IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 142 OF 2016

BETWEEN:

WILLESLEY ANTHONY LALOR

PLAINTIFF

AND

MARLON RALSTON MATTHEW COLLINS

DEFENDANT

Appearances:

Ms Sonia Bush of Sonia Bush & Associates on behalf of the Plaintiff

Mr Kerrie Cox of HSM Chambers on behalf of the Defendant

Before: **The Hon. Justice Kawaley**

Heard: **On the papers**

Ruling Circulated: **8 July 2019**

Ruling Delivered: **11 July 2019**

HEADNOTE

Costs of Defendant's successful application for summary judgment-whether unreasonable conduct displaces usual rule that costs follow the event-Grand Court Rules Order 62 rules 4(2), 4(5) and 11(2)

RULING ON COSTS

Introductory

1. On May 1, 2019, I dismissed the Plaintiff's application for summary judgment and granted the Defendant's cross- application for summary judgement upholding his

limitation defence. Reasons were delivered for that decision on May 27, 2019. Having directed that sequential written submissions be tendered in relation to costs, the Plaintiff's submissions were filed on May 27, 2019 and the Defendant's submissions were filed on June 4, 2019.

2. The reasons for granting summary judgment in favour of the Defendant and dismissing the present action was that it was commenced after the six year limitation period had expired. Bizarrely, the Plaintiff had initially commenced an action for his contractual claim well within time, switched lawyers and seemingly failed to inform his new lawyers that an action (Cause No. GO 490 of 2008-the "first action") had already been filed. Costs, one might expect, could only possibly be awarded to the Defendant. The Defendant too, however, when served with the second action, apparently instructed new counsel who inexplicably (it seemed to me) did not raise the duplicity issue from the outset. Had the Defendant acted unreasonably so as to displace the usual rule that costs should follow the event?

3. In my Reasons for Decision, I identified the following concerns for the parties, and in particular the Defendant, to address in relation to costs:

> *"18. The Defendant, like the Plaintiff, has also been represented by different lawyers in both the First Action and the Second Action. It appears, on the face of it, that the Defendant's strategy was to lure the Plaintiff down a dead-end litigation street. Rather than raising the issue of the present action being duplicative of the First Action and an abuse of the process of the Court as soon as the Writ was served on or about August 5, 2016, the Defendant filed a substantive Defence in March 2017. In fact, judgment in default was entered in October 2016 and the Defendant swore an affidavit in support of an application to set it aside complaining that he was only actually served in December and exhibiting a draft Defence. And neither that pleading nor the Defendant's First Affidavit makes any mention of the First Action. Were the Defendant's lawyers also not told by their client about the First Action? Lightning does not normally strike in the same place twice. It would not be surprising, however, if the Defendant too was "unable to continue to instruct" his initial attorneys and also chose to mount a new litigious horse.*
>
> *19. In the Defendant's Case Summary and Written Submissions dated April 29, 2019, it is complained that the present action was superfluous and that the Consolidation Summons was an abuse of process. It is implied that it was the Plaintiff's counsel who first raised the existence of the First Action in Court on February 25, 2019, without explaining why the Defendant did not raise the abuse of process complaint earlier, in particular, before filing a Defence*

and advancing a far more elaborate summary judgment application. A short letter demanding that the Plaintiff elect which action he wished to pursue as soon as the Defendant first had notice of the present proceedings was arguably the most reasonable and proportionate way to respond to service of the present proceedings, having regard to the parties' duty to assist the Court to achieve the Overriding Objective. The full picture will doubtless be revealed when the costs submissions are filed."

The Submissions

4. Ms Bush was forced to step into the breach at the 11th hour after counsel who previously had conduct of the matter unexpectedly became unable to continue. She made a brave plea for the Plaintiff to be awarded his costs of his ill-fated time-barred action which was plainly unsustainable. She fairly pointed to the injustice which would potentially flow from an adverse costs order against the Plaintiff, who might be left with an obligation to pay the Defendant and no remedy for the claim which the Defendant had partially admitted in the first action. However, the submission that the Defendant's conduct in belatedly applying to strike-out based on the limitation point was so unreasonable as to justify the Plaintiff being awarded the costs generated by his own folly was not tenable. In these circumstances, the only real question was whether the Defendant should be deprived of some or all of the costs of his successful application to dismiss the Plaintiff's claim.

5. The Defendant filed an Affidavit in which he deposed that he thought the first action had gone away and forgot about it when he received a copy of the Default Judgment in this action. He instructed his current attorneys and did not mention the first action until the hearing on February 25, 2019 when the Plaintiff's attorneys discovered about the first action. The Plaintiff was understandably unable to challenge this evidence. Mr Cox submitted:

> "29. *The Defendant avers that he never informed HSM of the First Proceedings because he thought that 'case' had simply 'gone away'; the Plaintiff had abandoned the action. He therefore considered that that matter had been concluded and the Second Proceedings only, had to be addressed.*
>
> *30. Whilst of course this may be a naive understanding of the true legal position, it is submitted that this would not be an unreasonable deduction to make, in the circumstances of not hearing anything further in those original proceedings for over 7½ years.*

> *31. Unaware of the First Proceedings, therefore, HSM could not have taken any early steps to correspond with SB&A under a warning that the Second Proceedings were tantamount to an abuse of process.*"

6. This was a complete answer to any unreasonable conduct on the part of the Defendant's lawyers, but an inadequate explanation as to why it was in objective terms <u>reasonable</u> for the Defendant as a litigant to defend the present action on its merits rather than seeking to bring it to a speedy end. Mr Cox went on to submit that the Defendant's cross-application for summary judgment was promptly filed and pursued and was always meritorious.

Governing principles

7. The overarching principle governing the jurisdiction to award costs is set out in GCR Order 62 rule 4(2) which provides:

> "*(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs* incurred *by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.*"

8. The right to cover costs is explicitly linked to conducting proceedings "*in an economical, expeditious and proper manner*". The governing principle in relation to the awarding of costs is found in GCR Order 62 rule 4(5):

> "*(5) 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.*"

9. This the usual rule that costs "follow the event" which means that the party that wins an application or a case should recover their costs from the losing party unless circumstances and the Rules justify a different approach. GCR Order 62 rule 11(2) provides one legal basis for depriving a successful party of all or some of his costs. GCR Order 62 rule 11 provides:

> "*(2) Where it appears to the Court in any proceedings that anything has been done or that any omission has been made improperly, unreasonably or negligently 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."

10. It is true that this rule empowers the Court to order a party who has won to pay his opponent's costs, it is well recognised that this power would only be exercised to punish a party for serious misconduct.

Findings

11. The Defendant has won and is in principle entitled to recover his costs. However, I find that he (but not, for the avoidance of doubt, his lawyers) acted unreasonably in failing instruct his attorney about the first action. I expressed the provisional view that the Defendant's counsel should, rather than defending the proceedings on their merits, have written a letter demanding that the present action be discontinued as it was an abuse of process and/or time-barred. Such an application would have been far simpler than the elaborate time-bar point and would not have necessitated the filing of a Defence. However, a draft Defence would have had to be filed in any event in support of an application to set aside the Default Judgment.

12. The Defendant's failure to properly instruct his attorneys creating circumstances where the present action might well have been brought to a speedy and uncontentious end nonetheless resulted in the case being conducted in an uneconomical manner to a very significant extent. It is entirely possible that if the Plaintiff was put on notice that it was far easier for him to pursue the first action that he would have abandoned the present action and avoided the delay and costs of dealing with a limitation point which did not arise at all in relation to the first action. Based on the way the Plaintiff responded to the Defendant's summary judgment application dated March 11, 2019, the possibility that the shot across the bows would have been ignored necessitating an application to set aside the Default Judgment and a strike-out application on abuse of process grounds in any event cannot be completely ruled out. There is no sufficient basis for disallowing all of the Defendant's costs.

13. Nor can the Court ignore the realities of how the case has been conducted based on the Defendant's protestations of an innocent mistake. The Court cannot allow a litigant in the position of the Defendant, seeking to avoid liability for a claim he has partially admitted, to obtain the significant strategic benefit of permitting his opponent to pursue a hopeless claim and incurring costs liabilities which have the potential to make it uncommercial to pursue that claim. In my judgment, carelessly and /or unintentionally conducting litigation in an unreasonable manner clearly counts for costs purposes. The Court is expressly empowered by GCR Order 62 rule 11(2) to disallow a party's costs

where "*anything has been done or that any omission has been made... negligently by or on behalf of any party*". The governing costs principles are primarily designed to have regard to the practical and objectively viewed realities of how litigation is conducted and the costs jurisdiction is not ordinarily shaped by abstract notions of morality.

14. The Defendant is entitled to some costs in relation to his successful defence of this action as a whole. An important consideration is that the Plaintiff's own negligent conduct is responsible for the present action being started because he too failed to properly instruct his new attorneys about the existence of the first action. The parties may be viewed as equally to blame in this regard. I would in the exercise of my discretion award the Defendant 50% of his costs of the action.

Summary

15. The Defendant is accordingly awarded 50% his costs of the present action.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY CJ
JUDGE OF THE GRAND COURT