COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW & EQUITY DIVISION
No. 2018/CLE/gen/1480

IN THE MATTER of section 13 and the other provisions of The Law of Property and Conveyancing (Condominium) Act, 1965 (as amended)

B E T W E E N:

LUCAYAN TOWERS SOUTH CONDOMINIUM ASSOCIATION
(a statutory non-profit body Corporate)

Plaintiff

AND

GRAND BAHAMA UTILITY COMPANY LIMITED

First Defendant

AND

JULIE GLOVER
DAVID GILLIS
TODD KIMBALL
SERGE POITRAS

Second Defendants

Before:	The Honourable Mr. Justice Loren Klein
Hearing Date:	1 October 2021
Appearances:	Meryl Glinton for the Plaintiff
	Edward Marshall II for the First Defendant

RULING

[*Costs*]

KLEIN, J.

Costs—Discretion of the Court—Circumstances justifying departure from 'costs follow the event' principle—Discharge of Injunction—Claim that injunction unjustified—Delay in application to set aside—Discharge unopposed by plaintiff—Conduct of parties—Wasted costs—Change of legal representation by defendant during proceedings

INTRODUCTION AND BACKGROUND

[1] This judgment deals with the costs resulting from the discharge of an interlocutory injunction which the plaintiff obtained against the first defendant (hereinafter referred to simply as "the defendant") on 9 April 2019 in an *ex parte* application before Thompson J.

[2] The injunction was discharged by me on 1 October 2021 pursuant to a summons filed 30 October 2019 by the defendant and supported by the affidavit of Karla S. McIntosh. The defendant also filed written submissions in aid of the application. As it turned out, there was no real fight over the discharge, as the plaintiff did not oppose the application. But the parties radically disagreed over what should be the appropriate costs order.

[3] I heard oral submissions on costs on 1 October 2021, in advance of which the plaintiff provided written submissions dated 29 September 2021. I requested and received supplemental memoranda on 3 and 5 October 2021 from the plaintiff and defendant respectively, dealing with additional issues which could not be addressed during the short oral hearing on the 1 October 2021. The plaintiff relied primarily on the Affidavit of Maurice O. Glinton QC (as he then was) filed on 29 September 2021 (the "Further Glinton Affidavit") and the earlier affidavit filed 17 December 2018 in the action (the "First Glinton Affidavit").

[4] The context in which the injunction was obtained requires a brief explication by way of essential background. The injunction was granted to restrain the first defendant from disconnecting the water supply to the condominium property managed by the plaintiff. Curiously, it was framed as an interlocutory injunction pending the disposition of outstanding litigation between the plaintiff and the *second* defendants (who were only added by amendment on 25 March 2019 to the generally indorsed writ filed 17 December 2018). It was not based on any claim then articulated against the first defendant and, perhaps unsurprisingly, one of the main contentions of the defendant (in its skeleton submission in support of the discharge and in costs submissions) is that there was no basis for the grant of the injunction.

[5] (For a full factual and procedural background on the application for the injunction, see the Ruling of this court in *Lucayan Towers South Condominium Association v. Grand Bahama Utility Company Ltd. and Ors. (Injunction)* [2018/CLE/gen/01480], dated 21 October 2022. This was the Court's ruling on the plaintiff's application for extension of time in which to file a statement of claim pursuant to the generally indorsed writ of 17 December 2018 and for a subsequent injunction following the discharge of the injunction that forms the subject of this costs Ruling.)

THE PARTIES' POSITIONS

[6] Counsel for the defendant, in essence the successful party, made the following main submissions in its claim for costs:

(i) The application for the *ex parte* injunction was an abuse of process as there was no cause of action pleaded against the defendant and no right to the injunction, which was ostensibly sought for the purpose of preventing the defendant from enforcing its contractual rights.

(ii) The plaintiff kept the injunction in place for over six months and refused to agree to its discharge except on costs terms favourable to it, even refusing to agree an order for costs to be taxed if not agreed (which they were not).

(iii) The plaintiff was the successful party, as the order was discharged, and ordinarily costs should follow the event: *Scherer v. Counting Instruments Ltd.* [1986] 2 All E.R. 529 at 536 (per Buckley L.J.).

(iv) The defendant is not guilty of any conduct that was calculated to occasion unnecessary litigation or costs, such as might justify depriving the defendant of its costs or any part of its costs in accordance with the principles enunciated by the UK Court of Appeal in *Ritter v Godfrey* [1919] 2 K.B. 47 (applied numerous times in this jurisdiction: see for example, *Cable Bahamas Ltd. v. Rubis Bahamas Limited and another* [2017] BHS J. No. 143; and *Bethel v. Knowles Estate* [1999] BHS J. No. 144).

(v) The defendant should not be made to bear the costs of several adjournments before Thompson J., which are now only being claimed, as the plaintiff never indicated that it intended to seek wasted cost in respect of those appearances and the costs of those appearances were not reserved. Therefore, this court should not now 'go back in time' to entertain the plaintiff's application for those costs.

(vi) The appropriate cost order would be to award the defendant its costs of and occasioned by the summons to discharge the injunction, to be taxed if not agreed, or alternatively, to summarily fix the costs in the amount of $20,000.

[7] In their original costs submissions and in response to defendant's arguments, the plaintiff submitted that:

(i) The defendant did not oppose the injunction in the nearly 10 months of which they had notice of it, following the filing of the generally indorsed Writ in December 2018, and allowed it to remain in place for nearly 6 months after its grant in April 2019 before filing an application for its discharge.

(ii) That, from as early as November 2019, the plaintiff indicated to the defendant that it was not opposed to having the injunction discharged, and had the defendant alerted the plaintiff to its desire to set aside the injunction prior to filing the summons, the parties might have avoided unnecessary litigation and wasted costs.

(iii) On several occasions, the defendant failed to attend in person or by counsel, thereby causing the plaintiff to expend costs in preparation for such hearings, which rightly ought to be paid by the defendant to the plaintiff.

(iv) That on the last appearance before Thompson J., counsel for the plaintiff submitted to the court that the injunction should be discharged, and counsel for the defendant opposed it.

(v) Although the plaintiff consented to the discharge of the injunction, it does not agree that there was no basis for its grant. The application for the discharge was premature, as the plaintiff had not yet filed a statement of claim in which to articulate its claims.

(vi) That the defendant's conduct is such that the Court should make no order as to costs, or otherwise should award the plaintiff the costs of several of the attendances before Thompson J. and for the hearing before this court. At the very least, the court should limit the defendant's costs, and in any event the costs claimed were exorbitant.

Costs principles

[8] The principles governing the award of costs are too familiar to require anything more than a brief recitation. I highlight only three leading principles. Firstly, costs are awarded in the discretion of the court. This principle is stated at s. 30 of the Supreme Court Act as follows:

> "s. 30: 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 shall have the full power to determine by whom and to what extent the costs are to be paid."

[9] Secondly, although the discretion is very broad, it is not unfettered and must be exercised in accordance with prescribed rules and principles. The imperative principle is that the party who is successful in any proceedings or application should usually be paid its costs from the

unsuccessful party—i.e., 'costs follow the event' principle. This is stated in Ord. 59, r.3 (1) and (2) of the Rules of the Supreme Court (R.S.C.) 1978 as follows:

> "3. (1) Subject to the following provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceeding except under an order of the Court.
>
> (2) 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."

[10] As indicated in the above rule, the Court may depart from the 'costs follow the event' principle where justified by the circumstances: R.S.C., Ord. 59, rr. 7(1) and (2).

> "7. (1) Where in any cause or matter any thing is done or omission is made improperly or unnecessarily by or on behalf of a party, the Court may direct that any costs to that party in respect of it shall not be allowed to him and that any costs occasioned by it to other parties shall be paid by him to them.
>
> (2) Without prejudice to the generality of paragraph (1) the Court shall for the purpose of that paragraph have regard in particular to the following matters, that is to say —
> (a) the omission to do any thing the doing of which would have been calculated to save costs;
> (b) the doing of any thing calculated to occasion, or in a manner or at a time calculated to occasion, unnecessary costs;
> (c) any unnecessary delay in the proceedings."

[11] In *Ritter v. Godfrey* (*supra*, at pg. 60), on which the plaintiff relies, Atkin L.J. stated the principle like this:

> "In the case of a wholly successful defendant, in my opinion the judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation, or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains."

[12] Thirdly, and this is less of a principle than a commonsense observation, while the rules and principles provide a convenient framework for consistency in the making of costs orders, the court's exercise of its discretion in any given case will depend on the unique features of that case. In *Bolton MDC v. Secretary of State for the Environment* [1995] 1 W.L.R. 1176 (at 1178-f) the House of Lords remarked that:

> "…in all questions to do with costs, the fundamental rule is that there are no rules. Costs are in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule."

[13] One of the best-known overall summaries of the general principles governing costs remains that of Buckley L.J. in *Scherer v. Counting Instruments Ltd.* (*supra*) (cited by the plaintiff) where His Lordship distilled the following principles from the case law [p. 536]:

> "(1) The normal rule is that costs follows 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 judicially exercised, 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 functions. (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 exists 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 his discretion … the opposing party may properly be ordered to pay his costs. […] (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."

DISCUSSION AND ANALYSIS

[14] I do not intend to deal with each of the arguments and allegations relied on by the parties in their submissions, but only to outline my reasons in respect of several of the more heavily contested issues.

Relevance of plaintiff's consent to discharge

[15] The plaintiff makes heavy weather of the fact that it was prepared to consent to the discharge of the injunction (and had indicated its intention to do so early on), which it contends should either militate against the grant of costs or mitigate any costs order made. It says it received notice of the application for the first time via email of 13 November 2019 from the defendant's counsel, and that had it been alerted to the plaintiff's intention to make an application, the parties might have been able to save the time and expense associated with that process by agreeing a consent position. In this regard, the plaintiff sets out in the Further Affidavit of Maurice O. Glinton QC, filed in opposition to the application for costs, a series of email correspondence between counsel for the plaintiff and defendant between 16 July and 10 August 2020.

[16] The thrust of that correspondence, some of it contentious, was to explore possible terms on which the parties could agree to discharge the injunction by a consent order providing for costs. The defendant asserted that it was entitled to recover its costs, which it assessed at $26,557.05, and which it indicated it was prepared to settle at a discount of 10%, i.e., for $ 23,557.05. The plaintiff rejected this as being "too high", citing in particular several occasions on which there was either no appearance by the defendant, or at which counsel appeared but did not go on the

record. This was because counsel was then caught in limbo (my words) between a pending change of representation of the defendant (from Graham Thompson & Company ("GTC") to Delaney Partners) and the transfer of the client's files to the latter firm. The plaintiff did not, however, make any counter-offer to the defendant's proposal for costs, although counsel for the plaintiff contended that this was largely due to the repeated failure of the defendant to respond to its request for a breakdown of its claimed costs.

[17] In my view, the nature and eventual outcome of the correspondence between the parties betrays the plaintiff's assertion or hope that pre-litigation discussions may have resulted in an agreement and averted litigation. It seems to have been accepted at the final appearance on 26 February 2020 before Thompson J. (see further below) that costs would not be agreed and the discharge application would have to be heard.

[18] The fact that the plaintiff did not oppose the discharge of the injunction does not mean that the costs of the application to set aside the injunction should not be recoverable by the defendant. Neither does anything turn on the indication that the plaintiff may have been minded to withdraw the action, and even filed a summons on 20 January 2020 seeking leave for that purpose. As events developed, the withdrawal application was not pursued and, as later proceedings bear out (see 'Injunction Ruling' referred to *supra*) the action was in fact proceeded with against the first defendant. Thus, the defendant was still put to the expense of filing a summons and affidavit, along with submissions, to have the injunction discharged and to appear for that purpose. The defendant's summons to discharge contained a prayer for the plaintiff to "*pay the costs of and occasioned by this application to the first defendant, forthwith, to be taxed if not agreed*."

[19] In the circumstances, I would hold that the defendant is entitled to its costs on the 'costs follow the event' principle. However, the fact that the discharge was unopposed reduced the time and costs that would ordinarily have been expended arguing the merits of the discharge application, and this would necessarily entail some discount. Significantly, while counsel for the plaintiff did not oppose the discharge, there was no capitulation to the assertion that the grant of the injunction was not justifiable. In fact, counsel for the plaintiff contended that the application to discharge on the basis of no cause of action was "premature", as a statement of claim had not yet been delivered, which presumably would have identified the legal interest of the claimant meriting protection. Mr. Marshall countered that, apart from there being no claim against the first defendant, the plaintiff's affidavit evidence (Further Glinton Affidavit) conceded that the "*primary objective for putting an injunction in place was to ensure against interruption of services because of the Association being seriously delinquent in paying for such services to justify such measures by [the] first defendant at the precise time when such termination of services is unexpected*."

[20] The contention that the application to discharge was premature in the absence of a statement of claim is clearly without merit. While it became unnecessary to consider the merits of the injunction because there was no formal opposition to its discharge, the suggestion that a party could obtain an injunction and defer until the filing of the statement of claim to identify the basis for the legal or equitable right protected by that injunction is unsound. A claimant for an injunction, interlocutory or final, must demonstrate the basis for the grant and provide the supporting evidence at the time of application.

Plaintiff allowing the injunction to remain in place for inordinate period

[21] I likewise have some considerable difficulty understanding the defendant's contention that the plaintiff was somehow at fault in allowing the injunction to remain in place for over 6 months and its relevance to the issue of costs. Firstly, the defendant itself did not enter an appearance to the claim until 11 July 2019 (initially by the firm of GTC), nearly 3 months after the *ex parte* injunction was obtained. Further, the application to discharge was not made until 30 October 2019. To be sure, a party who obtains an interlocutory injunctive order is obligated to progress the matter expeditiously. But a defendant who is subjected to an *ex parte* injunction that it thinks is irregular or, as was alleged in this case, lacks any basis in law, is obligated to move promptly to have it set aside. As observed by Hirst LJ in *East Hampshire DC and Anor v. Scott and Another* (1993) UK Court of Appeal, unrept. ([1993] Lexis Citation 2214):

> "In my judgment, in an appropriate case it is not only legitimate but correct that an interlocutory injunction should be granted until trial or further order, and without specification of a return date; and for the plaintiff to rest on his ex parte injunction thereafter without instituting further interlocutory proceedings, leaving it to the defendant, if he chooses to do so, to apply to discharge the ex parte injunction."

[22] The duration of the injunction might well be relevant to any claim for damages if that were to be pursued by the defendant, in accordance with the standard undertaking given by the plaintiff. But while the issue of damages appears to have been raised obliquely in correspondence, none were claimed.

Wasted costs order

[23] Based on the parties' pleadings and the Court's file, it appears that there were some five appearances before Thompson J. in connection with these proceedings: 8 March 2019, 9 April 2019, 20 January 2020, 5 February 2020 and 26 February 2020. The defendant claims that it should be entitled to wasted costs, at the very least, for the two appearances in February 2020. As to the circumstances of the hearings, this is how they apparently occurred. It appears that the defendant did not have notice of the first hearing and the matter (both the defendant's application for discharge and the plaintiff's foreshadowed application to withdraw) was adjourned to 20 January 2020. The 9 April 2019 was the *ex parte* application for the injunction. On 20 January 2020, Mr. Marshall attended and apparently held a watching brief for the defendant, which was then in the process of instructing Delaney Partners, for whom Mr. Marshall (formerly of GTC) appeared, now as a partner in that firm. On the 5 February 2020, Mr. Marshall attended, but again was not able to appear formally on the record. Mr. Marshall appeared formally on the record for the first time at the hearing of 26 February 2020, having filed a notice of change of attorney in favour of Delaney Partners on 19 February 2020. At this hearing, both parties indicated their agreement in principle to the discharge of the injunction, but it was clear that they were worlds apart on the issue of costs. The application was therefore reserved for hearing by another Judge, as Justice Thompson was then about to commence pre-retirement leave.

[24] The plaintiff, as it indicated in its submissions, might have been extending professional courtesy to the defendant in not taking any objections to the adjournments, having become aware of the evolving situation with a change of representation. But it could have pressed the issue both as to representation and costs at the hearings of 20 January and 5 February 2020, as

GTC was formally on the record for the defendant. It certainly could have done so at the hearing of 26 February 2020, when Delaney Partners was substituted for GTC and Mr. Marshall appeared on their behalf.

[25] The plaintiff prays in aid Order 59 r. 4, which provides that "*costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings."* This rule, which is facultative of the court's wide powers to deal with costs, certainly allows the court to award costs incurred at earlier stages of the proceedings. But in my view, it does not empower the Court to award costs where none had been claimed or reserved, or where a party's attitude made it reasonable to apprehend they would not be claiming costs (see, for example, *Cable Bahamas Ltd. v Rubis Bahamas Ltd. and another* (*supra*), where the Bain J. refused costs for an adjournment which was agreed by the plaintiff and to which the defendants did not object).

[26] In summary, the costs implications of the appearances are as follows: no costs were recoverable for the 8 March 2019, as the defendant had not been notified of the hearing; the costs of the *ex parte* application of 9 April 2019 were reserved until trial (which has now fallen away by the discharge of the injunction); on the 20 January and the 5 February there were no appearances on the record for the defendant (which the plaintiff did not oppose); and on 26 February 2020, the Court, not unreasonably, adjourned the application for a hearing by another judge. I do not therefore think that it is appropriate for the plaintiff to now claim costs in respect of those appearances in February 2020, or for the plaintiff to be awarded wasted costs for them.

Conduct of parties

[27] The plaintiff makes several allegations that the conduct of the defendant is such that the court should make no order as to costs, that is, the defendant should be deprived of their costs. As indicated, the fact that the defendant may have delayed with respect to formally objecting to the injunction and applying to discharge it is neither here nor there with respect to its entitlement to costs for the discharge, in contrast to any claim that might be made for damages.

[28] I have already expressed the view that there is nothing in the correspondence between the parties to impugn the conduct of the defendant any more than that of the plaintiff, or to suggest that it did not make efforts to try to agree a consent position. Even if one takes the view that the amount claimed by the defendant was disproportionate to the application (which is the view of the plaintiff)—and I will come to this shortly—there was the alternative for costs to be taxed if not agreed. The defendant cannot be faulted for seeking to protect its costs position with an order, which in any event was necessary for the matter to proceed to taxation (RSC, O. 59, (3)1) and, apparently this was the basis on which it objected to the discharge of the injunction without the protection of an order providing for taxed costs.

[29] In all the circumstances, I do not find anything in the conduct of the plaintiff that would justify any departure from the basic principle in adversarial proceedings that costs should follow the event.

Quantum

[30] Counsel for the plaintiff in oral submissions contended that the amount of costs sought by the defendant in the email exchanges was "exorbitant" (the original figure was just over $26,000)

and that there was in fact no breakdown or justification, such as would be provided in a draft bill of costs. I myself requested of counsel for the defendant during the hearing of 1 October 2021 some explanation as to basis for the figure.

[31] Mr. Marshall's reply was that it included reviewing and analyzing pleadings served on the defendant, the drafting of the application, affidavit and submissions, which he indicated was done with a view of getting a quick hearing date, and the one appearance on 26 February 2020, when the matter was reserved for hearing. Finally, he submitted that the offer to have the costs taxed would have allowed the plaintiff to dispute whether any of the costs claimed were reasonably incurred or not.

[32] As noted, by the time the application came on for hearing, the defendant was seeking its cost of and occasioned by the application to be taxed if not agreed, or summarily assessed at $20,000. This might not be an unrealistic sum for the discharge of a contested injunction in a complex commercial matter. But this was not such a case, and I agree that this figure tilts too far toward the high end, having regard to all the circumstances of this case. In particular, some deduction must be made for the fact that the plaintiff did not oppose the discharge and therefore did not unreasonably increase the length or costs of the proceedings. The only appearance at which the defendant was properly on the record was the hearing of 26 February 2020, and the hearing before this court (mainly on the costs issue) occupied just a little over 2 hours.

CONCLUSION AND DISPOSITION

[33] As will be apparent from the foregoing discussion, I find nothing in the plaintiff's submissions to dissuade me that the orthodox principle that costs follow the event should not apply in this case. The injunction was discharged. The fact that it was unopposed might warrant a discount, but does not disentitle the defendant to its costs.

[34] Considering the relative lack of complexity of this matter, I also do not think that it would be an effective use of judicial resources to order taxation before a master, which will only entail further delay and possibly increase the costs for one or both parties.

[35] Having carefully considered the submissions of counsel and the evidence, as well as the relevant authorities and principles, I consider that an award of $12,000.00 for the first defendant's costs is appropriate in the circumstances, and I so order.

Klein, J.

21 October 2022