COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2016/CLE/gen/01295

BETWEEN

HONG KONG ZHONG QING DEVELOPMENT COMPANY LIMITED

Plaintiff

-and-

(1) SQUADRON HOLDINGS SPV0164HK, LTD

First Defendant

(2) MR. D. SEAN NOTTAGE

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Christopher Jenkins with him Mr. Ra'Monne D. Gardiner of Lennox Paton for the Plaintiff
Mrs. Gail Lockhart-Charles and Mr. Rhyan Elliott for the Defendants

Hearing Dates: 31 May, 30 June,3 July,15 September 2017, 15 May 2018, 08 November,12 November, 14 November 2018

Costs – Taxation – Application for indemnity costs – Defendants re-litigate points already determined – Defendants sought exact same relief before another judge – Defendants failed to bring salient facts to attention of court – Whether points raised by Defendants benefitted Bahamian jurisprudence

RULING

Charles J:

[1] On 7 May 2017, I dismissed the Defendants' application to set aside the *ex parte* injunction which I granted on 16 September 2016 with costs to the Plaintiff. The Plaintiff claims its costs on an indemnity basis.

[2] The Plaintiff argues that the following findings justify an award of indemnity costs namely:

a) the then Counsel for the Defendants, Mr. Michael Scott ("Mr. Scott") launched an application that was moot causing the parties to incur the expenses of re-litigation on a point already conceded and causing the Court the inconvenience of allotting judicial resource to hear the issue unnecessarily;

b) that Mr. Scott at the hearing of 7 February 2017 failed in his duty to advise the Court as to what transpired at the hearing on 14 December 2016 and encouraged the Court to make directions inconsistent with its earlier directions;

c) the Defendants failed to bring to the attention of the Court at the hearing on 7 February 2017 that there were already live proceedings commenced by the Defendants before Senior Justice Isaacs addressing the very same issues which they sought preliminary determination of in these proceedings;

d) The Court found at paragraph 79 of the Ruling that Mr. Scott breached Practice Direction No. 4 of 1974 in seeking the perfection of the Disputed Directions Order, and in particular,

   i. Ought to have invited comments on their draft before sending the same to the Court;

   ii. Ought to have responded with comments to the revised draft emailed by Mr. Jenkins on 8 February 2017;

   iii. On presenting the Order to the Court for perfection, ought to have

      1. Advised the Court that the form of the order was not agreed (as she was at that time aware);

      2. Enclosed any rival draft or correspondence setting out the areas of disagreement; and

3. Actually copied Lennox Paton to the communication to Court (as opposed to merely professing to do so).

e) The Court, at paragraph 82(3) of the Ruling accepted that Mr. Scott misled the Court in paragraph 2 of its summons of 2 February 2017 that there had been a direct request from the Hong Kong Court for assistance of the Bahamian Court when no such request had been made

[3] The Defendants opposed the application for indemnity costs and argue that there is no basis for it. They say that in most cases where the issue of costs arises, the onus is on the Plaintiff to prove to the Court that in the normal course of events, the Court should not award costs on a party to party basis. The Defendants further submitted that since there is a pending appeal, it is only logical that the issue of costs be reserved until the final determination of the appeal. According to the Defendants, it will be premature to award costs at this stage with an appeal pending.

[4] The defendants also submitted that the basis for the application appears to be rooted in a personal attack on Mr. Scott. Such an attack is without merit and conveniently fails to mention the Plaintiff's own conduct, specifically failing to turn up to a scheduled hearing. I should state that the Court was informed that Counsel for the Plaintiff was ill and junior Counsel, Mr. Gardiner was present throughout the proceedings.

[5] The Defendants further submitted that the essential points determined by the Court in this matter involved serious questions of law which they were entitled to pursue. They also submit that one of the issues raised enhanced the jurisprudence in The Bahamas as the ruling of the court appears to be the only reported ruling which addresses whether section 70 of the International Business Companies Act ("the IBC Act") as to whether arbitration proceedings commenced by a Company prior to its incorporation would be a nullity following the **Freeport Licencees Property Owners Association v The Grand Bahama Port Authority Limited and others** [2009] 3 BHS J. No. 125 line of authority.

Indemnity costs

[6] The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. The Court has an unfettered discretion in determining the amount of costs that an unsuccessful party has to pay. However, this discretion ought to be exercised judicially, not whimsically or capriciously, but in accordance with established principles and in relation to the facts of the case and on relevant grounds connected with the case, which included any matter relating to the litigation, the parties' conduct in it and the circumstances leading to the litigation, but nothing else: see Buckley L.J. in **Scherer v Counting Instruments Ltd** [1986] 2 All ER 529 at pp. 536-537.

[7] In determining whether indemnity costs ought to be ordered, I glean my authority and wide discretion from the Supreme Court Act, Ch. 53. Section 30(1) provides:

> "**Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.**"

[8] The discretion to order costs in civil proceedings is further bolstered in Order 59, rule 3(2) of the Rules of the Supreme Court ("RSC") which provides:

> "**If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, 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] A parallel discretion is provided for in Order 59, rule 2(2) of the RSC which states:

> "**The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order.**"

[10] Additionally, Order 59 rule 4 empowers the Court to deal with costs at any stage of the proceedings or after the conclusion of the proceedings.

[11] In **E.M.I. Records Ltd v Ian Cameron Wallace Ltd and another** [1983] 1 Ch. 59 it was held that the court has power in contentious proceedings to order the unsuccessful party to pay the successful party's costs on bases other than party and party and common fund basis under rule 28 (UK) and those other bases included orders for costs on an indemnity basis as well as on the solicitor and client basis and the solicitor and own client basis.

[12] **E.M.I. Records Ltd** was cited with approval by Sawyer CJ in **Levine v Callenders & Co. et al** 1998 BHS J. No 75. She stated at pp. 2-3:

> **"As I understand that decision, the Vice Chancellor held, among other things, that the wide discretion set out in section 50 of the Supreme Court of Judicature (Consolidation) Act 1925, (England) which was continued under s.51 of the 1981 Act gives the High Court of that country, the power to make an order for costs on "an indemnity" basis in inter partes litigation, particularly in cases involving contempt of court proceedings. In addition, he equated such an order to an order for costs on solicitor and own client basis under Order 62, r 29(1) of the English Rules of the Supreme Court."**

[13] The test for the award of indemnity costs was said in **Bowen-Jones v Bowen-Jones and others** [1986] 3 All ER 163 to be the process of "exceptional circumstances" and in **Connaught Restaurants Ltd v Indoor Leisure Ltd** [1992] C.I.L.L 798, it is said to be the presence of factors that take the case outside the run of normal litigation. In that case the factor was litigation was fought **"bitterly or unreasonably**."

[14] Upon considering an application for indemnity costs, Mr. Justice Rattee in **Atlantic Bar & Grill Limited v Posthouse Hotels Ltd** [2000] C.P. Rep. 32 referred to the decision of Knox J in **Bowen-Jones v Bowen-Jones and others** [1986] 3 All ER 163 in which Knox J cited a passage from the well-known judgment of Brightman L.J. (as he then was) in **Bartlett v Barclays Bank Trust Co. Ltd. (No. 2)**[1980] Ch. 515. Brightman L.J. had this to say at p.547:

"…It is not, I think, the policy of the courts in hostile litigation to give the successful party an indemnity against the expense to which he has been put and, therefore, to compensate him for the loss which he has inevitably suffered, save in very special cases. Why this should be, I do not know, but the practice is well-established and I do not think that there is any sufficient reason to depart from the practice in the case before me".

[15] Mr. Justice Rattee continued:

"Knox J. applied that principle in the case before him. He relied also on the case of *Wailes v Stapleton Construction and Commercial Services Ltd and Unum Ltd. [1997] 2 L.L.R. 112,* in which Newman J said, at p.117:

> **'The circumstances in which an order for indemnity costs can be made, while an open ended discretion so far as the rules are concerned, is obviously one which must be exercised on judicial discretion.'**

Having then cited various authorities his Lordship went on to say:

> **'In summary, the position appears to be that, where there are circumstances of a party behaving in litigation in a way which can be properly categorized as disgraceful, or deserving of moral condemnation, in such cases an order for indemnity costs may be appropriate.'**

Newman J. went on to say this:

> **'There may be cases otherwise, falling short of such behaviour in which the Court considers it appropriate to order indemnity costs. <u>The threshold of qualification which a party would appear to have to establish is that there has been, on the party to be impugned by such an order, some conduct which can be properly categorized as unreasonable, and I would add to that in a way which the Court is satisfied constitutes unreasonableness of such a high degree that it can be categorized as exceptional</u>. There are varying ways in which the course of litigation, parties to it could be categorized as having behaved unreasonably, but one would not, simply as a result of that, decide that they should pay costs on an indemnity basis.'** [Emphasis added]

[16] In **Levine v Callenders & Co,** Sawyer CJ echoed the same sentiments and stated at p. 4:

"While I accept the general principle that the conduct of a party, in some cases, will justify an award of costs on an indemnity or solicitor and client basis, in my judgment conduct which would justify such an order would

> **have to be egregious –for example, a breach of an undertaking by a party (as in the case of a Mareva injunction mentioned earlier –which is itself a specie of contempt) and contumacious contempt of court. A failure to comply with the rules of pleading is not, in my judgment, in and of itself, a reason to award costs on an indemnity basis."**

Analysis and conclusion

[17] The general rule is, in most cases, where the issue of costs arises, the Court will award costs on a party to party basis. The Court does so in the judicial exercise of its discretion and would only depart from this principle when there are exceptional and egregious circumstances to do so. It is not possible to define the exact circumstances in which indemnity costs might be ordered. It therefore remains a matter for the judge exercising his discretion based on judicial principles. Typically, an award for costs on an indemnity basis can be made in exceptional cases where the conduct of a party can be considered egregious or where the conduct of a party can be properly categorized as disgraceful or deserving of moral condemnation.

[18] A court, in making an order for indemnity costs, will have regard to conduct which is so unreasonable during the course of the trial to justify an order for indemnity costs. In this regard, I am guided by the dictum of Judge Peter Coulson QC in **Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd** [2005] EWHC 2174. At [14], his Lordship stated:

> **"I do not believe that unnecessary or unreasonable pursuit of litigation must involve an ulterior purpose in order to trigger the court's discretion to order indemnity costs. I consider that to maintain a claim that you know, or ought to know, is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs."**

[19] I found it useful to adopt the approach offered in the treatise **Cook on Costs 2015** at [24.9] under the heading **"Culpability and abuse of process"**. The learned author said:

> **"Traditionally costs on the indemnity basis have been awarded only where there has been some culpability or abuse of process such as:**

(a) deceit or underhandedness by a party;

(b) abuse of the courts procedure;

(c) failure to come to court with open hands;

(d) the making of tenuous claims;

(e) reliance on utterly unjustified defences;

(f) the introduction and reliance upon voluminous and unnecessary evidence; or

(g) extraneous motives for litigation.

What is clear is that the exercise of the court's discretion is best considered by reference to specific examples of where the court has made indemnity costs orders. It is one of those situations where it is hard to pinpoint specific conduct, but one knows it when one sees it!"

[20] In my opinion, the concept of unreasonableness in **Atlantic Bar & Grill Limited v Posthouse Hotels** [supra] involves conduct which is outside the norm. This concept coupled with the list enumerated by **Cook on Costs** illustrates examples of circumstances where the court may make an award of costs on an indemnity basis.

[21] In the present case, the egregious behaviour complained about by the Plaintiff seemed to have been focused on the imperfections of Mr. Scott and not necessarily the Defendants. Further, I agree with learned Counsel for the Defendants, Mrs. Lockhart-Charles that it cannot be said that the Defendants acted improperly in pursuing this litigation. At the heart of the matter was whether arbitration proceedings commenced by a Company prior to its incorporation would be a nullity or whether section 70 of the IBC Act, which contemplates ratification of otherwise void agreements for the benefit of the Company would be similarly capable of breathing life into proceedings based on such agreements.

[22] In my considered opinion, the facts of this case do not justify an order for costs on an indemnity basis. Such an order would be overly harsh and while there

have been some breaches of court's procedure, I cannot classify them as abuses.

[23] Therefore, I will order that the Defendants pay to the Plaintiff costs on a party to party basis.

Dated this 8th day of November, A.D., 2018

Indra H. Charles
Justice