THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division

Claim No. 2025/CLE/gen/01083

BETWEEN:

EKRALE LTD.

First Claimant

AND

GODFREY BETHELL

Second Claimant

AND

CARL MCDONALD

First Defendant

AND

TYRESE CHISHOLM

Second Defendant

Before: Registrar Renaldo Toote

Appearances: Shanelle Bethel of Counsel for the Claimant
Raynard Rigby, KC of Counsel for the Defendants

Hearing date(s): 31 March 2026

RULING

Introduction

1. This matter concerns the issue whether the Court should make a non-party cost order against CG Atlantic General Insurance Ltd. ("CG Atlantic" or "the Insurer"), a company that is not named as a party on the record of these proceedings.

2. The issue follows two related applications filed on behalf of the First Defendant:
   (i) the Notice of Application filed on 19 December 2025 to set aside the judgment in default of defence pursuant to rule 13.2 of the Civil Procedure Rules, 2022, on the basis that the First Defendant had an arguable case and a real prospect of successfully defending the claim; and
   (ii) the subsequent Notice of Application filed on 10 March 2026 by Baycourt Chambers seeking leave to withdraw as attorneys for the First Defendant pursuant to rule 70.6 of the Civil Procedure Rules.

3. As a result of the Notice to withdraw, the Claimants contend that the Insurer should bear the cost incurred in connection with the set-aside application and related interlocutory steps. They say the Insurer funded, directed, and caused the application to be filed; failed to advance it promptly; failed, or chose not, to ensure compliance with the case management order; and later withdrew in circumstances that left the Claimants to bear wasted cost.

4. The Claimants seek an order that those cost be assessed on an indemnity basis and summarily assessed at $20,365.00, payable within 14 days.

The Accident

5. To better understand the contention, I will set out a few salient background facts to provide some context to the issues before the Court.

6. The accident occurred on 2 November 2024 at approximately 11:45 p.m. on Tonique Darling Highway. The Second Claimant, Mr. Bethell, was travelling westbound, while the Second Defendant, Mr. Chisholm, was travelling eastbound. The Claimants allege that Mr. Chisholm attempted to overtake another vehicle travelling in the same direction, crossed into the opposite lane, and collided head-on with Mr. Bethell's vehicle.

7. On 18 November 2025, the Claimants commenced these proceedings by standard claim form, seeking damages arising from the motor vehicle accident allegedly caused by the Second Defendant's negligence.

8. A notice to insurers pursuant to section 12(2) of the Road Traffic Act was issued to CG Atlantic General Insurance Ltd., which filed an acknowledgment of service on 2 December 2025.

9. On 19 December 2025, leave was granted to enter judgment in default of defence against the Defendants.

10. On 23 December 2025, Baycourt Chambers, acting on behalf of the First Defendant, filed a notice of application seeking to set aside the default judgment on the ground that the First Defendant had a good arguable case and a real prospect of successfully defending the claim.

11. On 10 March 2026, approximately three months later, Baycourt Chambers sought leave to withdraw as counsel and attorneys for the First Defendant. The firm stated that it had been appointed by CG Atlantic Ltd. and had recently been informed that the First Defendant did not have the benefit of insurance for the accident because, at the material time, the Second Defendant was driving without a driver's licence.

12. At the hearing of the interlocutory applications, the Court granted Baycourt Chambers leave to withdraw as counsel and attorneys on record for the First Defendant. As such, the remaining issue is whether a non-party cost order should be made against the Insurer, CG Atlantic Ltd.

Non-Party Cost Order

13. The factual basis relied upon by the Claimants for the proposed non-party cost order is that the Insurer was, in substance, the real party to the relevant interlocutory proceedings. Specifically, the Claimants assert that the Insurer:
    - (i) instructed Baycourt Chambers to act for the First Defendant;
    - (ii) funded and directed the conduct of the defence;
    - (iii) failed to give instructions for Baycourt Chambers to file a defence within the prescribed time, resulting in default judgment being entered against the First Defendant;
    - (iv) instructed and caused the Set Aside Application to be filed;
    - (v) failed to have the Set Aside Application advanced promptly;
    - (vi) failed and/or chose not to instruct Baycourt Chambers to comply with the Case Management Order; and
    - (vii) exclusively determined the litigation strategy throughout.

14. The Claimants further assert that the Set Aside Application, which has now been dismissed because it was abandoned, was not initiated independently by the First Defendant but at

the direction of the Insurer. They contend that at the last hearing, Baycourt Chambers confirmed that it had no instructions to make submissions on cost a fact which, they say, demonstrates that the Insurer, rather than the First Defendant, was the true decision-maker in relation to the relevant conduct of the proceedings.

15. As to cost, the Claimants say that the cost in issue arise directly from:
    (i) the filing of the Set Aside Application;
    (ii) the Claimants' preparation to oppose that application;
    (iii) the hearing listed for that application, which did not proceed; and
    (iv) the procedural consequences of the Insurer's late withdrawal.

16. The Claimants expressly confine their claim to those specific heads. They do not seek cost of the whole proceedings. The sum of $20,365.00 is said to be limited to the cost of and incidental to the Set Aside Application, the Withdrawal Application, preparation for and attendance at the hearing that did not proceed and associated interlocutory steps.

17. The Claimants further say they have suffered identifiable prejudice, namely: cost incurred in preparing for a hearing that did not proceed; delay in enforcing a valid default judgment; and procedural uncertainty caused by the Insurer's conduct.

18. In response to the Defendant's procedural objection, the Claimants submit that no formal standalone application was required for a non-party cost order. They rely upon the following sequence of events:
    (i) at the hearing, the Court confirmed that Baycourt Chambers had received the Claimants' submissions and Statement of Cost, which Baycourt Chambers confirmed;
    (ii) the Court expressly invited Baycourt Chambers to indicate whether it wished to make submissions on the issue of a non-party cost order against the Insurer;
    (iii) Baycourt Chambers confirmed that it had no instructions to do so;
    (iv) the Court granted leave for Baycourt Chambers to withdraw and reserved the issue of non-party cost to be determined on the papers; and
    (v) the Insurer subsequently filed written submissions on cost.

The Law

Does the court have jurisdiction to make a non-party cost order?

19. The Court's jurisdiction in relation to cost arises under section 30 (1) of the Supreme Court Act and is exercised in accordance with the Civil Procedure Rules 2022.

20. Section 30(1) of the Supreme Court Act provides that:

> *"the cost of and incidental to all proceedings in the Court ... 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 cost are to be paid."*

21. Section 30 of the Supreme Court Act plainly provides the statutory basis for the Court's power to award costs and gives it full discretion to decide by whom, and to what extent, those cost are to be paid. This language mirrors, in all material respects, section 51(1) and (3) of the Senior Courts Act 1981 (England and Wales). Section 51(3) provides that:

> *"the court shall have full power to determine by whom and to what extent the cost are to be paid."*

22. This is supplemented by the English CPR 46.2(1), which references the courts' power "to make a cost order in favour of or against a person who is not a party to proceedings." Both section 51 of the Senior Courts Act 1981 and CPR 46.2 operate as part of the courts' overall cost discretion, and there is therefore no need to identify a cause of action to invoke the discretion.

23. On the contrary, The Bahamas' CPR 2022 does not contain a provision in precisely the same terms as English CPR rule 46.2, but in my opinion, this is not material as the jurisdiction rests on section 30 of the Act to confer the Courts' power.

24. The authoritative construction of this language was settled by the House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd (The Vimeira) (No 2)* [1986] AC 965. This case was decided in the same year as the enactment of the English provision in its modern form.

25. In *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965, the House of Lords held that section 51(3) gave courts the power to order a non-party to pay cost. Lord Goff of Chieveley said:

> *"Courts of first instance are, I believe, well capable of exercising their discretion under the statute in accordance with reason and justice ... If any problem arises, the Court of Appeal can lay down principles for the guidance of judges of first instance."*

26. The critical point from Aiden Shipping is that the broad statutory language by Parliament was deliberate. Parliament chose the formulation "by whom … cost are to be paid" rather than "by which party." That choice was not accidental, it was broad enough to encompass any person, whether or not a named party, whose connection to the proceedings is sufficient in justice to warrant the order. The House of Lords recognized that the discretion thus conferred, was wide and capable of being exercised judicially.

27. Having established that the Court has jurisdiction to make a non-party costs order, the remaining question is whether it is just to do so in all the circumstances. In answering

that question, the Court considers, in particular, whether the proposed non-party funded and controlled the relevant litigation, whether it was in substance the real party to the proceedings, and whether its involvement caused the successful party to incur the costs in issue.

Whether a non-party cost order should be issued?

28. The applicable principles concerning non-party cost orders are authoritatively explained in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39 ("Dymocks"), with the position of liability, insurers further addressed in *Travelers Insurance Company Ltd v XYZ* [2019] UKSC 48 ("Travelers").

Principle in Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] UKPC 39

29. In support of their position, the Claimants rely on the decision of the Judicial Committee of the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39.

30. *Dymocks* was concerned with an application for a cost order against Associated Industrial Finance Pty Ltd ("Associated"), a non-party to franchise litigation between *Dymocks* and the Todds. The Todds had pursued appeals through the New Zealand Court of Appeal and ultimately to the Privy Council, failing at each stage and proving unable to satisfy the resulting cost orders.

31. The evidence demonstrated that Associated, a company beneficially owned by Mrs. Todd's family, had provided funding for the appeals. It advanced monies, took a debenture over the relevant entity, funded receivers, and was involved in arrangements that enabled the appeals to proceed. The Board found a substantial body of evidence regarding Associated involvement in and control over the appeals and concluded that, *but for* that involvement, the appeals would not have been pursued, and the related costs would not have been incurred. (*underline for emphasis*).

32. The Board held that Associated plainly funded the appeals and that it was principally, if not exclusively, the party standing to benefit from success. Although it played little role in the narrow conduct of the appeals, it took the all-important decision to fund and thereby promote them. In those circumstances, the non-party cost order was made.

33. The decision in *Dymocks* establishes several propositions of significance for the present case involving Ekrale. First, the description of such orders as "exceptional" means no more than that such cases fall outside the ordinary run in which parties litigate for their own benefit and at their own expense (See also *Deutsche Bank v Sebastian Holdings* [2016] EWCA Civ 23); it does not connote rarity in any rigid sense. Second, the ultimate question is always whether it is just to make the order. Third, where a non-party not only funds but

also substantially controls proceedings, or stands to benefit from them, justice will ordinarily require that the non-party pay the successful party's cost if those proceedings fail, this is the "real party" analysis. Fourth, causation remains an important limitation: a non-party should not ordinarily be made liable for cost that would in any event have been incurred without its involvement. Fifth, the Court may look beyond formal party status and examine the practical realities of who promoted, funded, controlled, and stood to benefit from the relevant litigation steps.

Principle in Travelers Insurance Company Ltd v XYZ [2019] UKSC 48

34. In response to the Claimants' reliance on *Dymocks*, Baycourt submitted that the Court should also consider *Travelers Insurance Company Ltd v XYZ* [2019] UKSC 48.

35. In *Travelers*, the Supreme Court considered whether a liability insurer could be ordered under section 51 of the Senior Courts Act 1981 to pay costs arising from litigation involving claims, some but not all of which fell within the insurance cover. The litigation concerned defective PIP breast implants, with Transform Medical Group as defendant and *Travelers* providing product liability insurance for bodily injury occurring within a specified policy period.

36. A substantial group of claimants' claims fell outside the scope of *Travelers'* cover, yet those uninsured claims were being pursued within a group litigation structure alongside insured claims, with common issues tried together. *Travelers* funded the whole of Transform's defence costs in relation to those common issues, including test cases that involved uninsured claims. Questions also arose about the timing and extent of disclosure of the limits of insurance cover and about *Travelers'* involvement in settlement and admissions. The lower courts made a non-party cost order against *Travelers*, but the Supreme Court allowed the appeal.

37. The principle in *Travelers* is significant for several reasons. First, it recognizes that liability insurers occupy a particular position; they fund and exercise substantial control over the defence of litigation not as volunteers or speculators, but pursuant to pre-existing contractual rights and obligations under policies of insurance. Second, ordinary insurer participation in the defence of an insured claim is not, without more, sufficient to trigger non-party cost liability. Third, the decision identifies two broad routes by which an insurer may nonetheless be exposed to such liability: (a) where it becomes in substance the "real defendant"; or (b) where it engages in unjustified intervention or "intermeddling" in claims that are not properly its business. Fourth, the requirement for a causative link between the conduct relied upon and the costs sought is strongly reaffirmed. Fifth, the mere fact that uninsured claimants have no effective route to recover cost, or that there is asymmetry in cost exposure, does not of itself justify a non-party cost order against an insurer.

38. *Travelers* therefore stand as a caution against extending non-party cost liability to insurers merely because they have funded or participated in litigation pursuant to ordinary policy rights, particularly in the absence of unjustified intervention and proven causation. It does not, however, immunize insurers from such liability altogether where the evidence discloses conduct beyond the legitimate scope of the policy relationship.

Application of the Authorities to the Present Case

39. The present case lies at the intersection of the principles established in *Dymocks* and refined in *Travelers*. *Dymocks* supplies the general framework: the Court asks whether, in all circumstances, it is just to make the order; whether CG Atlantic as the non-party funded or controlled the litigation; whether it was in substance the real party; and whether it caused the successful party to incur the cost claimed. *Travelers* refines that approach for insurers. The Court must distinguish between ordinary insurer conduct within the legitimate scope of a policy relationship and conduct that crosses that boundary, whether by rendering the insurer the real party in substance or by amounting to unjustified intervention causing cost.

40. Ekrale's case, as set out in their reply submissions, is materially stronger than a simple assertion that CG Atlantic was an insurer standing behind an insured defendant. They assert that CG Atlantic instructed counsel, funded and directed the defence, caused the Set Aside Application to be filed, failed to progress it promptly, failed and/or chose not to ensure compliance with the Case Management Order, exclusively determined litigation strategy, and then withdrew in circumstances that caused the listed hearing not to proceed and left the Claimants with wasted cost. If those asserted facts are accepted, the case moves beyond ordinary insurer participation and into the "real party" territory identified as relevant in Travelers.

41. Of particular significance is the contention that the Set Aside Application was not initiated independently by the First Defendant but at the direction of the Insurer. This is reinforced by evidence that Baycourt Chambers was acting for the Insurers. That appears from the affidavit of Sharon Moss filed on 19 March 2026, which expressly states that Baycourt Chambers acted on the Insurers' behalf, and from the exhibited email dated 18 March 2026, which states that, because the Second Defendant was not covered under the First Defendant's insurance policy, the Insurers would no longer act on its behalf and the First Defendant would be responsible for continuing the pursuit of the claim. A Notice of Withdrawal was subsequently filed. On the Claimants' case, those matters support the contention that the Insurer, rather than the First Defendant, was the true decision-maker in relation to the relevant conduct of the proceedings.

42. In my judgment, taken together, those matters are capable of bringing this case within the real-party analysis described in *Dymocks* and left open by *Travelers*. The critical question,

in the circumstances, is whether CG Atlantic's involvement arose from an error that led to its premature appearance on behalf of the First Defendant and, if so, whether, but for that premature appearance, the application to set aside the default judgment and the subsequent withdrawal application would have been filed at all.

43. It is then for the Court to look beyond the formal record to determine who, in substance, directed and pursued the relevant litigation steps. That distinction matters. *Travelers* does not shield insurers from non-party costs orders; it protects them only where they act within the ordinary and legitimate scope of their role and where the necessary causal connection is lacking. It remains open for liability to arise where an insurer assumes real-party control or unjustifiably intervenes in a way that causes costs to be incurred. In the present case, it appears that CG Atlantic did not act within that ordinary and legitimate scope. Had it done so, the apparent policy breach would have been identified before the acknowledgment of service was filed.

44. I therefore reject any submission that *Travelers* excludes the jurisdiction in the present circumstances. Properly understood, it directs the Court to ask the right questions: Was this merely ordinary insurer participation or did CG Atlantic assume practical control of the relevant application and cause the costs claimed. On the facts asserted by the Claimants, the answer is the latter.

45. The sequence of events is, in my view, telling. Baycourt Chambers, acting on the instructions of CG Atlantic, initiated the application to set aside the default judgment. Thereafter, once it was realized that the Second Defendant was not covered under the relevant policy, the Insurer withdrew from acting [which was in their right to do so], but only after the Claimants had incurred the cost of filing the necessary pleadings to oppose the application. This is the fundamental sequence that materially supports the Claimants' contention that the Insurer did not act within the ordinary and legitimate scope and caused the costs now sought.

Causation

46. The next question is causation. Both *Dymocks* and *Travelers* point in the same direction: the non-party should only be liable for costs that would not have been incurred *but for* its involvement or intervention.

47. The Claimants' case on causation is tightly framed. They do not seek the cost of the whole proceedings. They limit their claim to the Set Aside Application, the Withdrawal Application, preparation for and attendance at the hearing that did not proceed and associated interlocutory steps. Those specific cost are said to be the direct consequence of the Insurer's conduct. CG Atlantic caused the Set Aside Application to be filed and

maintained the relevant litigation posture until withdrawal on the basis of an error as explain at paragraph 45 above.

48. On the material before the Court, I am satisfied that this fits the causation principle described in *Dymocks* and reaffirmed in Travelers.

The Insurer's Objections

49. I have carefully considered the matters advanced by Baycourt Chambers on behalf of the Insurer. They may be addressed under five heads.

50. First, it is said that no non-party cost order may be made in the absence of an existing cost order. I reject that submission. The jurisdiction to make a non-party cost order is not confined to the enforcement of an already-made order. Where liability for cost and non-party responsibility are properly before the Court, the Court may determine both together. (See paragraphs 19-27 above and also *Aiden Shipping Co Ltd v Interbulk Ltd.* [1986] AC 965).

51. Secondly, it is said that the Insurer is not truly a non-party by reason of subrogation rights. I do not accept that the question is resolved by formal labels or nomenclature. Whether the Insurer may properly be treated as a non-party for costs purposes does not depend on the label "subrogee", but on the substance of its role in the litigation, including control, direction, and benefit. Both *Dymocks* and *Travelers* confirm that the Court looks to substance, not form.

52. Thirdly, it is said that the Claimants suffered no prejudice. I am unable to accept that submission on the case as presented. The Claimants incurred costs in opposing an application caused by CG Atlantic, prepared for a hearing that did not proceed, and were delayed in enforcing a regularly entered default judgment. Those are identifiable and cognizable heads of prejudice.

53. Fourthly, it is said that the Insurer acted promptly once coverage issues arose. Even accepting that for present purposes, that does not answer the critical question. Liability in this context turns on control and causation, not on delay alone. If the relevant cost had already been caused by the Insurer's conduct before it sought to disengage, the subsequent assertion of a coverage issue does not displace responsibility for those cost.

54. Fifthly, it is said that the absence of a separate formal application is fatal to the order sought. I reject that contention. The decisive requirements of procedural fairness are notice and a fair opportunity to be heard. On the facts set out in the Claimants' submissions, the issue was expressly raised at the hearing; the Court confirmed that Baycourt Chambers had

received the relevant materials; an invitation to make submissions was extended; the issue was reserved on the papers; and the Insurer subsequently filed written submissions on cost. On that account, the Insurer had notice of the risk of such an order and a full opportunity to be heard. The requirements of procedural fairness were thereby satisfied.

Whether it is Just to Make the Order

55. Drawing the strands together, I am satisfied on the materials before the Court that this is a proper case for a non-party cost order against CG Atlantic. The factors pointing in that direction are the following:

    (i) the Insurer is alleged to have controlled the relevant litigation steps and exclusively determined litigation strategy throughout;

    (ii) the Insurer withdrew only after it was realized that the Second Defendant was not covered under the relevant policy, by which time the Claimants had already incurred the cost of filing the necessary pleadings to oppose the application.

    (iii) the Set Aside Application is said to have been filed at its direction and has now been dismissed;

    (iv) the cost sought are confined to the specific interlocutory steps said to have been caused by the Insurer's conduct;

    (v) the Claimants are said to have suffered identifiable prejudice in the form of wasted preparation, delay in enforcing a valid default judgment, and procedural uncertainty; and

    (vi) absent such an order, the cost consequences of the Insurer's conduct would fall upon the Claimants or upon a Defendant who neither directed nor controlled the relevant proceedings.

56. Applying the principles in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39 as informed and refined by *Travelers Insurance Company Ltd v XYZ* [2019] UKSC 48, I conclude that it is just to make the order sought.

Basis of Assessment and Quantum

57. The Claimants seek indemnity cost. They submit that the circumstances of this case take it outside the ordinary run because the Insurer assumed effective control of the relevant interlocutory steps, caused the Set Aside Application to be filed, failed to progress it properly, withdrew in circumstances that rendered the listed hearing ineffective, and thereafter resisted liability for the cost thereby caused.

58. I am not satisfied that the conduct relied upon takes this case outside the ordinary run of cases so as to justify an order for indemnity costs. Although the costs claimed are said to be directly attributable to the Insurer's direction and conduct of the relevant proceedings, an order for indemnity costs is reserved for more exceptional circumstances. In my

judgment, that threshold has not been met on the material before the Court. Accordingly, costs will be assessed on the usual party-and-party basis.

59. The Claimants seek summary assessment in the amount of $20,365.00. That figure is stated to be limited to the costs of and incidental to the Set Aside Application, the Withdrawal Application, preparation for and attendance at the hearing that did not proceed, and associated interlocutory steps, as particularized in the Statement of Cost and Supplemental Statement of Cost.

60. I accept that the costs in dispute are sufficiently confined and identifiable to permit summary assessment, and that considerations of proportionality and finality favour that course rather than a further assessment process. Doing the best I can on the material before the Court, I fix the Claimants' costs in the sum of $10,000.00.

Order

42. For the abovementioned reasons, the Court orders as follows:

(1) CG Atlantic General Insurance Ltd. shall pay the Claimants' cost as a non-party for the thrown away wasted cost.

(2) The Claimants' cost are fixed in the sum of $10,000.00.

(3) The total amount payable by CG Atlantic General Insurance Ltd. to the Claimants is $10,000.00.

Dated this 4th day of June A.D. 2026

[Original signed & sealed]

Renaldo Toote

Registrar