



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. 143

BETWEEN:

JAMES ALEXANDER FORTESCUE WATLINGTON

Plaintiff

-and-

SHAWN THOMAS

Defendant

RULING (COSTS)

Application for Indemnity Costs by Plaintiff, when the Defendant was successful, but the Court formed a view that the conduct of the Defendant fell below an acceptable standard

Date of Hearing: Application on the Papers

Date of Ruling: 20 March 2025

Appearances: Paul Harshaw, Canterbury Law Limited, for the Plaintiff

Marc Daniels, Marc Geoffrey, for the Defendant

RULING of Mussenden CJ

Introduction

1. This matter commenced by way of a Specially Indorsed Writ of Summons issued 16 May 2022. The Statement of Claim set out that by a Promissory Note dated 1 September 2013 the Defendant borrowed from the Plaintiff the principal sum of \$50,000, which along with interest, had not been repayed in full by the Maturity date of 31 August 2016. The Plaintiff accepted that the Defendant had made some payments and thus he claimed the principal sum of \$40,437.62 and accrued interest in the sum of \$9,260.15 at the date of the Writ along with continuing interest and costs.

Background

2. On 27 June 2022 judgment in default of a defence (“**Default Judgment**”) was granted for the principal sum of \$40,437.62, accrued interest in the sum of \$9,260.15 and continuing interest.
3. The Defendant made two applications to be determined by the Court:
 - a. By a summons dated 26 October 2022, the Defendant sought an order that the Judgment dated 27 June 2022 be set aside and that the Provisional Order dated 24 August 2022 be set aside. It should be noted that on 24 August 2022 the Plaintiff’s costs were taxed pursuant to the Default Judgment and that an order was made on a *nisi* basis, which order became absolute on 14 September 2022 (the “**Provisional Order**”).
 - b. By a summons dated 17 March 2023, the Defendant sought an order that the sum of \$49,959.78 awarded in default dated 27 June 2022 be varied to \$32,730 and that the Provisional Order dated 24 August 2022 be varied in accordance with the Default Judgment.
4. On 25 October 2023, I determined both applications and I issued a written Ruling that same day.

5. The Defendant withdrew the summons to set aside the Judgment. I granted costs to the Plaintiff on a standard basis.
6. In respect of the application to vary the judgment sum, I did allow the variation of the judgment sum to \$38,147.33. However, I adjourned the hearing on costs stating at paragraph 10:

“I have considered the evidence of Mr. Thomas and the nature of how this litigation has been conducted. Mr. Thomas’ allegations are serious as well as his exhibiting the details of a private and confidential complaint. In any event, he has resiled from the original defences or assertions and has accepted the legitimacy of the Promissory Note and thus made payments. In my view, his conduct as respect the original denials and the allegations of dishonesty in this matter has fallen below an acceptable standard which could be met in costs. Therefore, I will hear the party on costs of the application to vary the judgment, to be listed in a Chambers hearing on a date to be agreed by counsel (a 30-minute time slot at noon).”
7. In any event, it was not possible to set the matter for a hearing. I then resolved to determine the matters on written submissions.

Law on Costs

8. The Rules of the Supreme Court (“**RSC**”) Order 62 rule 3 sets out the following:

62/3 General principles

- (1) This rule shall have effect subject only to the following provisions of this Order.*
- (2) No party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the Court.*
- (3) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall 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.*
- (4) The amount of his costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis where—*
 - (a) an order is made that the costs of one party to proceedings be paid by another party to those proceedings, or*
 - (b) an order is made for the payment of costs out of any fund, or*
 - (c) no order is required,**unless it appears to the Court to be appropriate to order costs to be taxed on the indemnity basis.*

9. In the case of *In re Elgindata Ltd. (No. 2)* (C.A.) [1992] 1 W.L.R. 1207 at 1214 Nourse L.J. set out the general principles of awarding costs:

*“(i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, **but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs,** (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, **the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs**” [Emphasis added]*

Law on Indemnity Costs

10. The RSC Order 62 rule 12(2) sets out the following:

“On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party; and in these rules the term “the indemnity basis” in relation to the taxation of costs shall be construed accordingly.”

11. In *St. John’s Trust Company (PVT) Limited v Medlands (PTC) and Ors* [2022] CA (Bda) 18 Civ (2 November 2022) the Court of Appeal for Bermuda clarified that the correct approach to indemnity costs in Bermuda is to apply the approach of the Courts of England and Wales, namely the ‘*out of the norm*’ test. I set out the relevant principles in *BS&R Group Ltd v Westport Architecture (Indemnity Costs)* [2024] SC (Bda) 33 Civ.

Plaintiff’s Application

12. Mr. Harshaw submitted that, on the Court’s finding about the Defendant’s conduct, that is, “*conduct as respect the original denials and the allegations of dishonesty in this matter*”, then the only proper order is for the Defendant to pay the costs of the Plaintiff on an indemnity basis. He relied on the Court’s judgment in *BS&R Group Ltd* at paras 34 – 36.

Defendant's Submissions

13. Mr. Daniels did not file any submissions on costs when the matter was first set to be determined on the papers in July 2024 or later on in January 2025 when the Court invited further submissions on indemnity costs taking into account the case of *BS&R Group Ltd* wherein the relevant test for indemnity costs had been clarified by the Court of Appeal.

Analysis

14. In my view I shall exercise my discretion to make no order as to costs. First, I acknowledge that on the summons to vary the judgment sum, the Defendant was successful.

15. Second, I did state in my Ruling that the conduct of the Defendant as respect the original denials and the allegations of dishonesty had fallen below an acceptable standard which could be met in costs. Upon a detailed review of the conduct of the parties, I note the following:

- a. The Writ claimed the principal sum of \$40,437.62 and accrued interest in the sum of \$9,260.15.
- b. In his First Affidavit sworn 14 September 2022 (incorrectly dated 14 September 2021), in support of the application to set aside judgment, the Defendant stated that his review of accounts led to his realisation that no funds were received from the Defendant. Although he did not dispute signing a Promissory Note, his position was that he never received funds from the Plaintiff and he did not receive any proof that the Plaintiff had made payments on his behalf to a third party. He then accused the Plaintiff of an illegal and unauthorized closure of the Cake Shop and made a formal complaint about his alleged conduct (the “**Complaint**”), which is private and confidential.
- c. In a document entitled “Defense” dated 14 September 2022, the Defendant pleaded that although he was making payments to the Plaintiff, he did not have a record of receiving the funds from the Plaintiff. Thus, he requested that the Plaintiff provide proof of monies paid to him or on his behalf to validate his claim.

- d. In the affidavit of the Plaintiff sworn 6 January 2023, resisting the application to set aside judgment, the Plaintiff stated that the substance of the Complaint was not set out in the Defence or the Defendant's First Affidavit where he would be called upon to particularize and prove the allegations; thus the Complaint was designed to sully the Plaintiff's reputation rather than serve a legitimate purpose. The Plaintiff rejected the Defendant's position that he did not loan the Defendant \$50,000, which was paid to the vendors on behalf of the Defendant. In his Second Affidavit sworn 2 February 2023, the Plaintiff exhibited the Promissory Note dated 1 September 2013 and the cheque dated 26 November 2013, made out to a third party on the Defendant's behalf.
- e. In his Second Affidavit sworn 26 May 2023, the Defendant confirmed that he had borrowed the sum of \$50,000 and had made some payments but had fallen behind. He then queried the record of payments in support of his application to vary the judgment sum. He stated that, having reviewed the Plaintiff's Second Affidavit, he was made aware that a cheque of \$50,000 had been paid to the third party on his behalf, notwithstanding that the Promissory Note never stipulated the manner in which the funds would be transferred or made them payable to a third party. The Defendant stated that, in respect of the application to vary the judgment sum, his counsel had tried to obtain the Plaintiff's agreement for a consent order that the amount of his claim was not accurate at the time that he had made it, but the Plaintiff through his counsel had refused, thus he sought an order from the Court to vary the judgment sum. I should add here, that having accepted the evidence of the Chartered Accountant Ms. Nesbitt, I did grant the application to vary the judgment sum. In doing so, I rejected the Plaintiff's submission that the Defendant could have relied on the Plaintiff's undertaking not to seek to enforce the judgment for more than was properly due.
- f. In the skeleton argument filed by the Defendant, submissions were made in support of the Defendant's position as set out above. Further, it set out that the Defendant was reluctant to accept the cheque as *prima facie* evidence of payment made on his behalf due, in part, to his claims that there was a second promissory note, dated 13 June 2016 (the "**Second Promissory Note**") purportedly entered between the

Defendant and two third parties. The Defendant alleged that the Second Promissory Note did not bear his true signature, which then became the subject of a police investigation. Thus, the comments made by the Defendant in his affidavit clearly related to the Second Promissory Note, a contract to which the Plaintiff was not a party, although the Defendant asserted that the document rested with the Plaintiff as sole attorney with oversight of the transaction; the result being that the Plaintiff was conflating the two issues. To the point of the Second Promissory Note, the Plaintiff in a letter dated 4 August 2022 acknowledges the existence of the Second Promissory Note and stated that it did not have anything to do with him. The submissions then addressed the application to vary the judgment sum. The submissions set out that added costs were incurred in attempting to resolve the matter as the Plaintiff refused to acknowledge that the judgment sum should be less than the claimed amount and refused to enter into a consent order for the correct outstanding balance.

16. Third, in respect of the application to vary the judgment sum, having considered the evidence and the conduct of the parties, I do not find that the conduct of the Defendant was ‘*out of the norm*’ such as to award costs on an indemnity basis as requested by the Plaintiff. The main reason is that in the Defendant’s Second Affidavit, he resiled from his earlier position in his First Affidavit having reviewed the affidavit evidence of the Plaintiff. To my mind, it is reasonable to take a new position once sufficient evidence has been provided to rebut the position in an earlier statement. In my view, it would be unreasonable and out of the norm, to maintain an incorrect position in the face of credible documentary explanatory evidence. I rely on *Esure Services Ltd.* that these matters were not outside the ordinary and reasonable conduct of proceedings.

17. Fourth, in respect of the allegation of dishonesty, I accept the submissions of counsel for the Defendant, that there was some concern of the Defendant with the circumstances of the Second Promissory Note which did not have anything to do with the Plaintiff as it involved other third parties.

18. Fifth, I will not take into account the circumstances of the Complaint by the Defendant, as that matter is private and confidential, and the Court is not seized of the Complaint.
19. Sixth, in my Ruling of 25 October 2023, I stated that I did not find any merit in considering the undertaking.
20. Seventh, in respect of the application to vary the judgment, the Defendant went to some lengths to establish the correct amount for the judgment sum. The Chartered Accountant found a different sum from both the Plaintiff and the Defendant. In any event, it was open to the Plaintiff to enter into a consent order in the sum calculated by the Chartered Accountant rather than seek to rely on the undertaking.
21. Eighth, in all the circumstances of this case, in my view I should not follow the usual order that costs follow the event due to the Defendant's conduct including his initial prolonging of the events. However, I am not minded to award costs to the Plaintiff either, due to the course of offering an unlikely undertaking (which was not accepted by the Court) and for not agreeing to a consent order for a corrected amount.

Conclusion

22. In light of the reasons set out above, in respect of the application to vary the judgment sum, the Court makes no order as to costs.

Dated 20 March 2025



HON. MR. LARRY MUSSENDEN
CHIEF JUSTICE OF THE SUPREME COURT