# In The Supreme Court of Bermuda

**CIVIL JURISDICTION**
**2004: 2**

**WANDA FRANCIS**

**Plaintiff**

**-v-**

**SIMON CARRUTHERS**

**Defendant**

## RULING ON COSTS

Date of hearing: April 18, 2007
Date of Ruling: April 30, 2007

Mr. Leo Mills, Trott & Duncan, for the Plaintiff;
Mr. Dennis Dwyer, Wakefield Quin, for the Defendant.

**Introductory**

1. On May 31, 2006, I reserved the issue of costs in giving judgment in this action in the following terms as set out in my judgment of that date:

> "51. *The Plaintiff's claim for damages succeeds as regards the Defendant's liability for breach of his covenant to deliver up the premises in a tenantable condition. As far as her claim for damages is concerned, the Plaintiff's claim is allowed in part and dismissed in part and she is awarded the sum of $12,580.*
>
> *52. The Defendant's counterclaim for damages for breach of the Plaintiff's covenant to keep the exterior of the building in good repair succeeds, but his claim for negligent damage to his car fails. In terms of damages, the Defendant's claim for breach of the landlord's duty to maintain the structure of the premises is allowed in part and dismissed in part, and he is awarded $1000 in this regard."*

2. Mr. Dwyer for the Defendant tendered extensive written submissions on the new costs regime and invited the Court to give guidance as to how the new Order 62 should be applied in cases such as the present where it was strongly arguable that a simple application of the usual "costs follow the event" rule would be inappropriate. Accordingly, I reserved judgment after hearing argument on costs.

**Provisional views on costs**

3. In my May 31, 2006 Judgment, I observed as follows:

*"53.I will hear Counsel, if needs be, as to costs, but will set out my provisional views as to* [the] *appropriate approach in a case where the parties declined to follow the Court's encouragement before trial to reach a settlement in a case which could obviously have been compromised if common sense had prevailed. As the Defendant's main expert's report supported the Plaintiff's claim to some extent, this trial (when it effectively started) was never seriously about liability at all and substantially a controversy on quantum with modest sums involved.*

*54.Both parties' claims have to some extent succeeded. But the Plaintiff's award represents 91.85% and the Defendant's award 8.15% of the total sum awarded. At the beginning of the trial, the Plaintiff sought $27,522.94 and the Defendant sought $4130, or 88.95% and 13.05%, respectively, of the total amount claimed. So the Plaintiff has substantially succeeded, and applying the usual rule that costs should follow the event, should be awarded her costs of the action. However, I would only award her 90% of the total sum awarded on taxation, if not agreed, in light of the fact that the Defendant's much smaller Counterclaim also succeeded. In the ordinary case I might have simply awarded the Plaintiff all of her costs and the Defendant a proportion of his Counterclaim costs. However, it is my provisional view that it would not be just to expose the Plaintiff to any possibility having to share in the costs of the Defendant's experts.*

*55.Calling three expert witnesses in a "small money" case, both in terms of their likely expenses and the impact on the length of the trial, was disproportionate to the sums in issue, and could only have been justified if the evidence adduced was capable of producing a complete answer to the Plaintiff's claim*[1]*. The Defendant's expert evidence was not, it emerged, capable of doing more than (a) reducing the quantum of the Plaintiff's claim and (b) supporting a counterclaim worth roughly 10% of the total sums at issue. A Defendant, albeit with a valid counterclaim, ought not to be rewarded in costs for deciding to spend more (or nearly as much) money in legal and experts' fees than would reasonably be required to settle a substantially valid claim*[2]*."*

**Parties' settlement negotiations and payment into court**

4. The matter was set down for trial in February 2005, but this hearing was vacated on the Defendant's application. It was then fixed for trial on January 12-13, 2006 when the Defendant applied for (a) leave to amend his Defence to add a Counterclaim, (b) leave to adduce expert evidence and (c) an adjournment of the trial. The amendment application was granted on January 12, 2006 and the other applications granted on January 13, 2006, with the costs of both days hearings awarded to the Plaintiff and ordered to be payable forthwith.

5. In adjourning the trial to enable the Defendant to advance expert evidence in support of a new counterclaim, I requested the parties to seriously consider settlement because it seemed likely that the costs of a trial would be disproportionate to the sums of money in dispute.

6. It is common ground that no settlement offer which came close to the net amount the Plaintiff has recovered ($11,580) was made by either party. On August 5, 2005, $2500 was paid into Court by the Defendant. However, pursuant to the Court's encouragement to the parties to pursue a commercially sensible settlement, on January 23, 2006 the Defendant's attorneys made the following "*Calderbank*" offer:

[1] The Defendant was granted leave to adduce expert evidence on the premise that such evidence would support his case that all damage complained of constituted merely fair wear and tear. Mr. Feathers, the Defendant's most eminent expert, opined in his pre-trial report that at least 25% of the damage complained of by the landlord would have been the responsibility of the tenant.

[2] If the Plaintiff rejected an offer of $**12,580** or more from the Defendant, the costs position will likely be entirely different, of course.

> "*Please be advised that our clients offer in full and final settlement…of your client's claim the total sum of $10,000 which is inclusive of the amount already paid into court of $2500. Please note that this offer is made pursuant to the provisions of Order 22 Rule 14 of the Amended Rules of the Supreme Court.*
>
> *Please acknowledge safe receipt and advise within seven days if the offer is accepted, if not we shall continue to employ an expert with a view to complying with paragraph 1 of the said Order*."

7. This offer was rejected by the Plaintiff, who was seemingly looking to recover by way of settlement a sum in the region of $20,000. No counter-offer was formally made. In the event she has recovered $1580 in excess of the sum tendered by the Defendant on January 23, 2006. According to her Bill of Costs (which Mr. Dwyer indicated was not as such disputed[3]), the Plaintiff incurred costs in the region of $6000 after that settlement offer was made.

8. So while it is obvious that the Plaintiff should be entitled to her costs before the settlement offer was made, it is far from obvious that she should recover all of her costs after such offer was made. Is it reasonable to award the Plaintiff the entirety of costs likely to be taxed in an amount of roughly four times the amount recovered in excess of the Defendant's settlement offer, in circumstances where she has made no reasonable counter-offer, and disregarded the Court's advice that proceeding to trial would likely be wasteful in terms of the level of costs incurred?

9. My provisional view that the Plaintiff should simply be awarded a percentage of her costs reflecting the respective percentages of the sums awarded to each party was complicated by the "*Calderbank*" offer being so close to the amount recovered.

**Counsel's submissions**

10. Mr. Mills submitted that there was no reason why the costs should be taxed at the Magistrates' Court scale or that costs should not follow the event. This would reflect the "*justice of the case*": *Veracchia-v- Metropolitan Police Commissioner* [2002] 1 W.L.R. 2409.

11. Mr. Dwyer submitted that costs should be awarded at the Magistrates' Court scale, if at all. This is because as of March 24, 2005, the Magistrates' Amendment Act increased the jurisdiction of the Magistrates' Court from $10,000 to claims worth $25,000. The Plaintiff's recovery fell within the lower court's jurisdiction, even though the amount claimed was still outside the limit and the amount recovered was above the limit when the action was commenced.

12. However, his primary submission was that no order should be made as to costs at all applying the principles in *Mayor and Burgesses of London Borough of Hackney-v- Campbell* [2005] EWCA Civ 613 and *Veracchia-v- Metropolitan Police Commissioner* [2002] 1 W.L.R. 2409. This would be appropriate because there had been partial success on both sides but no adequate basis on which to make an apportionment. Counsel invited the Court to hold that (a) whether or not a party was successful on an issue was more important than the reasonableness in raising the issue and (b) where evidence relevant to issues on which a party succeeds and fails overlaps, it may be just to award the successful party a proportion only of their costs: *Liverpool City Council –v- Rosemary Chavasse Ltd.* (1999)[4] Because of the complications involved in issue-based orders, percentage orders are generally to be preferred: *English-v- Emery Reimbold and Strick Ltd.* [2002] 1 W.L.R. 2409.

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[3] The Court may have misunderstood Counsel, whose Written Submissions speak of the need to "*avoid a lengthy and costly taxation hearing*".

[4] Cited on this point at paragraph 66.12 (b) of Blackstone's Civil Practice.

**Findings: applicable legal principles**

13. The dominant guiding principle, which is uncontroversial, is that costs must be ordered by the Court and normally follow the event:

> "**62/3 General principles**
> *3 (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."*

14. Of particular relevance is the extent of statutory guidance provided as to what factors may be taken into account in exercising the general discretion to award costs. The following provisions of Order 62 are germane in this regard:

> "**62/9 Matters to be taken into account in exercising discretion**
> *9 The Court in exercising its discretion as to costs shall take into account —*
>
> *(a) any offer of contribution brought to its attention in accordance with Order 16, rule 10;*
>
> *(b) any payment of money into court and the amount of such payment;*
>
> *(c) any written offer made under Order 33, rule 4A (2); and*
>
> **(d) any written offer made under Order 22, rule 14, provided that the Court shall not take such an offer into account if, at the time it is made, the party making it could have protected his position as to costs by means of a payment into court under Order 22.**
>
> **62/10 Misconduct or neglect in the conduct of any proceedings**
> *10 (1) Where it appears to the Court in any proceedings that any thing has been done, or that any omission has been made, unreasonably or improperly by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party…"*[emphasis added]

15. Although Order 22 rule 14 of the Rules, according to its terms, merely permits an offer to be made without prejudice save as to costs, its main purpose is to enable a party not in a position to make a payment into Court to make a settlement offer. Order 62 rule 9 (1)(d), in providing that a "*Calderbank*" offer shall not be taken into account where payment into Court could have been made, means that it is open to a Court to conclude that payment into Court could have been made and to ignore the offer altogether. No explanation has been given as to why payment in was not possible, nor has any point been formally taken that on these grounds the

offer ought to be ignored[5]. The general approach to construing Order 62 rule 9 (d) has been judicially defined as follows:

> "*Furthermore, in approaching the interpretation of Ord 62, r 9(1)(d) and, indeed, the general question of the interpretation and effect of a letter of a kind written by Kennedys on 17 February 1994, it is in my judgment necessary to bear in mind that the policy of the courts is to encourage every proper means whereby a party is made to realise that steps should actively be taken by him to bring the litigation to an end. In Cutts v Head [1984] 1 All ER 597 at 605, [1984] Ch 290 at 306 Oliver LJ said:*
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> *'That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation ... As a practical matter, a consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement, whilst, on the other hand, it is hard to imagine anything more calculated to encourage obstinacy and unreasonableness than the comfortable knowledge that a litigant can refuse with impunity whatever may be offered to him even if it is as much as or more than everything to which he is entitled in the action.'*"[6]

16. What does the proviso to Order 62 rule 9 (1)(d) contemplate as circumstances in which a defendant "*could have protected his position as to costs by means of a payment into court under Order 22*" ? The following extract from the judgment of Lloyd J in ***Padmanor Investments Ltd.-v-Soundcraft Electronics Ltd.*** [1995] 4 All E.R. 683 at 689 elucidates the policy underlying this rule:

> ***"****Mr White for Padmanor therefore submitted that since Four Seasons were a defendant to Soundcraft's counterclaim, they could have protected their position as against Soundcraft by paying into court under Ord 22, and accordingly the letter was not one which the court could take into account, by virtue of the proviso to Ord 62, r 9(1)(d). In my judgment this submission is wrong. I do not think that there can be any doubt that the purpose of the proviso to Ord 62, r 9(1)(d) is to give effect to the policy which was expressed by Oliver LJ in Cutts v Head [1984] 1 All ER 597 at 610, [1984] Ch 290 at 312:*
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> > *'... but it should not be thought that this [a Calderbank letter] involves the consequence that such a letter can now be used as a substitute for a payment into court, where a payment into court is appropriate. In the case of the simple money claim, a defendant who wishes to avail himself of the protection afforded by an offer must, in the ordinary way, back his offer with cash by making a payment in and, speaking for myself, I should not, as at present advised, be disposed in such a case to treat a Calderbank offer as carrying the same consequences as payment in.'*
>
> *If Four Seasons had only been a defendant to Soundcraft's counterclaim, then the proviso to Ord 62, r 9(1)(d) would undoubtedly apply. However, Four Seasons made their offer*

[5] I have assumed that payment in was not possible because acceptance of such payment in respect of the Plaintiff's claim would have left the Defendant's counterclaim outstanding, which on reflection seems an obvious justification for the use of the '*Calderbank*' letter by a very experienced litigator.

[6] *Padmanor Investments Ltd.-v-Soundcraft Electronics Ltd.* [1995] 4 All E.R. 683 at 689 per Humphrey Lloyd J.

*primarily as third party to Padmanor's proceedings against them. The purpose of the offer was to dispose of Padmanor's claim and, thereby albeit indirectly, Soundcraft's claim against Four Seasons. It was not clear to me what Four Seasons ought in practice to have done. If they had paid into court a substantial sum against Soundcraft's counterclaim, they ran the risk that Soundcraft would accept the money in court or be fortified in their view that what might otherwise have thought to have been a claim with tenuous prospects of success had nevertheless something more to it and would have pressed on for more. Either course would not have relieved Four Seasons of their potential and more obvious liability to Padmanor in respect of Soundcraft's claim against Padmanor for which Four Seasons would still be at risk. Even if Four Seasons had made a nominal payment into court, they might nevertheless have found that Soundcraft took the money out and as a result would have been entitled to obtain their costs from Four Seasons, but Four Seasons would obviously have no certainty that the principal monetary claim would disappear. Looked at realistically, Four Seasons' objectives were to dispose of all claims being made against them. I do not see how they could have protected their position on costs without writing some form of letter. I do not therefore consider that Four Seasons fall within the exception provided by Ord 62, r 9(1)(d).”*

17. The strict English law position appears to be that “*Calderbank*” letters can only be utilised in cases where payment into Court is not procedurally feasible (either because (i) it is not legally possible in relation to a claim that is neither in debt nor for damages or (ii) payment in would not for other fact-specific reasons be effective to settle the entire action). The Bermudian law position can hardly be different as our Rules are based on identical statutory provisions. However, the Judicial Committee of the Privy Council have suggested that a more flexible approach to settlement offers may be taken despite this rigid strict legal position. In *Director of Buildings and Lands-v-Shun Fung Ironworks* [1995] 2 A.C. 111, Lord Nicholls (delivering the judgment on behalf of the majority and deciding an issue with which the minority concurred) observed:

“*The effect of R.S.C. (Hong Kong), Ord. 22, r. 14 and Ord. 62, r. 5 is that Calderbank offers shall be taken into account by the court when exercising its discretion as to costs, but not if the party making the offer could have protected his position as to costs by means of a payment into court under Order 22. Ord. 22, r. 1 provides for a defendant making a payment into court "In any action for a debt or damages." A claim for compensation is not such an action. Thus on a strict reading of the rules this is not a case to which the bar on taking into account a Calderbank offer applies. Accordingly the Court of Appeal erred in holding that the Calderbank letters could carry no weight on questions of costs in this case. Their Lordships recognise this is a strict, even a literal, interpretation of the rules. However, viewing the matter more broadly, it is difficult to see why the Calderbank letters should not have consequences as to costs in this case. Parties are to be encouraged to settle their disputes and assisted in their attempts to do so. By accepting the first offer the claimant would have received a significantly larger sum than it was awarded by the tribunal at the end of an enormously protracted and expensive hearing. Interest would have followed automatically, and there is no reason to doubt the tribunal would have made a costs order in favour of the claimant. Had the Crown made a payment into court, assuming this is possible, the claimant's position would have been much the*

> *same, neither better nor worse. It is not as though a payment of money into court would have given the claimant some advantage over and above an offer by the Crown to settle for a like amount.*"[7]

18. Where a letter offering settlement may be taken into account, the Court is not concerned with the narrow issue of whether the Plaintiff has recovered more than the sum paid into Court. The Court is concerned with the broader question of whether it was reasonable for the Plaintiff to have refused the settlement offer having regard to the final amount awarded. In *Chrulew v Borm-Reid & Co (a firm)* [1992] 1 All ER 953 at 959-960, Waller J held:

> "***In relation to a Calderbank offer it furthermore seems to me there must be in any event further room for flexibility….. It would be wrong, in my judgment, to equate an offer of compromise in proceedings such as these precisely to a payment into court. I see no advantage in the court surrendering its discretion in these matters as it has to all intents and purposes done where a payment into court has been made. A Calderbank v Calderbank offer should influence but not govern the exercise of the discretion. Thus I can summarise the position as it seems to me in the normal litigation context as follows. (1) Where a payment in has been made and accepted under Ord 22, rr 1 and 3, a party is absolutely entitled to its costs (see Ord 62, r 5(4)). (2) Where there has been a payment in not accepted, then, if that payment in is equal to or beaten by the defendants, the defendants are entitled to their costs as the successful party unless there are special reasons for depriving the defendants thereof. (3) A Calderbank offer can only be used where the payment-in provisions are inapplicable, but where it is properly deployed, if the party to whom the offer is made has unreasonably failed to accept that offer, then the offering party will be entitled to costs post the time at which that offer should have been accepted ... The basis for the above approach is that the successful party in litigation is entitled to have his costs unless there are special reasons.***"

19. In my judgment when an offer of settlement has been made and rejected by a litigant following the "*Calderbank*" form, the Court has the discretion to take the reasonableness of the rejection of the offer into account in two key ways. Firstly, where a defendant recovers as much or more than the sum offered, the Court may consider awarding the costs after the offer to the defendant, as would occur with payment in. In addition, and this point is not explicitly supported by the above authorities, it must be permissible for the Court to take into account a rejected offer of settlement where a plaintiff has recovered more than the offered sum, but acted unreasonably in not either (a) accepting the offer or (b) otherwise seeking to settle the action on commercially reasonable terms. Because order 62 rule 10 explicitly empowers the Court to have regard to any unreasonable acts or omissions on a litigant's part. When the Court takes a "*Calderbank"* letter into account:

> *"Where an offer has been made, whether by payment into court or by way of another form of offer permitted by the Rules of the Supreme Court or by way of a Calderbank letter, the ultimate liability of the person making such an offer turns, first, upon a comparison of what was offered and what was achieved. It is obviously necessary to look at the outcome… Where an offer has been made, whether by payment into court or by way of another form of offer permitted by the Rules of the Supreme Court or by way of a Calderbank letter, the ultimate liability of the person making such an offer turns, first, upon a*

[7] At pages 140-141.

*comparison of what was offered and what was achieved. It is obviously necessary to look at the outcome."* [8]

20. In addition, and of broad general relevance, I have regard to the provisions of Order 1A of this Court's Rules, which embody (with effect from January 1, 2006) the Overriding Objective. These new guiding principles for the conduct of civil litigation were introduced at the same time as the new Order 62, which itself introduces the modern concept that successful litigants should be able to recover nearly all their actual costs, even on a standard basis taxation. The parties are obliged to assist the Court to achieve the Overriding Objective, which requires the Court to manage cases in a way which, *inter alia*, (a) saves expense and (b) is proportionate to the amount of money involved. In non-commercial cases involving litigants of limited means, the parties are positively required to conduct litigation in a way which does not waste costs. These factors are also relevant in deciding whether and, if so, to what extent, justice requires the usual "winner takes all" approach to costs to be modified or displaced.

21. I have been unable to locate any statutory provision explicitly empowering the trial judge to award costs to be taxed applying the Magistrates' Court scale. No such provision was cited by Counsel. It appears to me that Part II Division I of the Schedule to Order 62 empowers the Registrar to decide what amounts should be recoverable on a taxation. The role of the trial judge is to award costs, not (in the first instance at least) to tax them. Order 62 rule 3 provides as follows:

> *"(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.."*

**Findings: award of costs**

22. The Defendant's application for costs to be awarded on the basis that they should be taxed according to the Magistrates' Court scale is rejected. I am not satisfied that I have any jurisdiction to make such an order. Even if I did have the discretion to make such an order, I would decline to do so in relation to the present claim which was properly commenced as a Supreme Court action, even though the amount recovered at trial fell below the subsequently uplifted summary jurisdictional limit.

23. The Plaintiff is awarded her costs to January 30, 2006 (when the January 23, 2006 settlement offer expired) applying the usual rule that costs follow the event. No tenable ground for not applying the normal rule has been raised in this case.

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[8] Humphrey Lloyd QC in *Padmanor Investments Ltd.-v-Soundcraft Electronics Ltd.* [1995] 4 All E.R. 683 at 689.

24. I find that the January 23, 2006 settlement offer of "*the total sum of $10,000*" was reasonably rejected by the Plaintiff because she has in the event recovered more than she was offered. How much better off she is having regards to the costs incurred after that date is relevant to the related question of whether she acted reasonably in failing to make a counter-offer.

25. Based on her own Bill of Costs, she had at that juncture incurred costs of approximately $5000. The most she could reasonably have expected to be offered would be the net amount she actually recovered ($11,580) plus her costs in full ($5000 approximately). In effect the difference between the Defendant's offer and her maximum recovery based on what she has recovered was some $6500. Was it reasonable to make no counter-offer at all and to incur a further roughly $6000 in costs to recover $6500?

26. Looked at with hindsight, the parties ought to have compromised the action on terms that the Defendant agreed to pay the Plaintiff a sum between $11,500 and $16,500. The Defendant evinced a willingness to compromise the action by offering a sum which was only $1,500 shy of the net amount ultimately awarded excluding costs. For the Plaintiff to make no counter-offer at all and to incur additional costs almost equal to the difference between her maximum recovery and the settlement offer as at the date when it was made was, in my view, an unreasonable omission within Order 62 rule 10 for the following reasons.

27. The failure to seriously pursue a reasonable settlement was unreasonable having regard to (a) her obligations under the Overriding Objective to assist the Court to ensure that costs are saved and (b) the admonition given by the Court on January 13, 2006 that it seemed likely that the amounts in dispute were disproportionate to the costs likely to be incurred. It was not so unreasonable an omission as to justify making no order as to costs, but in my view impacts on the level of recovery which is appropriate in respect of the post -January 30, 2006 period.

**Conclusion**

28. In all the circumstances I would award the Plaintiff 50% of her costs of this action for the period after January 30, 2006, having regard to her failure to adequately pursue settlement after (a) the Court had recommended that settlement be pursued to avoid running up disproportionate costs and (b) a significant settlement offer had been made by the Defendant. The Plaintiff is on the usual "costs follow the event" basis awarded her costs generally for the pre-January 30, 2006 period.[9]

29. In light of the limited success of the Defendant on his Counterclaim and the award made with respect to the Plaintiff's costs, I make no order as to the costs of the Defendant's Counterclaim.

Dated this 30th day of April, 2007

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**KAWALEY J**

[9] Obviously, this award is without prejudice to any contrary costs orders that have previously been made.