In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
CONSOLIDATED ACTIONS
2017 No: 467
2018 No: 38
2018 No: 66

BETWEEN:

PAUL RODRIGUES
(TRADING AS RODRIGUES POOLS)

Plaintiff

And

CLEARWATER DEVELOPMENT LIMITED

Defendant

COSTS RULING

Costs Ruling: Distinction between an application for a split trial (to separately consider liability from quantum) and an application for the determination of a preliminary trial point- RSC Order 33- Overriding Objection RSC Order 1A and Court's Case Management Powers – RSC Order 24 Court's powers to order specific discovery- Cross applications for discovery

Hearing on the Papers
Date of Decision: Wednesday 16 December 2020

Plaintiff: Mr. Dennis Dwyer (Chancery Legal Ltd.)
Defendant: Mr. Richard Horseman (Wakefield Quin Limited)

RULING of Shade Subair Williams J

Introduction:

1. This is an application arising out of my earlier Ruling in this matter made on 6 September 2019 (the "September 2019 Ruling"). By letter to the Court dated 10 December 2020, the Defendant urged for this Court to deliver this Ruling which has been outstanding for approximately one year. This has been attributable to a combination of (i) an unintended disregard on my part, (ii) a series of administrative oversights which resulted in the delay in bringing this application to my attention and a further delay in submitting this file to me for judgment writing and (iii) the interim COVID-19 Court closures which merely aggravated the train of delay which had already been set in motion. I, therefore, offer my most sincere apologies to the parties who have been disadvantaged by the untimeliness of this Ruling.

2. Under the September 2019 Ruling I directed; "*Unless either party files a Form 31D to be heard on costs within 14 days of the date of this Ruling, I award 70% of the Defendant's costs on a standard basis, to be taxed if not agreed*."

3. The Plaintiff accordingly filed a Form 31D within the prescribed timeframe for me to review the issue of costs. Written submissions were subsequently filed by both parties in November 2019. The Plaintiff seeks for this Court to order that either (i) each party bears its own costs in respect of the applications before the Court; (ii) the parties' respective costs be costs in the cause or (iii) the percentage of the costs in favour of the Defendant be limited to a figure substantially less than 70%. The Defendant, however, contended that it won the majority of the applications before the Court and that the provisional costs order is reasonable in the circumstances. The Defendant further submitted that there is in fact a good argument that it should be entitled to all of its costs.

4. I have considered the arguments advanced by both sides and have carefully reviewed my September 2019 Ruling. Having done so, I now provide my decision on costs with the below reasons.

A Recap of the September 2019 Ruling

5. Under the September 2019 Ruling, I found in favour of the Plaintiff in respect of the Defendant's summons application for the Court to determine the preliminary issue under the Petition Action regarding the enforceability of the formula set out in the Agreement Letter, where it is stated that the Investor shall receive 5% on their investment from the time their funds were deposited with the Defendant until the date of repayment. I held [paras19-20]:

    "19. In my judgment, it is unnecessary for the Court to determine the preliminary issue for the disposal of the Petition action since the only contested relief sought by the Plaintiff is for a winding up order, which on the face of the Court documents seems unlikely. I should parenthetically note that Mr. Horseman did not pursue this part of his summons during his oral submissions. He instead informed the Court that the Defendant would likely bring an application to strike out the Petition in the event that the Plaintiff refuses to discontinue the Petition action, undeterred by the

Defendant's consent to the primary relief sought. Persevering, Mr. Dwyer defended his client's alternative pursuit for a winding up order or other such just and equitable order. Of course, these are arguments for the Court during any such strike out application in exercise of the Court's inherent jurisdiction and/or under RSC O.18/19.

20. For this reason I will not direct for the preliminary issue to be determined under RSC O. 33/3."

6. In my Ruling I stated my refusal to order a split trial on liability and quantum for Writ Action #1 under the misguided notion that the Defendant was pursuing a split trial in respect of Writ Action #1. I held [23-25]:

    23. In order to determine the most fair and expeditious way of proceeding with this matter, it is necessary to first consider the nature and depth of the disputed issues for resolve and whether the issues on liability and quantum are separable or in fact irrevocably intertwined. In this action, the issue of liability is tied to quantum so much so that the evidence underlying the level of work done and materials purchased by the Plaintiff is dispositive of both liability and quantum. Contentious issues on quantum meruit… may require the Court to hear expert opinion evidence from quantity surveyors. The Court will likely be called upon to make findings on calculations based on the percentage of labour and materials used out of the total fixed sum agreed.

    24. The principal argument made by the Defendant is that considerable costs in time and money would be wasted if the Court found that the Defendant was not liable under the claim. I reject this submission insofar as it relates to Writ Action #1. A finding that the Defendant is liable in Writ Action #1 is dispositive of very little. So to proceed to a trial on liability alone under Writ Action #1 would be a needless waste of time and money for both the Courts and the parties. The central dispute would only be dissolved by the Court's factual findings on the level of work done ie quantum.

    25. For this reason, I refuse the Defendant's application for a split trial on Writ Action #1.

7. Mr. Horseman pointed out in his costs submissions that this was never pursued [para 5-7]:

    "*5. In respect of refusing the defendant's application under Writ Action 1 for a split trial, the Defendant was never pursuing a split trial under Writ.*

    …

    6. There could be no split trial on Action 1 which was simply a dispute over whether the Plaintiff had been properly compensated for work complete. Writ action 1 is down to just a clam [sic] [claim] over damages.

7. The Defendant should not be penalized on costs when this was never an issue nor argued by either the Plaintiff or the Defendant."

8. The Defendant was successful on the discovery application for Writ Action #1. My reasoning behind this decision was provided as follows [paras 39-42]:

   39. The majority of the document descriptions under Schedule 1 of the Plaintiff's List of Documents for 'Building Contract Documents' refer to email exchanges. The remainder documents do not appear to fit the description or class of documents sought by the Defendant.

   40. Unsurprisingly, the Defendant does not accept that the documents he seeks in discovery are not in existence. On my assessment, the Plaintiff would surely possess or have the power bring under its custody its internal records for the completed construction works and the materials it purchased to the value of $297,557.02. Such records would, of course, show actual expenditures and would likely consist of, inter alia, bank records showing expenditures made during the relevant period and/or purchase receipts in respect of the construction work done on Buildings 2 and 3 of the Azura Project. Other relevant documents related to this matter in question would also include proof of salary payment to employees (eg. workmen time sheets and correlating payroll tax receipts).

   41. It may very well be industry standard for nothing more than invoices to be produced for payment on fixed price contracts, where of course the parties are in harmony with one another. However, when kinship and amity are stranded somewhere out in an ocean of contentious litigation, the standard for production of documents is governed by RSC O. 24 and not the construction industry practices. I accept the Defendant's contention that the mere production of invoices for payment does not suffice under the discovery test outlined in RSC O. 24.

   42. On this basis, in exercise of the Court's powers under RSC O.24/3(1) I order that the Plaintiff make and serve a list of all the documents which are or have been in its possession, custody or power relating to the construction work actually done on Buildings 2 and 3 of the Azura Project.

9. I also found in favour of the Defendant under Writ Action #2 in granting its application for a split trial on liability and quantum, albeit that I rejected the Defendant's proposed draft wording of the issues as to how liability should be determined. My reasoning was summarized as follows [47-51]:

   "47. The trial judge cannot be expected to hear and sift through copious documents in evidence in order to calculate the costs of the Defendant's numerous works in addition to the consequential losses claimed by the Plaintiff. (Mr. Horseman presented a visual aid on the volume of contractual documents relevant to the Plaintiff's claim for an assessment of damages when he showed the Court a 3-4

inch binder filled with the Defendant Company's portfolio of contracts.) The issue of quantum would further involve evidence of the Plaintiff's business activities, expenditures and income (or lack thereof) relevant in proving its losses and its duty to mitigate those losses.

48. In my judgment the issues relating to liability should be determined before the Court fixates on quantum. Of course, if a trial judge concludes that the Defendant is not liable, the cumbersome issue of quantum need not be tried, thereby rescuing the parties from a hefty disposal of time and money.

49. The Court is always beholden to its duty to manage cases expeditiously and fairly under the Overriding Objective at RSC O.1A. A salient component of active case management means identifying the disputed issues at an early stage and deciding the order in which those issues are to be resolved.

50. In the Defendant's summons, the particulars of liability for predetermination are stated as follows:

> *"… and in particular whether the Plaintiffs can claim damages for the alleged failure of the Defendant to allow the Plaintiffs to bid on all additional phases of the development and/or the alleged refusal of the Defendant to enter into further contracts with the Plaintiffs relating to the construction and development."*

51. Choosing a wide paint brush over a fine point pen, I reject the Defendant's proposed wording on liability and simply direct that the issue of liability in its general sense should be tried prior to and separately from quantum under Writ Action #2."

10. The Defendant was also successful in respect of Writ Action #2, in that I granted its application for specific discovery. I ordered the Plaintiff to make and serve a supplemental list of documents including specific classes of documents relevant to the period between 1 October 2017 and 1 April 2019. As agreed by Mr. Horseman, the Order granting the Defendant its specific discovery was held in abeyance pending the Court's need to determine the issue of quantum.

11. I further found in favour of the Defendant under Writ Action #2 in refusing the Plaintiff's application for specific discovery relating to the Greymane subcontracts with parties other than the Defendant Company.

<u>The Law on Costs</u>

12. RSC Order 62/3 provides that costs should follow the event as a starting point:

"*62/3 (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*."

13. These principles were outlined in *Bins and Ors v Burrows [2012] Bda LR 3,* per Kawaley J (as he then was) (citing the Court of Appeal's decision in *First Atlantic Commerce Ltd v Bank of Bermuda Ltd [2009] Bda L.R. 18,* and *In re Elgindata Ltd (No. 2) [1992] 1 WLR 1207)*. Kawaley J stated:

"*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 e.g. they were unreasonably incurred or there is some other compelling reason to depart from the usual rule that costs follow the event*."

14. In *Seepersad v Persad & Anor (Trinidad and Tobago) [2004] UKPC 19* (per Lord Carswell) the Privy Council held:

"*…The general rule which should be observed unless there is sufficient reason to the contrary is that costs will follow the event. Where the party who has been successful overall has failed on one or more issues, particularly where consideration of those issues has occupied a considerable amount of hearing time or otherwise lead to the incurring of significant expense, the court may in its discretion order a reduction in the award of costs to him, either by a separate assessment of costs attributable to that issue or, as is now preferred, making a percentage reduction in the award of costs: see, eg. Elingdata Ltd (No. 2) [1992] 1 WLR 1207"*

Decision and Reasons:

15. On my assessment of the 19 September 2019 Ruling, I find that the Defendant had overall success and that costs should follow the event accordingly. I have addressed my mind to the two issues on which the Plaintiff argues that the Defendant failed and the effect, if any, this should have on the costs award.

16. The first issue was in relation to the preliminary issue under the Petition Action regarding the enforceability of the formula set out in the Agreement Letter. While I ruled against the Defendant, it is also fair to say, as I observed in my Ruling, that he did not pursue this part of his summons application during his oral submissions. So, no hearing time was spent on arguing this issue. However, the Plaintiff pointed out that he had no pre-hearing notice of this concession. I, therefore, factor into consideration that the Plaintiff would have been preparing to argue this point in advance of the hearing and constructed its proposed case management strategy under the view that this would be argued before me.

17. The second issue in relation to the notion of a split trial under Writ #1 was never pursued by the Defendant, and so it cannot fairly be counted as a failed argument on the part of the Defendant. That was not clear to me when I ruled that there would not be a split trial under Writ #1.

18. Therefore, the Defendant's overall success is higher than what I previously considered it to be. Thus, it follows that the reduction of the costs award should be smaller than the 30% I originally envisaged.

19. For these reasons, and in the exercise of my judicial discretion, I award the Defendant all its costs on a standard basis save that each party should bear their own costs on the application relating to the preliminary issue under the Petition Action.

20. Further, the Defendant shall be awarded costs on a standard basis in respect of this cost application.

Wednesday 16 December 2020

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HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT