

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2013/CLE/gen/01344

B E T W E E N

COMMONWEALTH FRANCHISE HOLDINGS LIMITED

Plaintiff

AND

CASUAL DINING RESTAURANTS LTD.

First Defendant

AND

CHRISTOPHER A. MORTIMER

Second Defendant

AND

ISLAND BLOOM RESTAURANT LTD.

Third Defendant

AND

GALLERIA CINEMAS LTD.

Fourth Defendant

Before Hon. Chief Justice Ian R. Winder

Appearances: Sophia Rolle-Kapousouzoglou with Valdere Murphy for the Plaintiff

Gregory Moss for the First, Second, Third and Fourth Defendants

19 May 2020 and 6 April 2022

DECISION ON COSTS

WINDER, CJ

[1.] On 27 April 2020 I gave judgment in this action and invited the parties to give submissions on the appropriate order for costs. While the plaintiff (CFH) complied immediately with the invitation it is with much regret that the First, Second, Third and Fourth Defendants (the defendants) developed issues with their representation and was unable to comply until more recently. This is my brief decision on the issue of costs.

[2.] This was a claim by CFH in breach of contract. CFH's prayer for relief in the action sought the following:

1. Payment of the sum of \$213,899.40 plus late charges and interest on the late payment of royalty fees due and owing since the 15th November 2012
2. Damages against the Defendants for breach of contract
3. Loss of Future Royalty Payments of \$250,000
4. Loss of business opportunity
5. Damages related to breach of the Non-Compete Clause in the sum of \$250,000
6. Damages for the Second Defendant's breach of the Guaranty.
7. Injunctive relief as against the Third Defendant and/or its agents or assigns or otherwise howsoever authorized until 11th February 2023, which represents the intended term of the BFA.
8. Rescission.

[3.] The issues which the Court decided at trial is to be found in paragraph 25 of the trial judgment. Paragraph 25 of the judgment provided:

25. The issues for determination which arise in this action are the following:
 - a) Whether CFH has locus standi to pursue this claim.
 - b) Clause 17A of the Franchisee Agreement and the issue of the Insolvency of CDR.
 - c) Whether CDR is in breach of the Franchise Agreement in failing to pay outstanding royalties.
 - d) Whether Mortimer is liable to pay these sums due from CDR.
 - e) Whether there has been a breach of the non-compete clause by CDR, Mortimer and Island Bloom by opening up another competing business on the premises formerly occupied by Bennigans Nassau within the time period prohibited under the Franchise Agreement.

[4.] At trial the Court found for CFH on issues (a) - (d) but not on issue (e), as against the First Defendant (CDR) and Second Defendant (Mortimer). At paragraph 74 of the judgment the decision of the court found:

74 For the avoidance of doubt the decision of this court is as follows:

- (1) CDR and Mortimer do pay to CFH all outstanding royalty fees owing by CDR up to 24 January 2013 inclusive of interest and late payments in accordance with the terms of the Agreement up to the date of the commencement of this action. [The parties are invited to settle the calculation of the said sum, failing which the Court will make the calculation.]
- (2) All other claims against CDR and Mortimer are dismissed.
- (3) CFH shall be entitled to interest on the said sum from the date of the filing of the Amended Statement of Claim to the date of judgment in the amount of 4% and to accrue interest at the statutory rate
- (4) Claims against Island Bloom are dismissed.
- (5) Claims against the Fourth Defendant are dismissed.

[5.] CFH's case on costs, in summary, is as follows:

- (a) The usual order is that costs follow the event and as a result, CFH, as the successful party herein is entitled to its costs of this action, to be taxed if not agreed.
- (b) Alternatively, on the principle of issue based costs, it is contended that CFH was successful on the majority of the issues in dispute herein and therefore, CFH should be awarded costs in any event to be taxed, if not agreed.
- (c) In the event that the Court is of the view that the Third and Fourth Defendants are entitled to their costs, it would be appropriate in the circumstances of the instant case for the Court to make a Sanderson Order.

[6.] The defendants case on costs, in summary, is to be found in their written submission at paragraphs 14, 17, 21 and 24-26, as follows:

14. It is submitted, therefore, that the correct approach to a costs order in the case of partial victories is that the Court should decide whether it should, on the one hand, make an "*issue-based costs order*" or a "*proportionate costs order*" or, on the other hand, make "*no order as to costs*".

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17. In the event that the Court is minded to make an issue-based costs order, we would submit that the Court should make the following Orders on the basis that the First and Second Defendants defeated the Plaintiff on the majority of that 1st Claim and on the entirety of the 2nd through 8th Claims:

- (1) That the First and Second Defendants pay to the Plaintiff Twenty percent (20%) of the Plaintiff's costs on the standard basis in respect of the 1st Claim, to be taxed if not agreed.
- (2) That the Plaintiff pay to the First and Second Defendants the costs of the 2nd through 8th Claims to be taxed if not agreed.

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In the event that the Court is minded to make a proportionate costs order, we would submit (repeating the authorities in paragraph 21 above) that the Court should make the following Orders on the basis that the First and Second Defendants defeated the Plaintiff on the majority of that 1st Claim and on the entirety of the 2nd through 8th Claims:

- (1) That the First and Second Defendants pay to the Plaintiff Twenty percent (20%) of the Plaintiff's costs on the standard basis in respect of the 1st Claim, to be taxed if not agreed, on the basis that the First and Second Defendants defeated the Plaintiff on the majority of that 1st Claim.
- (2) That the Plaintiff pay to the First and Second Defendants the costs of the 2nd through 8th Claims to be taxed if not agreed.

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In the event that the Court is minded to make no order as to costs in relation to the 1st Claim, we would submit that the Court should make the following Order:

- (1) That there be no order as to costs in respect of the 1st Claim.
- (2) That the Plaintiff pay to the First and Second Defendants the costs of the 2nd through 8th Claims to be taxed if not agreed.

Costs of the Third and Fourth Defendants

25. In any event, it is submitted that the Plaintiff should be ordered to pay to the Third and Fourth Defendants their respective costs of the Action, to be taxed if not agreed, as the Plaintiff's claims against them were entirely misconceived and unsustainable and were dismissed.

Overall

26. In addition to the aforesaid orders as to costs, it is submitted that it should also be ordered that there should be a set-off of costs which are eventually assessed pursuant to such orders in favour of the respective parties, as applicable.

[7.] Having considered the submissions of the parties and having regard to the partial successes of both parties, I make the following costs orders:

- (1) As against CDR and Mortimer, CFH shall be entitled to 65% of its costs such costs to be taxed if not agreed.
- (2) The Third and Fourth Defendants, having been successful in defending against the claims of CFH, shall be entitled to their costs of the action. Admittedly, such costs ought to be minimal having regard to the joint

representation and the incidental connection of the claims against the Third and Fourth defendants to the wider claim. I did not accede to the request of CFH to make the other defendants responsible for those costs.

Dated this 16th day of September 2022

A handwritten signature in black ink, consisting of a stylized 'I' and 'W'.

Ian R Winder

Chief Justice