COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2016/CLE/gen/01346

BETWEEN

DELAPORTE POINT LIMITED

Plaintiff

-AND-

(1)KING ENTERPRISES LIMITED

First Defendant

AND

LEONETTE FERGUSON

Second Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mrs. Eugeina Butler of Providence Law for the Plaintiff
Mr. Oscar O. Johnson KC with him Mr. Keith Major Jr. of Higgs & Johnson for the Second Defendant
The First Defendant not participating as a result of a Judgment on Admission already entered against the Company on 21 July 2017

Hearing Date: 29 November 2022

Costs – Summons of Plaintiff to declare Second Defendant owner of Unit dismissed – Second Defendant has appealed Judgment - Dispute as to who is the successful party

Both Defendants alleged that they are the owners of a Unit situate within the Delaporte Point Community. As management fees on the Unit were owed (and are still owing), the Plaintiff sued both Defendants. On 21 July 2017, the Court entered a Judgment on Admission against the First Defendant in the presence of the Second Defendant. The Judgment on Admission remained wholly unsatisfied. The Plaintiff proceeded to have a Receiver appointed to sell the Unit with a view to liquidating the debt owed. A Receiver was appointed and, in the process of selling the Unit, the Second Defendant intervened asserting ownership of the Unit. As a result, on 6 May 2019, the Plaintiff filed a Summons seeking (i) to reinstate the Second Defendant to the action;

(ii) to declare her the legal and beneficial owner of the Unit and (iii) Judgment to be entered against her for the full amount owed to the Plaintiff for outstanding management fees. On 15 July 2019, the Court heard the first limb of the application and reinstated the Second Defendant to the action. The Second Defendant did not appeal that decision. Directions were given for the hearing of the remaining two issues.

In a written Judgment delivered on 24 August 2022, the Court dismissed the Plaintiff's Summons filed on 6 May 2019 to declare the Second Defendant the owner of the Unit and reinstated the Judgment on Admission, extending the time for the First Defendant to comply with the 21 July 2017 Order failing which the Receiver would be at liberty to sell the Unit. The issue of costs on the Summons was reserved.

The parties are now before me to determine who is entitled to costs as the successful party. As I understand it, both parties claim to be the successful party: the Second Defendant says that the Plaintiff's Summons was misconceived and hence, dismissed. On the other hand, the Plaintiff says that it got what it wanted: for the Court to determine the ownership of the Unit which was at the root of the action. The Plaintiff further stated that the Second Defendant lost her bid for the Court to declare her the owner of the Unit. In short, she was unsuccessful.

The Second Defendant has since appealed the Judgment. She seeks, in paragraph 7 of her Notice of Appeal an Order that (1) the Judgment be set aside in its entirety, or alternatively, in part; (2) the appeal be allowed…." She further submitted that the Court should not give any consideration to the fact that she has appealed the entirety of the Judgment.

HELD: Finding that the Plaintiff is the successful party in the action and ordering that the Second Defendant do pay costs to the Plaintiff be taxed if not agreed

1. Notwithstanding that part of the Plaintiff's Summons filed on 6 May 2019 to declare the Second Defendant the owner of the Unit was dismissed, the Plaintiff got what it wanted and, therefore, was the successful party in the action.

2. A critical issue which arose at the trial was for the Court to determine the ownership of the Unit. The Second Defendant was unsuccessful in her bid to be declared the owner of the Unit.

3. The Second Defendant's allegation that the Plaintiff's Summons was misconceived and that the Plaintiff wasted precious judicial time and caused unnecessary costs to be incurred cannot be supported by the evidence. On the contrary, it was the Second Defendant who inserted herself in this action and prevented the Receiver from selling the Unit. Had she not done so, there would have been no need for the Plaintiff to re-approach the Court seeking, among other things, an Order that she be declared the owner of the Unit. In fact, that was the very Order that she was seeking but failed in her attempt to persuade the Court to do so.

4. The Second Defendant has appealed the Judgment and has asked the Court of Appeal to set aside the Judgment in its entirety or, alternatively, in part; that the action be held dismissed against her with costs. Only unsuccessful parties appeal judgments in their entirety or call for a dismissal of the action.

5. The general rule is, 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 well-established principle when there are exceptional circumstances for doing so.

6. An award for indemnity costs can be made in exceptional cases where the conduct of a party can be considered egregious or disgraceful or exceptional or deserving of moral condemnation. The fact that the Second Defendant fought hard to be declared the owner of the Unit does not make her conduct egregious or disgraceful or exceptional or deserving of moral condemnation: **Levine v Callenders & Co. et al** [1998] BHS J. No. 75 per Sawyer CJ.

7. Costs are awarded to the Plaintiff on a party to party basis. Costs are to be taxed if not agreed.

RULING

Charles Snr. J:

Introduction

[1] By Summons filed on 6 May 2019, the Plaintiff ("Delaporte"), a company which carries on the business of the management of all matters related to the Delaporte Point Condominiums, sought (i) a Declaration to reinstate the Second Defendant ("Ms. Ferguson") to the action; (ii) a Declaration that Ms. Ferguson is the legal and beneficial owner of the Unit and (iii) Judgment to be entered against Ms. Ferguson for the outstanding management fees, accumulated interest and costs.

[2] At the heart of the dispute was whether Ms. Ferguson owns Unit H-9B ("the Unit") located in Delaporte in the Western District of New Providence.

[3] The Court heard the Summons and, on 24 August 2022, delivered a written Judgment ("the Judgment") in this matter. The Court concluded that:

1. Delaporte's Summons filed 6 May 2019 to declare Ms. Ferguson to be the owner of Unit No. H-9B ("the Unit") located within the Delaporte Point

Community situate in the Western District of the island of New Providence, one of the islands of the Commonwealth of The Bahamas is dismissed.

2. Judgment on Admission entered against King Enterprises Limited in favour of Delaporte Point Limited on 21 July 2017 and filed on 27 July 2017 in the sum of $61,184.64 (and continuing), interest at the statutory rate of 6.25% from 21 July 2017 to the date of payment and costs of $8,000.

3. King Enterprises is to comply with paragraph 2 of this Order by 31 October 2022 failing which the Receiver is at liberty to sell the Unit. A Penal Notice is to be affixed to this Order and;

4. The issue of costs on this Summons is reserved. Both parties will submit written submissions by 15 September 2022.

[4] For reasons which will become clearer in this Ruling, I find, notwithstanding that Delaporte's application to declare Ms. Ferguson the owner of the Unit was dismissed (which was only part of the Order made by the Court), Delaporte was the successful party in this action in that the Court reaffirmed that King Enterprises was the true owner of the Unit and the Receiver is at liberty to sell the Unit. Delaporte is entitled to its costs to be taxed if not agreed. It is not entitled to indemnity costs.

Procedural history

[5] The procedural history is worth narrating again as it will give a better perspective of the determination of the sole issue which is before me: who is the successful party to be awarded their costs.

[6] By a Specially Indorsed Writ of Summons filed on 14 September 2016, Delaporte seeks from both Defendants (both of whom claim to be the owner of the Unit), the payment of management fees on the Unit assessed as at 5 September 2016 to be in the sum of $36,849.19 as well as unrestricted access to it to effect necessary

repairs so that it does not negatively impact the adjoining units and the entire Condominium community as a whole.

[7] The crux of Delaporte's allegation was that (i) King Enterprises is the owner of record of the Unit and still asserts that it is the rightful owner and (ii) Ms. Ferguson claims to be the current owner of the Unit and has produced a copy of an unstamped and unrecorded conveyance executed by the President and Director of King Enterprises.

[8] On 25 October 2016, the Defendants filed a Joint Defence. At paragraph 2, they admit that King Enterprises is the owner of record of the Unit. At paragraph 3, the Defendants neither admit nor deny Ms. Ferguson's allegation that she is the current owner save to the extent of confirming that she has advanced funds to King Enterprises in respect of the Unit, as authorized by its beneficial owner. Thereafter, they neither admit nor deny most of the allegations in the Statement of Claim and put Delaporte to strict proof of them.

[9] Delaporte filed a Reply to Defence on 30 November 2016 and, before the matter came up for Case Management Conference, Delaporte filed an application on 20 February 2017 seeking Summary Judgment against both Defendants for the principal sum of $52,682.43, interest and costs. Delaporte also sought an order that it be allowed unrestricted access to the Unit to effect necessary repairs in order to prevent the risk of electrical, fire or flooding.

[10] On 21 July 2017, in the presence of Ms. Ferguson, King Enterprises, through its Counsel, admitted the judgment debt ("Judgment on Admission"). The Court made the following order:

> i. Judgment on Admission for the sum of $61,184.64 plus interest pursuant to the Civil Procedure (Award of Interest) Act, 1992 from the date of judgment to the date of payment;

ii. An Order that the Plaintiff be allowed unrestricted access to the Unit to effect the necessary repairs to the Unit and those affecting the adjoining units;

iii. That the Plaintiff shall recover the reasonable costs related to carrying out the essential repairs to the Unit from the First Defendant;

iv. That the First Defendant shall pay costs in the sum of $8,000 to the Plaintiff on or before the close of business on Thursday 31st day of August 2017;

v. That Summary Judgment against the Second Defendant is adjourned to Case Management as the Second Defendant was not represented by Counsel.

[11] Ms. Ferguson, who was previously represented by the same Counsel as King Enterprises, appeared pro se on that day and did not object to the Judgment on Admission against King Enterprises. Subsequently, Delaporte applied to discontinue the action against Ms. Ferguson.

[12] As a result of King Enterprises' failure to satisfy the Judgment on Admission, Delaporte proceeded to have a Receiver appointed to sell the Unit with a view to liquidating the debt owed.

[13] By an Order of the Court dated 21 November 2017 and filed on 6 December 2017, Mr. Edmund Rahming was appointed receiver to sell the Unit by public auction or private contract. During his oral testimony in the action, Mr. Rahming stated that the Unit was advertised for sale and he received a total of 10 offers. During the bidding process, Ms. Ferguson attended his office without notice and advised that she believed that she was the owner of the Unit. She did not provide any evidence of her ownership assertion nor was she willing to pay the outstanding fees owed to Delaporte but rather she placed a bid on the Unit for $70,000. The bidding

process closed on 8 February 2018. The individuals who submitted the highest offers were contacted. He subsequently accepted the fourth highest bid at $190,000 as the first three bidders were not minded to proceed.

[14] During the requisition process, the purchaser's attorney raised the issue of the conveyance which was issued to Ms. Ferguson for the Unit. Because of discussions with the purchaser's attorney with respect to Ms. Ferguson, Mr. Rahming was unable to proceed with the sale.

[15] As I stated in the Judgment, it was Ms. Ferguson's intervention that caused the sale by auction not to be proceeded with.

[16] After many unsuccessful attempts to obtain the "fruits of victory" of the Judgment on Admission, Delaporte once again turned to the Court, this time armed with a Summons, filed on 6 May 2019, pursuant to RSC Order 31A rule 18(2)(s), (i) to reinstate Ms. Ferguson to the action; (ii) a Declaration that she is the legal and beneficial owner of the Unit and (iii) Judgment be entered against her for the full amount owed to Delaporte for outstanding management fees, accumulated interest and costs.

[17] On 15 July 2019, the Court heard the first limb of the application and reinstated Ms. Ferguson as the Second Defendant in this action. There is no appeal from this decision.

[18] The matter was next adjourned to 11 September 2019 and then 20 November 2019. On 20 November 2019, the parties had agreed that the Court should make a Declaration that Ms. Ferguson is the legal and beneficial owner of the Unit. It was agreed that Ms. Ferguson was to stamp and record her Conveyance, pay the outstanding management fees to Delaporte and make the necessary repairs to the Unit as soon as practicable. As the Court was about to formalize the Consent Order, Ms. Ferguson recanted. The Court then gave directions for the hearing of the Summons.

[19] In addition to and during the intervening period, Ms. Ferguson through her new attorneys, Higgs & Johnson, filed a number of applications namely: (1) Summons filed 20 November 2019 for damages for lost rental income in respect of the Unit; such damages to be assessed; (2) Summons filed 20 November 2019 opposing the application for Judgment and costs; (3) Summons filed 20 February 2020 seeking leave for the Second Defendant to enter Counterclaim and (4) Summons filed 3 March 2021 seeking reconsideration and/or relief from sanctions with Certificate of Urgency.

[20] On 18 February 2020, this Court granted leave to Ms. Ferguson to file and serve a Counterclaim by 21 February 2020. The hearing of the Counterclaim and Further Case Management was fixed for Monday 20 April 2020 at 2.30 p.m.

[21] There was no hearing on 20 April 2020 as Covid-19 took hold and the world came to a halt. The Courts of The Bahamas were also affected.

[22] The matter commenced on 13 May 2021 and a few preliminary issues arose surrounding the Counterclaim. The Court then ordered that the Summons filed 3 March 2021 to file and serve a Counterclaim be dismissed with costs to Delaporte to be taxed if not agreed.

[23] At the hearing, the parties agreed that the following issues arose for consideration namely:

1. Whether or not Ms. Ferguson has good title and ought to be declared the rightful owner of the Unit;

2. Who the owner of the Unit is and;

3. Whether management fees are owing to Delaporte by the owner of the Unit?

[24] Before the issues commenced, Ms. Ferguson also raised a preliminary issue arguing that the Court was *functus officio.* The Court found that this preliminary

issue had no merit and it was too late to complain and to raise such an issue in submissions.

[25] The first primary issue was whether or not Ms. Ferguson has good title to the Unit since she claimed to be the owner. She relied on a conveyance which was unstamped and unrecorded. The Court found that she had not displaced King Enterprises as the owner of the Unit and that King Enterprises owed management fees to Delaporte.

[26] In paragraphs 83 and 84 of the Judgment, the Court focused on a way forward and stated that:

> **"[83] On 21 November 2017, Registrar Darville-Gomez (as she then was) appointed Mr. Edmund Rahming to be the Receiver by way of Equitable Execution to sell by public auction the Unit.**
>
> **[84] The Order of the Registrar is still effective."**

[27] It cannot be disputed that the Court dismissed the second limb of Delaporte's Summons filed on 6 May 2019 to declare Ms. Ferguson the owner of the Unit. The Court found, at paragraph 80 of the Judgment, that "*until and unless the presumption of 'good and valid' title is displaced by Ms. Ferguson (or anyone else), King Enterprises is the owner of the Unit*."

[28] The Court then proceeded to reinstate the Judgment on Admission against King Enterprises, extending time for the Company to comply with the 21 July 2017 Order failing which the Receiver will be at liberty to sell the Unit. The issue of costs on the Summons was reserved.

Who is the successful party in the action?

[29] Mrs. Butler, appearing as Counsel for Delaporte, submitted that, notwithstanding that its application to declare Ms. Ferguson the owner of the Unit was dismissed, Delaporte was successful because, essentially, it got what it wanted, that is to say,

for the Court to affirmatively determine ownership of the Unit since both Defendants say that they own it.

[30] On the other hand, Mr. Johnson KC, appearing as Counsel for Ms. Ferguson, argued that Delaporte's Summons filed on 6 May 2019 was unnecessary and misconceived; nonetheless Delaporte persisted with the Summons causing unnecessary costs to be incurred and judicial time to be wasted.

[31] Ms. Ferguson's allegation that Delaporte's Summons was misconceived and Delaporte wasted precious judicial time and caused unnecessary costs to be incurred cannot be supported by the evidence. On the contrary, it was Ms. Ferguson who inserted herself in this action and prevented the Receiver from selling the Unit. Had she not done so, there would have been no need for Delaporte to re-approach the Court seeking, among other things, an Order that she (Ms. Ferguson) be declared the owner of the Unit. In fact, this was the very Order that Ms. Ferguson herself was seeking: for the Court to declare her the owner of the Unit.

[32] Both parties asked the Court to make an affirmative determination on the issue of ownership of the Unit. Both parties asked the Court to make an order that Ms. Ferguson is the owner of the Unit. Thus, the Summons was relevant. Neither party was able to persuade the Court to make such an order.

[33] That said, Delaporte got judgment in its favour. The Court ordered, among other things, that the Receiver is at liberty to sell the Unit and liquidate the debt owed to Delaporte. This is what Delaporte wanted all along: for the owner of the Unit (whoever that party might be) to pay management fees which were owing and which continues to increase with the passage of time.

[34] In my judgment, Ms. Ferguson was the unsuccessful party and Delaporte is entitled to its costs of the action.

Appeal

[35] Ms. Ferguson has appealed the Judgment. She has asked the Court of Appeal (1) to set aside the Judgment in its entirety or, alternatively, in part; (2) that the action be held dismissed against her; (3) the appeal be allowed; (4) Delaporte be directed to use all reasonable endeavours and resources available to it to treat her in the same manner and with the same courtesies as afforded to her predecessor in title, that is to say, in utmost good faith and upon proper principles; (5) the costs of and occasioned by both the Appeal and the Action be awarded to her; and (6) such further and or other relief which the Court may deem just and equitable.

[36] Ms. Ferguson submitted that the Court should not give any consideration to the fact that she has appealed the Judgment. I disagree. The intended appeal is probative of the fact that she lost the action. Only unsuccessful parties appeal decisions.

Full costs/Indemnity costs

[37] Delaporte claims full costs. By that, I believe that Delaporte is claiming indemnity costs.

[38] On this point, I can do no better but to adopt the legal principles emanating from my own Judgment in **Douglas Ngumi v Hon. Carl Bethel et al.** 2017/CLE/gen/01167. I quote liberally from paras. 118 to 121 of the Judgment (which part of the Judgment was upheld on appeal):

> **Indemnity costs**
>
> **"[121] Learned Queen's Counsel Mr. Smith seeks costs on a full indemnity solicitor own client basis. He submitted that given the manner in which this case was conducted by the Defendants, Mr. Ngumi seeks costs on a full indemnity solicitor own client basis and relied on the case of *R. v Christie Ex Parte Coalition to Protect Clifton Bay* 2013/PUB/jrv/0012 Ruling No. 2.**
>
> **[122] In this vein, I can do no better than to rely on the rulings that I have done on this subject matter. I therefore quote extensively from one of those rulings which was delivered not so long ago on 21 September 2020: *Sumner Point Properties Limited v (1) David E. Cummings (2) Bryan Meyran* 2012/CLE/gen/1399 (unreported). In paras 8 to 18, I discussed the law on indemnity costs. I stated:**

"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:

> **"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. <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]

[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."

[120] Applying the legal principles emanating from the above authorities to the facts in the present case, I am not inclined to award costs on an indemnity basis as the conduct of the Defendants was in no way egregious or contumacious. The award of exemplary damages has already taken into account the need in bringing home to the Defendants that "*torts do not pay*".

[121] I will therefore order that the Defendants do pay reasonable costs to Mr. Ngumi on a party to party basis…."

[39] Shortly put, an award for indemnity costs can be made in exceptional cases where the conduct of a party can be considered egregious or disgraceful or exceptional or deserving of moral condemnation. The fact that Ms. Ferguson fought hard to be declared the owner of the Unit does not make her conduct egregious or disgraceful or exceptional or deserving of moral condemnation: **Levine v Callenders & Co. et al** [1998] BHS J. No. 75 per Sawyer CJ.

[40] I will make an Order awarding costs to Delaporte on a party to party basis. Ms. Ferguson shall pay reasonable costs to Delaporte to be taxed if not agreed.

Dated this 7th day of December 2022

Indra H. Charles
Senior Justice