

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

2016/CLE/gen/No.01273

BETWEEN

FLORIKA V. DAVIS

Plaintiff

AND

CLEAVON CARLO CLEARE

1st Defendant

AND

ROLAND THEADORE HAMILTON

2nd Defendant

AND

FAMILY GUARDIAN INSURANCE COMPANY LIMITED

3rd Defendant

Before: The Honourable Mister Justice Keith H. Thompson

Appearances: Mr. E. Raphael Moxey of Messrs. Mackay & Moxey for the Plaintiff

Mrs. Ruth Bowe- Darville then of Commonwealth Law Advocates for
the for the 2nd Defendant
Ms. Niketa Issacs for the 3rd Defendant

Hearing Date: 4th April 2019

R U L I N G

**Civil Practice and Procedure - Rules of the Supreme Court (RSC 1978) - Order 59 – Costs- costs
on the indemnity basis**

Thompson, J:

Introduction

1. On the 4th April 2019 in the context of a scheduled Case Management Conference, the parties to this action were prodded by this Honourable Court to reach a settlement position in relation to this matter. Settlement was struck, leaving costs as the remaining live issue in this cause to be adjudicated upon, to which I now turn.

Procedural Overview

2. This action was commenced on the 30th August 2016 by Writ of Summons. The Plaintiff sought various reliefs, namely; Declarations to the effect that the Conveyance between the Plaintiff and the First Defendant dated 10th May 1998 and the subsequent Conveyance as between the First Defendant and the 2nd Defendant dated 21st June 2004 both recorded in the Registry at Volume 11114 at pages 149-155 and 170-173, respectively, be declared null and void and set aside. The Plaintiff further prays for a Declaration that the impugned subject property of this action does not constitute security for the Indenture of Mortgage as executed between the 2nd Defendant and the 3rd Defendant. Ultimately, the Plaintiff sought Declaration affirming her fee simple title held in Trust for her son Ron Albert Davis to the lot in question.
3. The 2nd Defendant filed a Notice and Memorandum of Appearance and a simultaneous application by Summons supported by affidavit to have himself removed as a party to the action or in the alternative, time to file and serve a Defence on the 26th February 2019. It is to be noted that there is no record of any Defence on behalf of the 2nd Defendant.
4. The 3rd Defendant filed a Notice of Conditional Appearance and simultaneously made application to have the Writ set aside as against itself by way of Summons supported by Affidavit all filed on 28th November 2016. The said application was dismissed by the Assistant Registrar Edmund Turner on 16th May 2017 leading the 3rd Defendant to subsequently file Notice and Memorandum of Appearance on 29th May 2017. A Defence was filed on behalf of the 3rd Defendant on the 21st December 2017.

The Law & Analysis

5. In balancing my discretion in awarding costs pursuant to my powers under Order 59 rule 3 of the Rules of the Supreme Court, 1978 regard is had to the authority of the High Court of England and Wales in *Noorani v Calver* [2009] All ER D 274. There, Coulson J relying on the authority of *Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspden and Johnson* [2002] EWCA Civ 879 opined that:

'in any dispute about the appropriate basis for the assessment of costs, the court must consider each case on its own facts. If indemnity costs are sought, the court must decide whether there is something in the conduct of the action, or the circumstances of the case in question, which takes it out of the norm in a way which justifies an order for indemnity costs.'

6. It is the position of this Court that costs on the indemnity basis be reserved for circumstances amounting to culpability or abuse of process by a party to an action. Nonetheless, certain conduct whilst not of such a nature as to attract moral chastisement from the Court, may still ground an award for costs on an indemnity basis. This was recognized in the authority of *Reid Minty v Taylor* 2002 1 WLR 2800 where it was stated at paragraph 28 that *'litigation can readily be conducted in a way which is unreasonable and which justifies an award of costs on an indemnity basis, where the conduct could not properly be regarded as lacking moral probity or deserving moral condemnation.'*
7. In the context of the extant matter, I find the ambulation of the civil practice and procedure lacking on behalf of the 2nd Defendant. The overly delayed response of the 2nd Defendant to vigorously defend this action in entering Notice and Memorandum of Appearance to a 2016 Writ in 2019 and the subsequent failure to file a Defence is wanting.
8. The 3rd Defendant fared better in its traverse of the civil practice. I note also the execution of the Deed of Release in favour of the Plaintiff recorded in the Registry at Volume 13372 at pages 301-306 on 11th December 2019. Nevertheless, I find so too that the 3rd Defendant could have made greater efforts towards the settlement of this claim as it is the position of this Court that the 3rd Defendant was duly placed on inquiry as to the fraudulent behaviour of the 2nd Defendant as uncovered by this Honourable Court and as reflected in the order of my brother Winder J of 11th November 2016 in a prior action involving both the 2nd and 3rd Defendants as Mortgagee and Mortgagor respectively, namely action 2013/CLE/gen01067 *Beverley Dorsett-Smith et al v Roland Hamilton and Cleavon Cleare*

(deceased). In future, a more common-sense approach to litigation coupled with good faith efforts to amicable resolution is advised so as to save judicial time and to avoid costs associated with the protracted progression of litigation.

Conclusion

9. The Plaintiff has met its case for costs on the indemnity basis. Therefore, pursuant to Order 59 rule 3 of the Rules of the Supreme Court, 1978 I hereby award costs on an indemnity basis to the Plaintiff as against the 2nd and 3rd Defendants apportioned at 55% and 45% of total costs respectively, to be taxed if not agreed.

Dated this 17th day of September, A.D., 2020

A handwritten signature in blue ink, appearing to read "Keith H. Thompson J.", is written over the typed name below.

**The Honourable Justice Keith H. Thompson
Justice of the Supreme Court
The Commonwealth of The Bahamas**