



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018 No: 129

BETWEEN:

DOUGLAS KELLEY

(In his capacity as the Trustee of the PCI Liquidating Trust)

Plaintiff

And

Steven G. Stevanovich; Paragon Management Ltd. n/k/a Bermuda Administrative Services Ltd; Marshall Diel and Meyers a/k/a Marshall Diel & Meyers; Talisman Capital Talon Fund a/k/a Talisman Capital Talon Master Fund Ltd.; Westford Global Asset Management Ltd.; Westford Asset Management, LLC f/k/a/ Bridgewater Capital Management, LLC; Monahan and Biagi PLLC; Berkeley Square Management Ltd; Groen Brothers Aviation Inc.; Groen Brothers Aviation Global Inc.; Clean Fuels Technology, Inc.; Rudolf W Gunnerman; MLO Products, Inc. n/k/a Genisoy Food Company, Inc.; John Does #1 – 9,999

Defendants

COSTS RULING

(In Chambers)

Dates of Hearing: 24 January 2019
Date of Ruling: 06 February 2019

Counsel for the Plaintiff: Jennifer Haworth (MJM Limited)
Counsel for the Defendant: Steven White (Appleby (Bermuda) Limited)

Ruling on Costs
Order of Costs to Follow the Event / Whether Defendant succeeded in real life terms
Whether Defendant achieved substantial success
Application to set aside order for examination (RSC O. 70 of the Rules of the Supreme Court)

RULING of Shade Subair Williams J

Introduction

1. This is the Defendant’s application for costs following my Ruling of 12 October 2018 (“the October Ruling”). The underlying proceedings to which the costs application relate refer to the Defendant’s contested summons application dated 2 July 2018 to set aside or vary my ex parte Order made on 26 April 2018 (“the ex parte order”) for Bermuda Administrative Services Ltd. (“BAS”) to comply with the terms of a Request from the United States Bankruptcy Court for the District of Minnesota (“the Request”) for International Judicial Assistance for a proper representative of BAS to submit to examination under oath by a Bermuda appointed examiner.
2. Having heard arguments on costs from Counsel on both sides, I reserved my ruling and indicated that I would provide these written reasons.

The Plaintiff’s Preliminary Objections

3. In the October Ruling I granted leave for either party who wished to be heard on costs to file a Form 31D¹ within 14 days of the date of the Ruling.
4. Unfortunately, as the Court was made to understand, the published version of the October Ruling contained a date discrepancy between the front page and the final signature page resulting in some confusion between the parties on the official date of the October Ruling.
5. The inconsistent descriptions of the date of the October Ruling resulted in ambiguity as to whether the correct date of the said ruling was 12 or 18 October 2018. Indeed, the correct date ought to have been reported as 12 October 2018.
6. Ms. Haworth, on behalf of the Plaintiff, operating on the correct presumption that the timeline for the filing of the Form 31D commenced on 12 October 2018, objected to the

¹ Form 31D is a hearing request form used for the Supreme Court Registry by litigants who wish to be heard on a disputed issue with liberty of the Court to make the relevant application

Court hearing Mr. White's application on the basis that he filed for the application out of time. Notably, the Defendant's request to be heard on costs was filed within a 14 day period of the 18 October 2018.

7. Having clarified that the correct date of the October Ruling is in fact 12 October 2018, I allowed Mr. White to proceed in making his application for costs, in the exercise of my discretion.

Background Proceedings

8. By summons dated 1 June 2018 ("the First Summons") the Defendant sought to adjourn the examination date as fixed for 5 June 2018 by the *ex parte* order. The First Summons also contained a prayer for further or other directions to be ordered by the Court. The Court was informed through a chronology chart provided by the Defendant at the cost hearing that the First Summons was filed after the Plaintiff refused on 28 May 2018 to agree an adjournment of the examination date.
9. The basis of the adjournment application prayed in the First Summons was that the Defendant had been deprived of the minimal 28day period envisaged by the Court for it to consider the *ex parte* order. The Defendant complained, by letter to the Court dated 30 May 2018, that the *ex parte* order was served on 7 May 2018 but that the supporting application documents were not served until 22 May 2018. Mr. White informed the Court that the Plaintiff's Counsel conveyed to him that it was the Defendant's obligation to request the *ex parte* documents and not the Plaintiff's responsibility to voluntarily serve them.
10. On 4 June 2018 the parties appeared before me on the First Summons and indicated from the outset of the hearing that directions had been agreed between the parties. A Consent Order for Directions followed which adjourned the fixed hearing date for the following day and outlined further directions which included an 8 June 2018 deadline for the Defendant to file and serve its application to set aside the *ex parte* order which would be made returnable for a half day hearing on 9 July 2018. Costs under the Consent Order were reserved.
11. On 12 June 2018 the Defendant filed its summons application which was dated 2 July 2018 and made returnable for 9 July 2018 ("the Second Summons"). In the Second Summons the Defendant primarily sought to set aside the *ex parte* order. In pursuit of further or alternative relief the Defendant applied to vary the *ex parte* order so to include six specific conditions which were listed in the Second Summons.

12. The Second Summons was heard before me on 9 July 2018 and the ruling was delivered on 12 October 2018².

The Submissions before the Court on the Costs Application

13. The Defendant argued that in application of the principle that costs ought to follow the event in civil proceedings, his client should be awarded his costs on both the First and the Second Summons. Mr. White argued that the Defendant was overall successful in his application to set aside or vary the *ex parte* order and should accordingly be granted a costs order in his favour.

14. Mr. White emphasized that any of the issues which were agreed on the Second Summons were first agreed by the Plaintiff at the 9 July 2018 hearing and not before-hand. This was particularly relevant to the list of 6 conditions set out in the Second Summons.

15. Ms. Haworth, however, submitted that the Court should make no order as to costs because the overall result of the findings on the Second Summons favoured the Plaintiff's position in equal measure or more than that of the Defendant.

The Application to Set Aside or Vary the Ex Parte Order

16. At paragraphs 10 – 12 in the October ruling, I outlined the terms of the Letter of Request (“the Request”) granted by the *ex parte* order and the grounds for the relief prayed in the Second Summons:

10. In addition to the requirement for a BAS representative to be examined under oath, the *ex parte* Order also required the Defendant to produce various documents specified in paragraph 18 of the Request which stated:

a) *Particulars of the beneficial owners on whose behalf Paragon held shares in Capital Strategies during the period April 30, 2001 to October 14, 2010, the latter being the date Capital Strategies was placed into voluntary liquidation.*

b) *Copy of the custodian or nominee agreement between Paragon and the beneficial owners of the shares in Capital Strategies.*

² The period of delay between 9 July 2018 hearing and the 12 October 2018 Ruling is attributable to extended medical leave as stated in the 12 October Ruling.

- c) *For the period February 1, 2003 to September 20, 2005, bank statements for Paragon's bank account number ... with Bank of N.T. Butterfield & Son Limited into which Capital Strategies made the following transfers to Paragon*

(A tabled chart setting out dates ranging between 27 February 2003 and 31 May 2005, and providing the originating bank account details in addition to various amounts transferred under eight separate transactions is inserted at this part of the Request. These transfers total \$8,300,000.00.)

- d) *For the period April 1, 2006 to October 31, 2009, bank statements for the Paragon bank account(s) into which Capital Strategies made the following transfers to Paragon:*

(Again, a tabled chart setting out the dates, originating bank account details, and the various amounts transferred is inserted at this part of the Request. These transfers totaled \$72,116,147.15)

- e) *Particulars of to whom Paragon paid the monies referred to at (c) and (d) above, including copies of all checks, withdrawals debit vouchers, electronic or written transfer application and all other documents relating to such transfers.*

- f) *Details of to whom Paragon distributed the limited partnership units in Capital Strategies Cayman L.P., a Cayman Islands exempted limited partnership, which it received as a distribution in specie on October 14, 2010, together with all documents relating to such transfers.*

11. The application to set aside the *ex parte* order is made on the following grounds:

- (i) *The Application for foreign judicial assistance is an attempt to gather information from Bermuda Administrative Services Ltd speculatively as part of a 'fishing expedition', for the purposes of pre-trial discovery and/or to establish new lines of enquiry in the present proceedings before the US Bankruptcy Court District of Minnesota; and*
- (ii) *Further or alternatively the Application contains requests which do not meet the strict requirements of Bermuda law for the grant of such requests, as further set-out in the Second Affidavit of Luciano Aicardi sworn on 8 June and filed in support of this Summons.*

12. Alternative grounds for the variation of the *ex parte* Order are pleaded in the following terms:

- (i) *The examination should take the form of examination-in-chief;*
- (ii) *The evidence taken and documents so produced should only be used for the purposes of the relevant overseas proceedings in which the Application for foreign judicial assistance has been made and the hearing of such examination should be made conditional upon the Plaintiff providing an undertaking to this effect;*
- (iii) *That any documents to be put to the proper officer appearing on behalf of Bermuda Administrative Services Ltd ought to be served on the attorneys for Bermuda Administrative Services Ltd not less than 14 days before the date of examination (or such other reasonable period as may be proposed);*
- (iv) *That the expenses of the proper officer appearing on behalf of Bermuda Administrative Services Ltd should be paid by the Plaintiff as required by the Evidence Act 1905 and the Curt Fees and Expenses Act 1971 (or as may be agreed);*
- (v) *That the reasonable legal fees of Bermuda Administrative Services Ltd in providing for its legal representation at the examination should be paid by the Plaintiff; and*
- (vi) *In regard to (iv) and (v) above, the hearing of the examination should be made conditional upon the Plaintiff providing an undertaking fortifying these conditions;*
- (vii) *Costs*

Summary of Court Findings on the Application to Set Aside or Vary the Ex Parte Order

17. In the October Ruling I set aside the *ex parte* order which required production of the following information:

Particulars of the beneficial owners on whose behalf Paragon held shares in Capital Strategies during the period April 30, 2001 to October 14, 2010, the latter being the date Capital Strategies was placed into voluntary liquidation;

Copy of the custodian or nominee agreement between Paragon and the beneficial owners of the shares in Capital Strategies; and

Particulars of to whom Paragon paid the monies referred to at (c) and (d) above, including copies of all checks, withdrawals debit vouchers, electronic or written transfer application and all other documents relating to such transfers.

18. I varied, using the ‘blue pencil’ approach, the *ex parte* order requiring ‘*Details of to whom Paragon distributed the limited partnership units in Capital Strategies Cayman L.P., a Cayman Islands exempted limited partnership, which it received as a distribution in specie on October 14, 2010, together with all documents relating to such transfers*’.
19. I further granted the Defendant’s application to vary the *ex parte* order by way of conditions prayed in sub-paragraphs 2(i)-(iv) of the Second Summons but refused the Defendant’s application for the Plaintiff to cover any part of the legal fees of BAS at the examination.
20. I refused the Defendant’s application for me to set aside the parts of the *ex parte* order which required the production of the Bank of N.T. Butterfield & Son Limited statements for Paragon into which Capital Strategies made transfers between 1 February 2003 to 20 September 2005 and 1 April 2006 to 31 October 2009.

The Relevant Law

21. RSC Order 62/3 provides that costs should follow the event as a starting point in contentious civil and commercial litigation. It reads:

“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.”

22. The Defendant relied on the judgment of Kawaley J (as he then was) in *Bins and Ors v Burrows [2012] Bda LR 3* in support of costs principles well-established and followed by this Court. In 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.”*
23. 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*”*

Analysis and Decision

24. The costs of the First Summons should be part of costs in the cause on my assessment as the material part of the First Summons resulted in an order for case-management directions in aid of the Second Summons application. Notably, the Defendant was successful in its application to adjourn the examination as also prayed in the First Summons.
25. The Defendant had clear overall success on its Second Summons to set aside or to vary the *ex parte* order. The fact that a portion of the documents ordered for production remained in place and unvaried does not undo the Defendant’s bottom-line success.
26. I see no reason to reduce the award of costs to which the Defendant is entitled. Real-life success in the context of contentious litigation does not mean that each and every single point argued was won by the victor. Some battles may be lost but in the end the question comes down to who ultimately won the war. In this case, it was clearly the Defendant.

Conclusion

27. Costs of the Defendant's First and Second Summons in addition to costs of the costs application is awarded to the Defendant on a standard basis to be taxed if not agreed.

Dated this 6th day of February 2019

SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT