

BARBADOS

**IN THE HIGH COURT OF JUSTICE
CIVIL DIVISION**

**No. 1824 of 2013
(Consolidated with No. 1487 of 2013)**

BETWEEN:

ALVIN DAVID BRYAN

CLAIMANT

AND

ANTHONY THEOPHILUS BRYAN

DEFENDANT

Before the Honourable Mr. Justice William J. Chandler, Judge of the High Court.

Appearances:

Mr. Alvin Bryan in person

Ms. Susanna Thompson with Mrs. Janelle Jones-Carter for the Defendant

Dates of Hearing: 2014 January 29th, 30th, 31st

Date of Decision: 2014 December 5th

DECISION ON COSTS

INTRODUCTION

- [1] By a Notice of Application filed on 23 August 2013 and amended on 27 September 2013, the Claimant sought, *inter alia*, an injunction to restrain the Defendant whether by himself, employees, servants or agents from doing or authorising any acts that would breach the Claimant’s right to exclusively occupy property at No. 1 Astoria Court, Astoria in the parish of Saint George.
- [2] On 11 November 2013, the parties, then both represented by Counsel, agreed an order by consent (“the consent order”), which provided, *inter alia*, that “the Claimant withdraws his application for injunctive relief and the amended application filed on the 27 day of September 2013 filed against the Defendant herein and the Defendant withdraws his application for injunctive relief filed against the Claimant herein on the 18th day of October 2013”.
- [3] That Consent order was filed on 22 January 2014. The Defendant has complied fully with its terms while the Claimant did so only partially.
- [4] By affidavit filed 11 December 2013, the Claimant applied for an Order that the Defendant:
- “i. Restore the water and electricity back to the house [called “Astoria” situate at Dayrells in the parish of St. George]
 - ii. Replace all doors removed by the Defendant;

- iii. Repair and replace all the security bars and windows back in their original position;
- iv. Be restrained his and agents from harassing Claimant or being abusive or threatening manner against the Claimant and his immediate family;
- v. Be restrained his servants and agents from entering the property to commit any breaches of the herein agreement which exist between the Claimant and the Defendant;
- vi. To produce all necessary documents in order to complete the valuation of Lot 2;
- vii. Further or other relief;
- viii. Costs.”

[5] By that affidavit, the Claimant sought further interlocutory relief under his original and amended applications. In order to do so, he contended that the consent order was invalid on the ground that it had (i) failed to comply with **Rule 42.7(c)** of the **Supreme Court (Civil Procedure) Rules 2008 (CPR)** because he had not signed it; (ii) it was not served on him pursuant to **Rule 37.1**; and (iii) was obtained by means of fraudulent misrepresentation and material non-disclosure. He did not, however, make any application to vary or set aside the consent order.

[6] The application was heard on 29, 30 and 31 of January and in a written decision dated 31 January 2014, I dismissed the Claimant’s application for interlocutory relief and set out my reasons for doing so. I also adjourned the matter, at the Claimant’s request, to permit the Claimant to respond to the Defendant’s application for costs and reserved the question of costs to the adjourned date of hearing. On the adjourned date the Defendant appeared but the Claimant failed to do so. Both parties have, however, filed written submissions.

ISSUE

[7] The only issue is whether the Court should order that the Claimant bear the costs incurred by the Defendant in the Claimant’s unsuccessful application for interlocutory relief.

THE DEFENDANT’S SUBMISSIONS

[8] On the authority of *Donald Campbell and Company Limited v. Pollak [1927] A.C. 73* Counsel for the Defendant submitted that, in the absence of any special circumstances a successful defendant had “a reasonable expectation of obtaining an Order for the payment of his costs” but conceded that the Court had a discretion under **section 85** of the **Supreme Court of Judicature Act, Cap 117A of the Laws of Barbados** as to which party, if any, should bear the costs of the application. She pointed out that in exercising its discretion under **section 85**, the Court was, however, to be guided by **CPR Rule 64.6** which required the Court to examine certain factors including the conduct of the parties both before and during the proceedings, their success on each of the issues raised in the

application and whether it was reasonable for a party to pursue a particular allegation or raise a particular issue.

- [9] As to the conduct of the parties, Counsel for the Defendant pointed out that the Claimant had harassed his father, the Defendant, and also threatened him. The Claimant, argued Mrs. Jones-Carter, had also shown flagrant and persistent disregard for court procedure. He had not served an injunction obtained against the Defendant on the Defendant so that the Defendant could comply with its terms and had also attempted to evade service of documents filed by the Defendant in the suit.
- [10] Mrs. Jones-Carter also contended that in making the very serious and entirely unsubstantiated allegation that the Consent Order to which both parties had agreed was obtained by fraudulent misrepresentation, the Claimant “embarked upon a useless and unreasonable pursuit of [an] unfounded allegation...which amounted to a considerable waste of time”.
- [11] Finally, Counsel observed that not only had the Defendant been successful in defending the application but had been entirely reasonable in his conduct prior to and during the proceedings. In light of all the circumstances of the case, she contended that the Claimant should be required to bear the Defendant’s costs to be assessed.
- [12] As to the quantification of those costs, it was submitted that fixed costs, prescribed costs and budgeted costs were not applicable to the proceedings and the costs of the matter should therefore be assessed in accordance with **Rule 65.12** at a date fixed by the Court.

THE CLAIMANT’S SUBMISSIONS

- [13] In response to the Defendant’s submissions on costs, Mr. Bryan drew the Court’s attention to **Rule 65.11**, which stated that in deciding which party, if any, should pay the costs of an application, the general rule is that the unsuccessful party has to pay the costs of the successful party.
- [14] Mr. Bryan, relying on **Odgers on High Court Pleading and Practice (23rd Edition) at p. 443**, defined issue to mean “that which results in a determination or adjudication in favour of one party or the other”. According to Mr. Bryan, there had been two separate issues before the Court: (i) the Defendant’s argument that no further application for injunction could be brought because of clause 5 of the Consent Order; and (ii) the Claimant’s application for interlocutory relief.
- [15] Mr. Bryan submitted that while the Defendant had not been successful in the first issue the Claimant had not been successful on the second. On the authority of **Odgers (supra)** he argued that, where a matter raised two separate causes of action and each party had succeeded on one and failed on the other, the Defendant was entitled to the costs incurred on the action on which he succeeded while the Claimant was entitled to costs on the cause of action on which he succeeded. The Court therefore had to deal separately with the costs of each cause of action and

any items of costs attributable to both were to be divided or apportioned between the parties.

- [16] Mr. Bryan contended that as “the Consent Order and the application for further relief may be deemed as two separate causes of action in the interlocutory proceedings” and as the Claimant had succeeded on one and the Defendant on the other, their costs (i.e the costs of the Claimant and the Defendant) should be apportioned between them.

LAW AND DISCUSSION

- [17] **Section 85(1)** of the **Supreme Court of Judicature Act, Cap. 117A of the Laws of Barbados** confers upon the court a discretion as to the award of costs in all proceedings before it. It provides:

"85. (1) Subject to rules of court the costs of an (sic) incidental to all proceedings in the High Court and the Court of Appeal, including the administration of estates and trusts, are in the discretion of the Court and each court has power to determine by whom and to what extent the costs are to be paid."

- [18] **Part 64** of the **CPR** regulates the exercise of the discretion conferred by **section 85** of the **Supreme Court of Judicature Act**. Pursuant to **Rule 64.6(1)**, the general rule is that the court will order the unsuccessful party to pay the costs of the successful party. **Rule 64.6(2)** provides that the Court may, however, depart from this general rule and either make no order as to costs or, in an exceptional case, order a successful party to pay all or part of the costs of the unsuccessful party.

- [19] In seeking to determine whether this court should grant an order for costs in favour of the Defendant, the Court is required to have regard to all the circumstances of the case (**Rule 64.6(4)**) and specifically all of the factors set out in **Rule 64.6(5)**. Those factors are as follows:

- “(a) the conduct of the parties both before and during the proceedings;
- (b) whether a party has succeeded on particular issues, even if the party has not been successful in the entire proceedings;
- (c) whether it was reasonable for a party to
 - (i) pursue a particular allegation; or
 - (ii) raise a particular issue;and whether the successful party increased the costs of the proceedings by the unreasonable pursuit of issues;
- (d) the manner in which a party has pursued
 - (i) the case;
 - (ii) a particular allegation;
 - (iii) a particular issueand whether the manner increased the costs of the proceedings.

- (e) whether the claimant gave reasonable notice of an intention to pursue the issue raised by the application.”

[20] Mr. Bryan argued that he and the Defendant were equally successful in the application before the Court. He contends that there were two causes of action and he had succeeded in one and the Defendant on the other. His submission is misconceived and its basis incomprehensible.

[21] The Claimant brought an application for interlocutory relief using only an affidavit. By this application he sought similar relief to that sought by the application filed on 23 August 2013 and amended on 27 September 2013.

[22] The application raised the sole issue of whether the Claimant was entitled to the relief sought, which issue, according to para [19] of my judgment, required me to consider the following:

- “(a) the effect of the initialling of the order upon the parties,
- (b) whether there has been material non-disclosure and/or fraudulent misrepresentation; and
- (c) whether the Claimant is debarred from making his application *de novo*.”

[23] In the course of my decision I noted that the Claimant was entitled to apply for an injunction at any stage of proceedings. However, I went on to find that his application brought in the form of an affidavit and not under Form 10 was without merit.

[24] I further found that the Claimant had not acted equitably nor had he come with clean hands in taking benefits under the consent order whilst seeking also to undermine it. It was, therefore, unreasonable for him to bring these proceedings before the Court *de novo*.

[25] I also found that the Claimant had alleged fraudulent misrepresentation against the Defendant, a prominent businessman, without any particulars of such fraudulent misrepresentation. I found that there was no basis for these allegations. I also found that there was no basis for his allegation of material non-disclosure.

[26] It is clear, therefore, that the Claimant did not succeed on any of the issues raised in the case. The substantive claim, I pointed out, is still before the Court.

[27] It is manifest from my decision that there was no reasonable basis for the Claimant to bring the proceedings against the Defendant. There was, likewise, no reasonable basis for trying to disturb the consent order based on an interpretation of **CPR 42.7** which was entirely without merit. In these circumstances to order costs against the Defendant, regardless of his financial standing, would be most unjust indeed.

[28] In light of the foregoing, I see no need to depart from the general rule that the unsuccessful party shall pay the costs of the successful party.

[29] The Court has been inconvenienced in the delivery of this decision by the fact that the Claimant has made it impossible to serve notice of the date of delivery of the decision on him personally. Efforts were made to serve him by registered post and by e-mail as well as at his addresses on file. There is no address for service

on file. In spite of this he has neglected and/or refused to appear for the decision on 17th, 31st October, 2014, 21st, 28th November, 2014 and today's date. The Court is of opinion that the interests of justice require that the decision to be rendered without further delay.

[30] In view of the difficulties experienced in serving notice of the date of hearing of the decision on costs on the Claimant and his failure to attend on several previous occasions, I see no good reason to delay the quantification. The overriding objective in relation to saving judicial time and expense as well as the parties' time and expense is best achieved by making the assessment now.

[31] The Defendant has submitted his bill of costs containing the particulars of disbursements, stamp duties, legal fees and how such fees were calculated. This has been served on the Claimant.

[32] I have considered the said bill of costs and have amended it after taking into account the views of counsel for the Defendant. I hereby assess the costs in the manner set out in the bill of costs, as amended.

Disposal

[33] I have amended the fees charged in the light of the fact and I hereby assess the costs at \$8 680.00 being professional fees, \$8 290.00 and disbursements of \$390.00. The Claimant must pay these costs on or before the expiration of three months from the date of service of a certified copy of the Court's order on him.

WILLIAM J. CHANDLER
Judge of the High Court