COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2016/CLE/gen/01355

BETWEEN

BLUE PLANET GROUP LIMITED

First Plaintiff

AND

YELLOW ELDER COMPANY (BAHAMAS) LTD

Second Plaintiff

AND

WILLIAM DOWNIE

Defendant

AND BETWEEN

WILLIAM DOWNIE

Plaintiff to Counterclaim

AND

BLUE PLANET GROUP LIMITED

YELLOW ELDER (BAHAMAS) LTD

Defendants to Counterclaim

Before Hon. Mr. Justice Ian R. Winder

Appearances: Tara Archer-Glasgow with Audley Hanna Jr for the Plaintiffs

Metta MacMillan-Hughes with Chizelle Cargill and McFalloughn Bowleg for the Defendant

RULING

WINDER, J

1. This is my brief decision relative to the issue of costs following the 6 April 2019 decision to discharge the Mareva injunction granted on 22 February 2018. The matter was remitted back from the Court of Appeal for reconsideration of this singular issue.

2. Having carefully considered the submissions of both parties I am not satisfied that there is a proper basis to depart from the general rule that costs follows the event. I therefore award Costs to the Defendant.

3. The Defendant has asked that I award costs on an indemnity basis. My learned sister, ***Charles J***, in the case of ***Sumner Point Properties Limited v (1) David E. Cummings (2) Bryan Meyran 2012/CLE/gen/1399*** (unreported) provides an instructive discussion on the issue which I adopt as the correct statement of the law. In paras 8 to 18, ***Charles J*** states::

> The law on indemnity costs
> [8] There is no doubt that the court has the jurisdiction to determine whether indemnity costs ought to be ordered.
> [9] A good starting point is the case of E.M.I. Records Ltd v Ian Cameron Wallace Ltd and another [1983] 1 Ch. 59 where 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.
> [10] E.M.I. Records Ltd was cited with approval by Sawyer CJ in Levine v Callenders & Co. et al [1998] BHS J. No 75 where she stated at pp. 2-3:
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> > "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."

[11] The test for the award of indemnity costs was said to be the process of "exceptional circumstances": Bowen-Jones v Bowen-Jones and others [1986] 3 All ER 163 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."

[12] 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".

[13] 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. 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. 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]

[14] In Levine v Callenders & Co, Sawyer CJ echoed similar 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." [Emphasis added]

Discussion, analysis and conclusion

[15] 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 circumstances to do so. Usually, 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.

[16] 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 dicta 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."

[17] A useful approach to adopt is to be found in 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!"

> [18] The concept of unreasonableness in Atlantic Bar & Grill Limited v Posthouse Hotels [supra] involves conduct which was outside the norm. This concept coupled with the list enumerated by Cook on Costs illustrate examples of circumstances where the court may make an award of costs on an indemnity basis."

4. In the circumstances, having regard to the authorities, I am not inclined to award costs on an indemnity basis as the conduct of the Plaintiff (whilst in the main inappropriate so as to cause the discharge of the injunction), was in no way so egregious or contumacious to warrant the punishment of indemnity costs.

5. Whilst I continue to lament the potential for systemic unfairness of the assessment of costs by taxation, it would be more unfair to deprive both the Defendant and the Plaintiff of the opportunity to make submissions in the usual manner on the individual items on the Defendant's bill. This wasn't a simple application, as mareva relief provides one of the more technical civil applications. I therefore decline the application to summarily fix the sum of costs to be awarded. I will however certify that costs are fit for two counsel.

6. Suffice it to say that having regard to the several rulings emphasizing the costs disputes between these parties, I expect the Registrar to be vigilant in the taxation process to scrutinize the reasonableness of the items to be assessed.

Dated this 11th day February AD 2021

Ian R Winder
Justice