# IN THE SUPREME COURT OF BERMUDA
# COMMERCIAL COURT
# CIVIL JURISDICTION

## 2014: No. 301

IN THE MATTER OF THE EVIDENCE ACT, 1905 (AS AMENDED)

AND IN THE MATTER OF ORDER 70 OF THE RULES OF THE SUPREME COURT 1985

AND IN THE MATTER OF A CIVIL MATTER NOW PROCEEDING BEFORE THE CIRCUIT COURT, COOK COUNTY, ILLINOIS, UNITED STATES OF AMERICA, ENTITLED:

THE PATRIOT GROUP, LLC

Plaintiff

vs.

HILCO FINANCIAL, LLC n/k/a 1310 FINANCIAL, LLC;
HILCO TRADING, LLC;
HILCO APPRAISAL SERVICES, LLC;
HILCO ENTERPRISE VALUATION SERVICES, LLC;
and HILCO, INC

Defendants

## RULING ON COSTS
(in Chambers)

Date of hearing: June 18, 2015

Date of Ruling: June 23, 2015

Mr. Alex Potts, Sedgwick Chudleigh Limited, for the Applicant

Mr. Mark Diel, Marshall Diel & Myers Limited, for the Respondents/US Defendants

**Background**

1. On May 8, 2015, I refused the Applicant witness' application to set aside the Ex Parte Order made without a hearing on August 20, 2014 for her examination in Bermuda for the purposes of Illinois proceedings pursuant to a Letter of Request from the Illinois Court. However, I found that the Order as originally granted was liable to be set aside on various grounds including material non-disclosure. These irregularities occurred in part because the application was prepared and prosecuted as if it was a non-opposed application when in fact the witness had not previously been contacted and signified that the proposed application would not be contested.

2. In light of the fact that the Respondents (the US Defendants) had subsequently (a) offered to vary the Order by including conditions in relation to the proposed examination, and (b) on or about November 7, 2014 filed an Affidavit which fortified the strength of the merits of the original application, and to save costs, I exercised my discretion in favour of varying the Order rather than setting it aside. The Applicant also achieved some marginal outcome success in terms of broadening the scope of the examination conditions which the Respondents had previously offered prior to the hearing.

3. In that Ruling, I set out the following provisional views as to costs:

> "*39.Although the Respondents have ultimately succeeded overall, the inappropriate way in which the Ex Parte Order was obtained appears to me, and subject to hearing counsel as to costs if required, to engage the application of Order 62 rule 10(1) of this Court's Rules*[1]*. Based on the findings set out above, and notwithstanding the good faith efforts the Respondents made to agree fair and reasonable terms for the examination in the course of September, I have found above that the Applicant was entirely justified in seeking to set aside the Ex Parte Order until the Second Hirst Affidavit was served and considered on or about November 7, 2014. The Applicant should, at appears to me, be awarded her costs to this point. Thereafter, although the Respondents would ordinarily be entitled to their costs, it seems to me that would nevertheless be unjust to order even an unusually aggressive independent witness to pay the examining parties costs in light of the way these proceedings have been conducted by them at the outset.*
>
> *40.Unless any party applies to be heard as to costs within 21 days by letter to the Registrar, I would make the following Order as to the costs of the unsuccessful application to set aside the Ex Parte Order:*
>
> > *(a)the Respondents shall pay the Applicant's costs of the present application up to the date of receipt and consideration of the Second Hirst Affidavit; and*

[1] Rule 10(1) provides: "*Where it appears to the Court in any proceedings that anything 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.*"

*(b)there shall otherwise be no Order as to costs.*"

**Arguments**

4. Mr. Diel for the Respondents sought to persuade the Court that since (a) his clients substantially succeeded on the application to set aside, and (b) were willing to concede that they should pay the Applicant's costs up to November 7, 2014 (after which I provisionally suggested the Applicant ought not to have proceeded with the application to set aside), the Applicant should be required to pay the costs of the application to set aside. He relied on the standard rule that costs should follow the event, having regard to which party had succeeded in 'real-life' terms: *Binns-v-Burrows* [2012] Bda LR 3 (at paragraph 5); *Kentucky Fried Chicken (Bermuda) Ltd.-v- Minister of Economy* [2013] Bda LR 34 (at paragraph 14). He challenged the suggestion from the Bench that special rules applied to the case of a witness.

5. In addition the Respondent's counsel forcefully argued that if the Court were to order the Respondents to pay the Applicant's costs up to November 7, 2014 taking into account the irregularities surrounding how the Ex parte Order of August 20, 2014 was obtained, it would be inherently unjust and equivalent to 'double jeopardy' to have regard to the same irregularities when awarding costs for the *inter partes* hearing.

6. Mr. Potts for the Applicant contended that the Applicant should be awarded her costs and in any event not be required to pay the Respondents' costs. He submitted that the position of a non-party witness engaged distinctive costs rules according to which the starting assumption was that where evidence was being sought from a non-party, that party is entitled to their costs. He relied in this regard on the persuasive authority of paragraph 46.1 of the English CPR, which provides as follows:

> "***Pre-commencement disclosure and orders for disclosure against a person who is not a party***
>
> ***46.1***
>
> *(1) This paragraph applies where a person applies –*
>
> *(a) for an order under –*
>
> *(i) section 33 of the Senior Courts Act 1981; or*
>
> *(ii) section 52 of the County Courts Act 1984,*
>
> *(which give the court powers exercisable before commencement of proceedings); or*
>
> *(b) for an order under –*

*(i) section 34 of the Senior Courts Act 1981; or*

*(ii) section 53 of the County Courts Act 1984,*

*(which give the court power to make an order against a non-party for disclosure of documents, inspection of property etc.).*

*(2) The general rule is that the court will award the person against whom the order is sought that person's costs –*

*(a) of the application; and*

*(b) of complying with any order made on the application.*

*(3) The court may however make a different order, having regard to all the circumstances, including –*

*(a) the extent to which it was reasonable for the person against whom the order was sought to oppose the application; and*

*(b) whether the parties to the application have complied with any relevant pre-action protocol.*"

7. The Applicant's counsel also prayed in aid the following commentary in paragraph 46.1.3 of the White Book:

> "*Although there is a presumption under r.46.1(3) that the court will award the person against whom the order is sought, their costs of the application and of complying with any order made, the court is entitled, as a matter of discretion, to deprive the successful party of its costs on the basis that the application has been unreasonably and unsuccessfully resisted: (Bermuda International Securities Ltd. v KPMG).*"

**Principles applicable to the award of costs in relation to applications by witnesses to set aside ex parte examination orders made under Order 70**

8. On balance, I accept Mr. Diel's submission that the ordinary rules as to costs apply in relation to applications to set aside an ex parte examination order made to adduce evidence for use at trial in foreign proceedings. I decline to follow by analogy the practice under rule 46.1 the English CPR on the grounds that the type of application it deals with is not analogous, despite being initially attracted by Mr. Potts' reliance on this special costs rule.

9. Firstly it is noteworthy that the list of contents for CPR Part 46 ("*COSTS-SPECIAL CASES*") does not include in the special cases category examination orders in aid of

foreign proceedings which are governed by rule 36. Further, and more substantively, the legal context of a pre-action disclosure order is simply not analogous to an examination order under Order 70 as read with Order 39 of this Court's Rules pursuant to section 27P-Q of the Evidence Act 1905. The analogous process in respect of obtaining evidence for use in local civil proceedings is the power to issue a subpoena under Order 38 rule 13. This analogy is illustrated by the following provisions of section 27Q of the Evidence Act 1905, which I referred to in my May 8, 2015 Ruling herein:

> "*(5) A person who, by virtue of an order under this section, is required to attend at any place shall be entitled to the like conduct money and payment for expenses and loss of time as on attendance as a witness in civil proceedings before the Court.*"

10. The modest nature of the expenses which witnesses are presently entitled to receive in respect of their participation in an examination adds little credence to the notion that witnesses should be *prima facie* entitled to their costs of applying to set aside an examination order without regard to the result of such application. Examination orders are usually only challenged by the opposing parties in the foreign proceedings or perhaps by institutional witnesses concerned to protect client confidentiality.

11. Where a foreign litigant seeking to obtain evidence in Bermuda for use in foreign proceedings has not made enquiries of the witness in advance and confirmed that any order obtained will not be challenged, it is incumbent on such party to ensure that the application is robustly supported by appropriate evidence and that the usual duties in making an ex parte application will be fully complied with. There may be exceptional cases where contacting the witness to procure their cooperation before making the ex parte application may be impracticable. But in the typical case, one would expect the applicant for an examination order to contact both the proposed witness and the proposed examiner before making the application so that the court can be advised whether or not the application is essentially a formality or a potentially contentious one. Unless otherwise agreed between the applicant and the proposed witness before the ex parte application is made, the order sought should also contain sufficient safeguards so the witness has no obvious need to retain counsel to haggle over the examination terms and query whether the ex parte examination order was properly obtained.

12. In the ordinary course a witness ordered to attend an examination should simply attend the hearing in the same way as a witness served with a subpoena, leaving it to the opponent of the party calling her to ensure that only relevant and admissible evidence is elicited at trial. Where a witness is a potential target of the foreign claim, and requires legal representation as a result, they will typically either be a past or present director or officer of the foreign defendant protected by appropriate insurance cover. If for reasons of high strategy related to their status as a potential defendant such a witness chooses to adopt an unusually aggressive response to an examination order, this can hardly provide a rational basis for departing from the usual party and party costs regime.

13. In the present case the manner in which the ex parte application was made seriously misled the Court for the following reasons. Firstly, the Court was advised that the

application was being made as a matter of urgency with a view to an examination hearing being conducted within a tight time-frame. This suggested to the Court, incorrectly, that the Respondents had reason to believe that the order sought was a mere formality and the proposed witness had agreed to cooperate. It was or ought to have been obvious to the Respondents' attorneys when they were offered the opportunity of a hearing on the papers by the Assistant Registrar that this offer was based on the assumption the application was an uncontentious one. Secondly, the supporting evidence did not clearly make out the important requirement that the evidence was relevant to issues at trial. If (as the Respondents knew) the witness had not signified her agreement to submit to the examination provided an order was obtained, this was also a matter which should have been drawn to the attention of the Court either at an oral hearing or at least in a supporting skeleton argument.

14. Is there or should there be a special rule for costs in relation to witnesses served with an order to appear at an examination to give evidence for use at trial in foreign proceedings according to which they are *prima facie* entitled to their costs of responding to the order? This Court should be slow to develop as a matter of common law more generous costs rules in favour of witnesses which could potentially encourage them to adopt an adversarial stance to orders summoning them when their proper role is to be neutral. This would be inconsistent with the public policy underpinning the jurisdiction to obtain evidence by way of assistance of courts overseas. The Bermudian law position reflects the corresponding English law position:

> "*The general principle which is followed in England* [Bermuda] *in relation to a request from a foreign Court for assistance in obtaining evidence for the purpose of proceedings in that Court is that the English Court will ordinarily give effect to such request so far as is proper and practicable and to the extent that is permissible under English law. This principle reflects judicial and international comity…It is the duty and pleasure of the English* [Bermudian] *Court to do all it can to assist the foreign Court, just as the English* [Bermudian] *Court would expect the foreign Court to help it in like circumstances…*"[2]

**Application of costs principles to the facts of the present case**

15. The August 20, 2014 Ex Parte Order was obtained in circumstances in which it was liable to be set aside for, *inter alia*, material non-disclosure and varied to include conditions which it was reasonable for the Applicant to insist on their inclusion. The application was only adequately supported in evidential terms when the Second Hirst Affidavit was filed on November 7, 2014. The application was based on a grossly exaggerated case of urgency which represented to the Court that the proposed witness had agreed to be examined within the indicated timeframe when in fact no such agreement had been reached. The crucial findings made in my May 8, 2015 Ruling which elucidate the nature of the result were the following:

[2] 1999 *White Book*, paragraph 70/6/3.

(1) "*19. I find that that the Applicant has established grounds for setting aside the Ex Parte Order based on the material then before this Court…*";

(2) "*20. However, in light of the further evidence adduced by the Respondents, I am now satisfied that the witness does have relevant evidence to give which will likely be used at the trial of the Illinois action and not as part of the Illinois discovery process. In other words, after an inter partes hearing, and in light of further evidence, it is now clear that good grounds for making the examination Order do in fact exist. Where an ex parte order has been improperly been obtained but is subsequently justified, the Court also retains the discretion to affirm the order rather than setting aside.*"

16. The Applicant succeeded in demonstrating that the Ex Parte Order was liable to be set aside and the Order would have been set aside based on the material before the Court prior to the filing of Second Hirst on November 7, 2014. Second Hirst did not deprive the Court of jurisdiction to set aside the Ex Parte Order; the Court merely decided to exercise a *locus poenitentiae* and to relieve the Respondents of the normal consequences of setting aside. In terms of the ultimate result, the Respondents may very narrowly be viewed as having won in 'real-life' terms although the Applicant also achieved a fair measure of success on the legal merits. Neither party comprehensively won the application to set aside.

17. The Court nevertheless possesses a broad discretion to make a punitive costs order in exercising its jurisdiction to forgive the improper way in which the Ex Parte Order was obtained rather than setting it aside. Order 62 rule 10(1) provides as follows:

> "*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.*"

18. This rule gives the Court jurisdiction to both deprive the Respondents of their costs and to order the Respondents to pay the costs of the Applicant. No 'double jeopardy' is entailed by relying on the same unreasonable conduct as a ground for both awarding some costs to the Applicant and depriving the Respondents of other costs to which they might otherwise have been entitled. The converse applies if the Applicant is viewed as having achieved substantial success.

19. In the exercise of my discretion I order the Respondent to pay the Applicant's costs of responding to and applying to set aside the Ex Parte Order up to and including reviewing the Second Hirst Affidavit. Prior to that, it is inconceivable that the application to set aside would not have succeeded both on the merits and in the result. After considering such Affidavit, however, in my judgment the Applicant as an independent witness ought to have been content to negotiate a consensual variation of the Ex Parte Order in terms which were at that point substantially agreed.

20. On the hypothesis that the Applicant won in 'real-life' terms, I would not award her costs thereafter. On my narrowly preferred hypothesis that the Respondents succeeded in sustaining the Ex Parte Order after November 7, 2014, I would deprive them of their costs having regard to the cumulative weight of the defects in the original application which the *inter partes* application served to illuminate.

21. For these reasons I make no order as the costs of either party after November 7, 2014, which is also consistent with a third view of the outcome; namely, that both parties achieved a more or less equal level of success.

22. Overall, this result is consistent with my provisional order which the Respondents unsuccessfully sought to better. The Applicant also sought her costs, despite indicating by way of fall-back that she was content with my provisional costs order. Mr. Potts invited the Court without any documentation (nor, apparently, prior notice to his opponent) to summarily assess his clients' costs to November 7, 2014 at $26,000. Both counsel invited me to make a provisional order as regards the costs of the present costs hearing.

23. Unless either party applies to be heard by letter to the Registrar within 14 days, I make the following further Order as to costs:

    (1) the Applicant's costs to on or about November 7, 2014 (including the review of the Second Hirst Affidavit) are summarily assessed at $20,000; and

    (2) no Order is made as to the costs of the hearing on costs itself.

Dated this 23rd day of June, 2015

IAN R.C. KAWALEY CJ