COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2020/CLE/gen/00722

BETWEEN

LONG ISLAND DEVELOPMENT LIMITED

Plaintiff

AND

1) DYLLIS SMITH
2) WESLEY B. SMITH
3) ROBERT SMITH
4) ILENE SMITH
5) ORAMAE PINDER
6) HELEN DARVILLE

Defendants

Before: The Honourable Madam Justice Tara Cooper Burnside (Ag)

Appearances: Mr Adrian M. Hunt and Ms Christina D. Justin for the Plaintiff

Mr Mark Flowers for the Defendants

Civil Practice – Costs – Interlocutory injunction – Injunction refused on basis of balance of convenience.

RULING
(COSTS)

[1] On the 25 March 2021, I delivered a Ruling in this matter where I denied the Plaintiff's application for injunctive relief and invited the parties to make submissions on the issue of costs.

[2] I have now had the opportunity to consider the written submissions of both parties on the issues of costs and for the reasons which follow, I exercise my discretion and order that the costs of the Plaintiff's application for injunctive relief be costs in the cause.

[3] It is trite law that the issue of costs shall be in the discretion of the Court, which discretion must be exercised judicially and in accordance with established principles. The wide discretion enjoyed by the Court is derived from section 30(1) of the ***Supreme Court Act*** which states:

> "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."

[4] It is also reflected in RSC Order 59, rule 2(2) which states:

> "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."

[5] Buckley LJ in ***Scherer and another v Counting Instruments Ltd*** [1986] 2 All ER 529 summarises the relevant principles to be applied by the Court when considering costs as follows (at page 536):

> "(1) The normal rule is that costs follow the event. That party who turns out to have unjustifiably either brought another party before the court or given another party cause to have recourse to the court to obtain his rights is required to recompense that other party in costs. But, (2) the judge has under s 50 of the 1925 Act an unlimited discretion to make what order as to costs he considers that the justice of the case requires. (3) Consequently, a successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party but has no right to such an order, for it depends on the exercise of the court's discretion. (4) This discretion is not one to be exercised arbitrarily: it must be exercised judicially, that is to say in accordance with established principles and in relation to the facts of the case. (5) The discretion cannot be well exercised unless there are relevant grounds for its exercise, for its exercise without grounds cannot be a proper exercise of the judge's function. (6) The grounds must be connected with the case. This may extend to any matter

relating to the litigation and the parties' conduct in it, and also to the circumstances leading to the litigation, but no further. (7) If no such ground exists for departing from the normal rule, or if, although such grounds exist, the judge is known to have acted not on any such ground but on some extraneous ground, there has effectively been no exercise of the discretion. (8) If a party invokes the jurisdiction of the court to grant him some discretionary relief and establishes the basic grounds therefor but the relief sought is denied in the exercise of discretion, as in *Dutton v Spink & Beeching (Sales) Ltd* and *Ottway v Jones*, the opposing party may properly be ordered to pay his costs. But where the party who invokes the court's jurisdiction wholly fails to establish one or more of the ingredients necessary to entitle him to the relief claimed, whether discretionary or not, it is difficult to envisage a ground on which the opposing party could properly be ordered to pay his costs. Indeed, in *Ottway v Jones* [1955] 2 All ER 585 at 591, [1955] 1 WLR 706 at 715 Parker LJ said that such an order would be judicially impossible, and Evershed MR said that such an order would not be a proper judicial exercise of the discretion, although later he expressed himself in more qualified language (see [1955] 2 All ER 585 at 587, 588–589, [1955] 1 WLR 706 at 708, 711). (9) If a judge, having relevant grounds on which to do so, has on those grounds, or some of them, made an order as to costs in the exercise of his discretion, his decision is final unless he gives leave to a dissatisfied party to appeal. (10) If, however, he has made his order having no relevant grounds available or having in fact acted on extraneous grounds, this court can entertain an appeal without leave and can make what order it thinks fit.

When these principles fall to be applied to an interlocutory step in an action, the circumstances may be such that it is not then possible to see on which side justice requires that the decision who should bear the costs of that step should ultimately fall. This may depend on how the issues in the action are eventually decided. Consequently, costs in interlocutory matters are often made costs in the cause or reserved."

[6] Counsel for the Plaintiff, Mr Hunt, submits that the appropriate order as to costs ought to be an award of costs in the cause. He relies on the decisions in ***Ricketts v Ageeb*** [1982] BHS J. No. 26, ***Isaacs v Curry*** [1986] BHS J. No. 63 and ***McDonald's Corporation v McDonald's Corporation Limited*** [1997] 4 LRC 646 to support his position and on the following observations made by Henry J in ***Ricketts*** (at paragraph 11) in particular:

> "In interlocutory proceedings, the final issue between the parties being still undecided, the order as to costs is more usually linked to the ultimate outcome of the proceedings. Sometimes the question of costs is simply reserved to be determined at the trial. If an immediate order is made it customarily takes the form of "costs in the cause", "Plaintiff's/ Defendant's

> costs in the cause" or "Plaintiff's/Defendant's costs in any event." This last order is appropriate inter alia where the party in whose favour it is made had been forced to make an application to enforce compliance with the rules or as here, to set aside an order irregularly obtained. It is within the discretion of the court to make the more stringent order for payment of costs forthwith, but there ought to be special or unusual circumstances justifying this."

[7] Counsel for the Defendants, Mr Flowers, seeks costs in the amount of $8,592.75 to be paid within 14 days. He cites Order 59, rule 4 and the case of ***Kickers International SA v Paul Kettle Agencies Ltd*** [1990] IP & T Digest 18 regarding the Court jurisdiction to tax and order immediate payment of costs. RSC Order 59, rule 4 provides:

> "Costs may be dealt with by the Court at any stage of the proceedings; and any order of the Court for the payment of any costs may, if the Court thinks fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded."

[8] To justify the amount, Mr Flowers also seeks to rely on the Affidavit of Sandra Russell filed on the 31 March 2021 (the "**Affidavit**") which exhibits exchanges between the parties' Counsel which obviously constitute a genuine attempt to compromise the matter; and Mr Hunt objects to their disclosure. Mr Flowers argues that they are admissible and relies on the authority of ***Calderbank v Calderbank*** [1975] 3 All ER 333 to support his position.

[9] It is a general rule that "without prejudice" correspondence is inadmissible on the question of costs. As an exception to that rule, ***Calderbank*** established that an offer might be made by a litigant in such a form that it is made without prejudice while reserving the right of the litigant to refer to it on the issue of costs. All this is elementary. In ***Gresham Pension Trustees v Cammack*** [2016] EWCA Civ 655 Lady Justice Sharp stated (at paragraphs 22 and 25):

> "The principles relating to without prejudice correspondence are too well-known to require detailed exposition, and are not in dispute in this appeal. Written or oral communications made for the purpose of a genuine attempt to compromise a dispute between parties may not be admitted in evidence. Such an exchange attracts without prejudice privilege, whether or not the words "without prejudice" are used. Where the privilege applies the court does not have a general discretion to admit such communication into evidence… **Negotiations which have taken place expressly on a "without prejudice save as to costs basis" are admissible on the question of costs as an exception to the general rule which precludes the admission of without prejudice communications**: see Calderbank v Calderbank [1976] Fam 93, Cutts v Head [1984] Ch 290 and Unilever v Procter & Gamble [2000] 1 WLR 2436 at 2445 C-E. **However, if the parties**

> **wish to exclude the general rule that would otherwise apply, they must say so**: see for example, the judgment of Hoffmann LJ, as he then was, in Muller v Linsley & Mortimer [1996] PNLR 74 at 77…" (my emphasis)

[10] In this case, the exchange between the parties was not marked "without prejudice save as to costs" and the Plaintiff has not otherwise waived the privilege attached to them. The Affidavit is inadmissible in the circumstances.

[11] In any event, I am persuaded by the submissions of Mr Hunt that the costs of the Plaintiff's application for injunctive relief should be costs in the cause.

[12] In ***Desquenne et Giral v Richardson*** [2001] FSR 1, the English Court of Appeal held that the costs of an interim injunction application granted on the basis of the balance of convenience should usually be reserved until trial of the substantive issue because in such case, there is no successful or unsuccessful party. Lord Justice Morritt stated:

> "It is quite plain from the passage in the judge's judgment from which I quoted that he granted or continued the junction on the basis of the balance of convenience in order to hold the ring until the dispute between the parties could be properly decided at a trial. It is inconsistent with an order such as that, that there should be successful or unsuccessful parties for the purposes of the rules either new or old."

[13] I agree with the sentiments expressed by Lord Justice Morritt. However, so far as the apparently preferred order of costs reserved is concerned, I note that it may be difficult for the trial judge to reconstruct how matters looked when the Plaintiff made its application, particularly as the factors which weighed into the balance of convenience and ultimately tipped that balance in the Defendants' favour may not be relevant at the trial.

[14] ***Silicon Graphics Incorporated & Another v Indigo Graphic Systems (U.K.) Ltd & Others*** [1994] FSR 403 is also instructive. In that case, Knox J identified the two questions which had to be answered when considering what order for costs should be made where the defendant successfully fights off an interlocutory injunction: (i) would it be unfair for the defendants to have the costs of the motion even if they lost at the trial? and (ii) was the launch of the motion justified?

[15] In my view, the Plaintiff's application for injunctive relief was not unjustified because it is the owner in fee simple in possession of the property in dispute by virtue of a certificate of title. I am also of the view that if the Plaintiff is successful at trial and a permanent injunction is granted against the Defendants, it would be unfair for the Defendants to have the costs of the Plaintiff's application for interlocutory injunctive relief.

[16] In the circumstances, I order that the costs of the Plaintiff's application shall be costs in the cause.

DATED this 14th day of May, 2021

TARA COOPER BURNSIDE
JUSTICE (AG)