In The Supreme Court of Bermuda

COMMERCIAL COURT
CIVIL JURISDICTION
2016 No: 241

IN THE MATTER OF A CONSENT JUDGMENT BETWEEN MEXICO INFRASTRUCTURE FINANCE LLC AND THE CORPORATION OF HAMILTON DATED 27TH MAY 2015

BETWEEN:-

THE CORPORATION OF HAMILTON

Plaintiff

-and-

MEXICO INFRASTRUCTURE FINANCE LLC

Defendant

EX TEMPORE RULING ON COSTS

(In Chambers)

Costs – whether exceptional circumstances to justify departure from principle that costs follow the event

Date of hearing: 25th November 2016

Mr Mark Diel, MDM Limited, for the Plaintiff
Mr Narinder Hargun, Conyers Dill & Pearman Limited, for the Defendant

1. This is an application for costs by the Corporation of Hamilton ("the Corporation") following its successful application to set aside an order by consent for summary judgment in favour of Mexico Infrastructure Finance LLC ("MIF") for $18 million ("the Consent Order"). At the time when the Consent Order was entered into, both parties understood that this sum was due and owing under a written guarantee ("the Guarantee"). I found that the Guarantee was in fact *ultra vires* and rejected the submission that it was an abuse of process for the Corporation to apply to set it aside.[1]

2. The general principle is that costs follow the event. However Narinder Hargun, who appears for MIF, argues that this is a case involving exceptional circumstances where it would be unjust to order MIF, as the unsuccessful party, to pay the successful party's costs.[2] Both parties are agreed that the fact that the application to set aside was made in separate proceedings rather than the proceedings in which the Consent Order was made is neither here nor there as, for the purposes of this costs application, the Court should look not to the form but the substance.

3. Mr Hargun submits that the Corporation should not recover its costs because this was a consent judgment, which the Corporation claimed to have entered into by mistake. The general principle is that a party seeking to set aside a consent judgment should pay the costs of the other party.

[1] See [2016] SC (Bda) 94 Com (18 November 2016).
[2] He referred me to a passage in Binns v Burrows [2012] Bda LR 3 SC at para 6 per Kawaley J (as he then was): the Court should consider whether *"... there is some ... compelling reason to depart from the usual rule that costs follow the event*".

4. Mr Hargun submits that, on the Corporation's case, its mistake was particularly egregious as the mistake should have been apparent to the Corporation on the information known to it when it entered into the Consent Order. This is because it was in receipt of an opinion from leading counsel which raised the *ultra vires* point before it entered into the Guarantee. Notwithstanding that various measures were enacted to facilitate the giving of the Guarantee, it should have been obvious to anyone who considered the issue that they did not address the point raised by leading counsel that the Guarantee was *ultra vires* section 23(1) of the Municipalities Act 1923.

5. Moreover, Mr Hargun submits, the Guarantee was approved by the Senate and the Legislative Assembly. In those circumstances, it was entirely reasonable for MIF to rely upon the Guarantee, which it had done to its detriment, prior to the application to set aside, and then to defend the Consent Order, particularly bearing in mind that the Consent Order gave it the right to enforce payment of the monies due under the Guarantee as a judgment creditor.

6. As against that, Mark Diel, who appears for the Corporation, submits that at the outset of the set aside proceedings MIF was provided with a copy of the legal opinion upon which the Corporation relied to bring them. Having considered that opinion, MIF could have taken an informed decision not to contest the application to set aside.

7. Further, Mr Diel submits that if the Corporation had not consented to judgment, but had pleaded the *ultra vires* issue as a defence, there would have been a trial of the issue at which the Corporation would have prevailed. There would have been no good reason not to award the Corporation its costs in such an event. By parity of reasoning there was no good reason not to do so now.

8. Mr Diel also submits that, once the Corporation had got the second opinion from leading counsel advising that the various legislative measures taken did

not address the *ultra vires* point, it had, given its responsibility to its ratepayers, no alternative but to take these steps.

9. There is force in both sets of submissions. However I cannot get away from the fact that the need to apply to set aside the Consent Order was entirely of the Corporation's making. It would be adding insult to injury, and would be unjust, to cause MIF to pay the Corporation's costs. Therefore the order that I make, based upon the fact that these are exceptional circumstances and taking account of the justice of the case, is no order as to costs.

Dated this 25th day of November 2016

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Hellman J