

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No. 264

BETWEEN:

(1) WANDA ANN PEDRO 1st Plaintiff
(2) JENNIFER PEDRO 2nd Plaintiff

-and-

(1) ROSEMARIE GAIL PEDRO 1st Defendant
(2) HSBC BANK BERMUDA LIMITED 2nd Defendant

COMMERCIAL JURISDICTION

2018: No 156

BETWEEN:

HSBC BANK BERMUDA LIMITED Plaintiff
(FORMERLY THE BANK OF BERMUDA)

-and-

(1) ROSEMARIE GAIL PEDRO 1st Defendant
(2) THE ESTATE OF QUINTON HORACE DOWLING JR 2nd Defendant

Before:

Hon. Assistant Justice Attride-Stirling

Appearances:

**Ms Wanda Pedro, In Person, for the 1st Plaintiff
Ms Jennifer Pedro, In Person, for the 2nd Plaintiff
Mrs Aura Cassidy, Kairos, for the 1st Defendant
Mr John Hindess, Marshall Diel & Myers Limited, for
the 2nd Defendant**

Date of Hearing:

23 August 2019

Date of Ruling:

13 September 2019

COSTS RULING

Introduction

1. On 23 August 2019, I handed down a judgment (having earlier circulated to the parties a draft copy for typographical corrections only) in this matter and gave a preliminary indication that I would make an order of costs in favour of the First Plaintiff Wanda Pedro, subject to giving the Defendants leave to apply to Court in relation to the issue of costs.
2. At the hearing on 21 August 2019, the Defendants stated that they wished to be heard on the issue of costs but were not prepared to deal with this at that time. The parties agreed that the issue of costs could be dealt with instead on the papers with written submissions filed within one week. The parties sought a joint extension of time to file submissions which was allowed.
3. All parties (excluding Jennifer Pedro who did not participate in the trial) filed written submissions on costs, with Wanda Pedro filing supplemental submissions as well. In this ruling I will, again, refer to the three sisters Wanda, Jennifer and Rosemarie by their first names, for simplicity only and meaning no disrespect.
4. Counsels' submissions on costs have been very helpful and the Court is grateful to have received such a detailed analysis of the costs issues.
5. The starting point on the award of costs is found in the Rules of the Supreme Court 1981 at O.62 r.3(3), which states:

“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.”

6. In relation to costs involving a litigant in person, the RSC provide at O. 62. R. 18 as follows:

“18(1) Subject to the provisions of this rule, on any taxation of the costs of a litigant in person there may be allowed such costs as would have been allowed if the work and disbursements to which the costs relate had been done or made by an attorney on the litigant’s behalf together with any payments reasonably made by him for legal advice relating to the conduct of or the issues raised by the proceedings...”

7. In the context of this case, in real life terms, Wanda clearly succeeded. And whilst it is recognized that she did not succeed on all bases, in relation to the principle relief sought, she was successful. That is the starting point, but more follows.
8. Counsel for HSBC and for Rosemarie Pedro have urged the Court to take into account the very poor conduct of Wanda Pedro. Counsel for HSBC made the following submission:

“9. Considering the Court of Appeal Judgment in First Atlantic Commerce, the Bermuda Supreme Court in the case of Binns v Burrows (2012) Bda LR 3 [Tab 3], where the Supreme Court also reduced the costs award to a successful plaintiff, subsequently summarized the relevant Bermudian costs principles as follows:

“The above authorities suggest that, unless the Court or the parties have identified discrete issues for determination at the trial of a Bermudian action, the Court's duty in awarding costs will generally be to:

- i. Determine which party has in common sense or "real life" terms succeeded;*

ii. Award the successful party its/his costs; and

iii. Consider whether those costs should be proportionately reduced because eg they were unreasonably incurred or there is some other compelling reason to depart from the usual rule that costs follow the event."

...

12. *In the case of In re Elgindata (No 2) 119921 1 WLR 1207 at p. 1214 [Tab 5], Nourse LJ held as follows.*

"The principles are there. (1) 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."

13. *In the case of Thomson v Thomson and Colonial Insurance Co Ltd (Costs) [2013] Bda LR 49 at p. 2 [Tab 6], stated other reasons for ordering a reduction in the award of costs include, for example:*

- the unreasonable conduct of the successful party;*
- because costs were "unreasonably incurred"; or*
- because the successful party "has caused a significant increase in the length of proceedings."*

14. The Court in Thompson also stated "where the successful party raises an issue improperly, he cannot only be deprived of his costs but be ordered to pay his opponent's costs."

9. HSBC submitted that the legal arguments on which Wanda succeeded were raised by the Court not her, as such she should not have these costs. However Wanda, like the other parties, would have had to consider and respond if thought appropriate to the legal authorities raised by the Court, for commentary by the parties.
10. HSBC further submitted that they should be entitled to a costs order against Rosemarie Pedro on the basis that they were successful against her. But, as Rosemarie's counsel correctly pointed out, she did not resist HSBC's claim and went further to concede it from inception. In the premises, HSBC should have an order for its own costs relating to its claim against Rosemarie, however HSBC's costs are limited until the date on which Rosemarie Pedro conceded HSBC's claim against her.

Joint and several costs award

11. HSBC has submitted that it would be unfair to make the order for costs against the two Defendants joint and several. It accepts that such an order can be made but that it should not be made where the two Defendant's do not have "*a similar case*".
12. Although not identical, the principal issues in contention, which dominated most of the case, applied equally to both defendants. HSBC adopted entirely the position of Rosemarie in relation to the Declaration of Trusts and the 2009 Mortgage. HSBC insisted on joining Wanda's action against Rosemarie and they now must live with that decision. In reality, much of the defence of the action was driven by HSBC and its counsel who made the majority of the legal arguments. Rosemarie and her counsel played a very small role during the trial. Much of the time spent during the trial was a consequence of HSBC's joinder.

13. Most of the issues and arguments addressed during the course of the trial would have been necessarily addressed whether or not HSBC had joined the proceedings (even recognizing that some of the legal arguments raised by HSBC were not raised by Rosemarie's counsel). In the premises, there can be no unfairness to HSBC if it is made liable with the other Defendant on a joint and several basis.

New evidence

14. Wanda Pedro submitted a report dated 3 September 2019, from Handwriting Consultants of London and she includes submissions relating to this in support of her position.

15. Prior to the trial Wanda indicated her intention to call evidence from a handwriting expert, but she never did. This would be an issue of expert evidence, which a trial judge would likely have given permission to introduce, but would likely have led to the opposing parties also considering introducing their own expert. The expert witnesses would have had to have been made available for cross-examination so that their evidence could be tested.

16. The trial is over and new evidence, which could have been adduced at the trial, cannot be introduced at this point. In the premises, I can have no regard to this new material.

The Leyoni Junos case

17. The Plaintiff relies on the decision of *Leyoni Junos v. Minister of Tourism and Transport* (2012) Bda LR 67, a decision of Kawaley CJ addressing the issue of costs of a litigant in person. This case confirms the position that a litigant in person may claim, amongst other things, an hourly rate of up to \$50 per hour, for certain work relating to the case. Given the complexity of the legal issues raised by this trial, the costs basis for the successful litigant in person should be at the upper level, namely \$50 per hour.

The conduct of Wanda Pedro

18. Both Defendants claim that Wanda should not be allowed her costs because of her conduct. Alternatively, that her costs awarded should be reduced because of her conduct. HSBC's written submissions highlight various examples of the conduct complained, including the following:

"17. From the moment that HSBC became involved with Wanda Pedro in or about November 2018, Wanda Pedro inundated HSBC's counsel with emails, many of which were superfluous, threatening and derogatory.

18. For example, on 14 May 2019, Wanda Pedro wrote an email to counsel for HSBC stating:

*"HOW LAWYERS ARE PURPOSELY MANIPULATING EVIDENCE IN AN ATTEMPT TO DENY PEOPLE THEIR RIGHT TO THEIR PROPERTY AND ARE MISAPPROPRIATING FUNDS AND COMMITTING FRAUDULENT ACTIVITY EVEN SO FAR AS TO OBSCURE THE TRUTH...!!!!!!
GOOD LUCK AGAIN MR. HINDESS BECAUSE IT IS CRYSTAL CLEAR YOU ARE EITHER LYING OR YOU DON'T HAVE A CLUE WHAT THE TRUTH REALLY IS!!!!!!!!!!!!"*

19. Over a period of 5 months, from November 2018 to April 2019, counsel for HSBC received over 150 emails, many of which were several pages in length and contained similar statements and allegations to the above.

20. In addition, Wanda Pedro's contempt for the Court and for opposing counsel during the trial was glaring. The Court's Judgment itself acknowledges that Wanda "became difficult and at times obstreperous," "constantly insult[ing] all other parties, their counsel and opposing witnesses," "accus[ing] all opposing counsel of improper conduct in some

instance amount to dishonesty and of professional improprieties" [paragraph 26]. On one occasion, she even called a witness "the devil'.

21. *Wanda went so far as to "accuse Court staff of improprieties" and "accus[e] the Judge of corruption and/or bias", even threatening to make an application for recusal of the Judge [stated at paragraphs 26, 27 and 29 of the Judgment].*

22. *The trial was fraught with Wanda "making "many rude interruptions and personally offensive allegations" and conduct that "bordered on contempt' (paragraph 28).*

23. *On 14 May 2019, Assistant Justice Attride-Stirling said to Wanda that "most of the chaos has been caused by your constant interruptions.""*

19. Counsel for Rosemarie referred to a quote from Kawaley CJ in *Minister of Home Affairs v. Bermuda Industrial Union* (2016) Bda LR, as follows:

"the central object of the costs rules is to impose a discipline on civil proceedings which would be wholly lacking if the court was not obliged to apply the cost rules in a predictable manner. That discipline essentially operates so as to reward meritorious applications and punish both unmeritorious applications and unreasonable conduct in the course of litigation..."

20. Given the factual findings I have already made about the very poor conduct of the First Plaintiff, I am required to consider this and the issue of costs. I do not accept the further submission of the Defendants that Wanda's conduct, poor though it was, "caused a significant increase in the length of the proceedings". It did cause some delay but the trial would have been long in any event. It may be the case that the fact that Wanda did not have the benefit of legal representation, which would have assisted her in focusing on the key arguments and making those arguments in a quicker and more legally disciplined way, caused a significant increase in the length of the proceedings. In reality, despite what the Defendants

- have said, most of Wanda's witnesses (excluding two of them who added very little time to the trial) were relevant and their evidence factored in the decision of the court.
21. The time estimate for the trial was hopeless, but Wanda, as a lay person was not to know this. Experienced counsel for the Defendants agreed with the time trial estimate, which on reflection, and even if Wanda had had counsel, was never going to be completed in two days, certainly not once HSBC joined the action.
 22. To the extent that Wanda did not succeed, for example on her fraud claim against Rosemarie and on her fraud and breach of fiduciary duty claims against HSBC, those claims occupied very little of the court's time. Wanda made bald allegations of fraud in her pleading, but provided no particulars of fraud and called no substantive evidence of fraud (although there was some limited evidence of fraud by Rosemarie, insufficient to lead to a finding of fraud on the evidence heard at trial). Because of the way in which Wanda put her case, these allegations did not add much to the time spent in court.
 23. Much of the time spent was on the issue of the evidence surrounding the DoT and the law relating to trusts, as well as the evidence surrounding the allegation of undue influence and the law relating to this issue. Wanda won on these main issues. She also won on the issue of mental capacity, although only in part, as it related to the latter transactions, not the earlier one.
 24. However, Wanda's conduct, coming so close to being in contempt of Court, should not be without consequence. A party to litigation in Bermuda, or anywhere, should not be permitted to comport themselves so poorly (see the quotations above) without paying a price for such poor behavior. Civil litigation should be civil.
 25. I have taken into account that Wanda was in a difficult position. For reasons that are difficult to understand, her application for legal aid was denied, despite her claim that she had no job, income or assets (and a good case on breach of trust).

This, in the circumstances where, her sister who claimed to own the property in question, did get legal aid.

26. Wanda was forced to sue, without legal assistance, a large and powerful bank, as well as her own sister, which experience was difficult for her. As I observed in the judgment, these factors may have led her to being obstreperous at times which in part might be understandable. Nevertheless Wanda's conduct, as observed earlier, at times went too far and crossed the line of propriety.

27. Even in relation to a successful party, the Court retains a discretion to award the loser's costs against the winner to or not allow the winner all of her costs. In the present action, for all the reasons stated above, I reduce the amount of the costs award in Wanda's favour by 25%.

Conclusion

28. I award Wanda her costs on a standard basis, against both Defendants, on a joint and several basis, to be taxed if not agreed. That costs award is reduced by 25% as a consequence of her conduct during the course of the trial.

Costs

29. Given that I have awarded Wanda her costs, she has, again being successful in real life terms. In the premises, I would propose to award her the costs of the costs application, reduced by 25% on the basis of the reduction in the main action.

Dated 13 September 2019

ROD S. ATTRIDE-STIRLING
ASSISTANT JUSTICE