultimately restrict access to justice.* I readily accept that I cannot reform this system one case at a time and thereby discriminate against successful litigants with the misfortune of appearing before me.
3. This case however demonstrates my concerns as to costs, fully. According to the draft bill submitted by the defendant he asserts that he has incurred costs in the incredible amount of \$309,316.50 and indicating that he would have utilized the services of six attorneys. This is a claim allegedly for \$2,000,000 which has yet to reach trial. However, in support of two interlocutory costs applications, (one of which has been set aside) the defendant has advanced a combined cost incurred of \$850,000. I repeat that the trial has yet to begin and pleadings have not been properly closed. The plaintiff however is not all to innocent in this battle of the bill of costs. It filed a bill of costs, arising from attendance at Court and the review of a Summons, in the amount of \$66,425.00 plus \$9,000 for the estimated disbursements. That bill, as the file reveals, was eventually taxed in the region of \$11,400.
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 a 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. The Courts discretion must be exercised not merely by looking at the work said to have been done by Counsel but also taking into account the reasonableness of incurring such costs. As the hearing judge, I am in a prime position to determine the reasonable level of costs to be awarded in what ought to have been a very simple interlocutory application. It is not, as seem to be suggested by the defendant, to be a means of indemnifying him, I did not order costs on an indemnity basis.
6. In my decision, on setting aside the subpoenas, I indicated that this was a relatively simple application where the defendant threw the kitchen sink behind his application. I also decried the position of the plaintiff in continuing to pursue a hopeless defence of its position. A litigant can engage infinite man hours in researching and expending legal talent on a matter however it is only such work which is reasonably capable of being incurred which an unsuccessful party ought to have to bear.
7. The matter was not certified fit for any amount of counsel and I would be hard-pressed to certify that it was fit for more than 2 counsel. The employing of six lawyers, each coming up to speed on this dispute is unreasonable. This was a simple application to set aside subpoenas which, in my view, were *ex facie* irregular. Junior counsel, Ms Cargill was more than able to argue herself without assistance.

8. In assessing the reasonableness of the costs, I have taken into account the time spent before me, the work reasonably to have been expended, the seniority of counsel and the importance of the matter to the client. Having looked at the work, in the round, I will fix the reasonable professional charges in this matter, at \$40,000 and disbursements of \$750.00.

Dated the 18th day of April 2019

A handwritten signature in black ink, appearing to read 'I. Winder', written in a cursive style.

Ian Winder

Justice