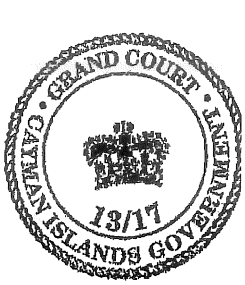


IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G 178 OF 2018

BETWEEN:

ROGELIO ANTONIO HAWKINS

Plaintiff

AND

ARARBANEL LTD.

Defendant

Appearances:	Mr. Michael Wingrave of Dentons & Mr. Henry Orren Merren IV Attorney-at-Law Mr. Colm Flanagan of Nelson & Company for the Defendant
Before:	Hon. Justice Richard Williams
Plaintiff's Written Submissions:	22 May 2020
Defendant's Written Submissions:	23 May 2020
Draft Judgment circulated:	2 June 2020
Date of Judgment:	8 June 2020

HEADNOTE

Costs – preliminary issue hearing – cost following the event

JUDGMENT AS TO COSTS

Introduction

1. Pursuant to the Consent Order approved by Richards J on 3 September 2019, a hearing came on before me to determine a preliminary issue on the discrete and

separate question as to whether the Moneylending Law 1938 of Jamaica ("the Law")[1] is in full force and effect in the Cayman Islands.

2. In my Judgment circulated on 7 May 2020 I found that the Law was not in force or effect in the Cayman Islands. That was a final decision on the issue for determination.

3. Following circulation of the draft Judgment, the Defendant submitted that the Plaintiff should pay the Defendant's costs in relation to the trial of the preliminary issue. The Plaintiff submitted that the costs should be costs in cause.

4. In the circulated copy of the final judgment I stated at paragraph 46 that:

> *"The Defendant has been the successful party in the trial of the preliminary issues. Costs ordinarily follow the event. Having regard to the approach adopted by Nugee J in* ***Merck KGaA -v- Merck Sharp & Dhome Corpe*** *[2014] EWHC 3920 (Ch) my preliminary view is that the Plaintiff should pay the Defendant's costs in relation to the trial of the preliminary issues on the standard basis to be taxed if not agreed. However, as the parties have not been afforded the opportunity to make submissions in relation to costs, they may submit written submissions on the issue of costs by or on 24 May 2020 to enable me to then make a final decision about the appropriate costs order. If written submissions are not filed by that date, then I will make an order that the Plaintiff should pay the Defendant costs*

[1] The Law is incorrectly referred to by the Plaintiff as being the Money Lending Act.

in relation to the trial of the preliminary issues on the standard basis to be taxed if not agreed."

5. Written Submissions were received from the Plaintiff on 22 May 2020 and from the Defendant on 23 May 2020. Due to the detailed nature of these submissions I am able to reach a decision on costs without requiring Counsel's attendance before me. In their Submissions both parties retain their initial positions about the nature of the costs order, the Defendant stating that that Plaintiff should pay its costs and the Plaintiff stating that the order should be costs in cause.

Law

6. GCR O.62 was amended apparently to bring our rules more in line with the modern English rules. The award of costs is in the discretion of a Trial Judge, but the discretion should be exercised along well–settled lines. The basic principle set out in GCR O.62, r.4 is that reasonable costs incurred in conducting proceedings in an economical, expeditious and proper manner should follow the event except where it appears in all the circumstances of the case that some other order should be made as to the whole or any part of the costs. GCR O.62, r.4(7) provides:

"The orders which the Court may make under this rule include an order that a party must pay –

(a) a proportion of another party's costs;
(b) a stated amount in respect of another party's costs;
(c) costs from or until a certain date only;
(d) costs incurred before proceedings have begun;
(e) costs relating to particular steps taken in the proceedings;
(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs (that the prescribed rate for Cayman Island dollars) from or until a certain date, including a date before judgment."

7. Therefore, I have a wide discretion to do justice between the parties, although this discretion must be exercised judicially, having regard to the underlying principle that the "real winner", as distinct from a nominal winner, is generally entitled to his costs. Further, I should not embark on a minute examination of all the various issues and the time taken to determine every issue, but should consider the event or outcome of the litigation and, in the light of that consideration, any timely offers of settlement that were made, should use a broad brush in attempting to arrive at a just result.

8. The general rule governing the award of costs to a successful Defendant was laid down by Atkin LJ in ***Ritter v Godfrey*** [1920] 2 KB 47 at 60:

> *"In the case of a wholly successful defendant, in my opinion the judge must give the defendant his costs unless there is evidence that the defendant (1.) brought about the litigation, or (2.) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3.) has done some wrongful act in the course of the transaction of which the plaintiff complains."*

9. I am satisfied that the Defendant has succeeded in the issue for determination at the preliminary hearing. In the case of ***Merck KGaA v Merck Sharp & Dhome***

Corpe [2014] EWHC 3920 (Ch) Nugee J considered what orders should be made as to the costs of the claimant who had succeeded on a trial of a preliminary issue.

10. In ***Merck*** the Claimant alleged that the Defendant had used its trade mark without consent. A dispute arose as to whether an agreement and a letter were governed by German law or by the law of New Jersey, it being agreed that the governing law of the agreement and the letter must be the same as that governing an earlier agreement. Therefore, Nugee J had to decide which law governed the earlier agreement and he found in favour of the Claimant who had argued that the proper law of the contract was German law.

11. The Learned Judge did not find anything in the defendant's submissions that persuaded him that there should be a departure from the normal principle that the losing party should pay the successful party's costs in full. Nugee J made the following helpful observations:

    (i) in general, it was a salutary principle that those who lost discrete aspects of complex litigation should pay for the discrete applications or hearings which they lost, and should do so when they lost them rather than leaving the costs to be swept up at trial;

    (ii) there was no advantage in considering what costs order might have been made in relation to the proper law issue if it had been tried as part of the main trial;

(iii) if the Claimant's claim ultimately failed, the relevant costs need not have been incurred, but it could equally be said that the costs would not have been incurred at all if the Defendant had not pleaded that the proper law was New Jersey Law; and

(iv) neither party had been unrealistic or unreasonable in contending for alternative governing laws-but that of itself was no reason for not applying the general rule that the unsuccessful party should pay the costs: the mere fact that a reasonable argument with realistic prospects was advanced did not justify departing from the usual consequences if the argument failed.

Review and Conclusions

12. The Plaintiff seeks to distinguish the case of ***Mercks*** on various grounds. The first is that in ***Mercks*** the Claimant had asked for the preliminary issue hearing, whereas in this matter, both parties agreed the terms of the preliminary trial, pursuant to the 3 September 2019 consent order. However, the fact that both legally represented parties, albeit not both corporate entities with one being an elderly lay gentleman, sensibly agreed that the determination of this novel and complex issue as a preliminary issue does not mean that there should be a departure from the normal approach to costs orders. I note that it was the Plaintiff who filed the Summons for Further Directions dated 15 July 2019 in which, at paragraph 3, a direction was sought that a number of preliminary questions,

including the issue which was before me, be dealt with at a preliminary trial. The Plaintiff's Summons was filed after the Defendant's Summons was filed on 8 July 2019 in which the orders to strike out the Plaintiff's Reply and parts of the pleadings were sought by the Defendant. It is clear from paragraph 30 of the Amended Defence filed on 2 October 2019 that the Defendant had reiterated its position that the Law had no force or effect in the Cayman Islands.

13. Another factor which the Plaintiff contends amounts to an operative and distinguishing factor is the wording at paragraph 5 of the Consent Directions Order dated 28 September 2019 which stated that:

> *"The costs of and consequential to the Plaintiff's Summons and the Defendant's Summons shall be costs in the cause."*

Ordinarily when one sees a similarly worded provision in a directions order it is related to the costs to date in relation to the relevant summons or to the costs of that hearing. That is how I read that provision when I place it in context with the rest of the directions and the case as a whole. Paragraph 5 of the Order does not fetter the wide discretion given to this Court when it is considering costs pursuant to GCR O.62, r.4.

14. Another factor which the Plaintiff contends amounts to an operative and distinguishing factor is his contention that the Defendant has failed to comply with ordered directions. The substance of the contention is disputed by the

Defendant. Even if substantiated the mentioned conduct is not relevant to the determination of the preliminary issue, although it arguably may be raised and become relevant in the wider proceedings.

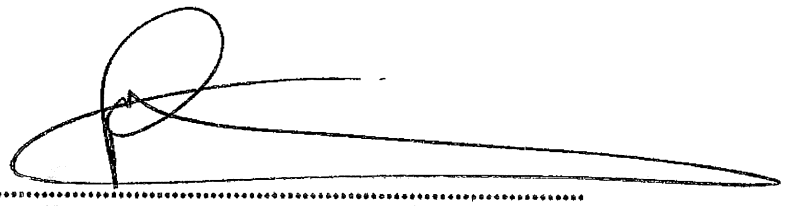
15. Having reviewed the Plaintiff's eight pages of Written Submissions in relation to costs, in the circumstances of the discrete and separate issue determined in this case, I still find that there is no reason to depart from the normal rule that those costs should follow the event. I am fortified in reaching this decision when I adopt Nugee J's sound reasoning and approach in ***Mercks.***

16. Accordingly, I order that the Plaintiff should pay the Defendant's costs in relation to the trial of the preliminary issues on the standard basis to be taxed if not agreed.

Footnote

17. Contained in the Plaintiff's Written Submissions in relation to costs *"and related matters"* there is reference to an attached *"draft Consent Order for Further Directions"*. It is clear that these directions are not agreed at this stage. Even if the directions were agreed, if any directions are now sought the party or parties should apply in the normal way by Summons to enable a judge to effectively case manage the matter. The large amount of amended pleadings to date give a disorganised appearance to the proceedings and this is characterised by the fact

that there was a perceived need to file the detailed Re-Amended Statement of Claim. This case is not reserved to me, as the preliminary point upon which I have ruled is a discrete and separate issue. Therefore, this matter moving forward may come before any Judge.



The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT