

IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMERCIAL DIVISION

CLAIM NO. 2023/COM/com/00057

BETWEEN

THE COMMITTEE TO RESTORE NYMOX SHAREHOLDER VALUE, INC
(CRNSV)

	First Claimant
RANDALL LANHAM	
	Second Claimant
CHRISTOPHER RILEY	
	Third Claimant
M. RICHARD CUTLER	
	Fourth Claimant
STEVEN RILEY	
	Fifth Claimant
ARTHUR DIEDRICH	
	Sixth Claimant
MARK RAMINA	
	Seventh Claimant
MAURIZIO BIAGGI	
	Eighth Claimant
TODD MITMESSER	
	Ninth Claimant
ROBERT S. PILAND	
	Tenth Claimant
JAMES BYROM	
	Eleventh Claimant
SEAN BEASLEY	
	Twelfth Claimant

v.

PAUL AVERBACK	First Defendant
PATRICK DOODY, ESQ.	Second Defendant
JAMES G. ROBINSON	Third Defendant
DAVID MORSE	Fourth Defendant
NYMOX PHARAMACEUTICAL CORPORATION	Fifth Defendant

Before: Her Ladyship The Honourable Madam Senior Justice
Deborah Fraser

Appearances: Ms. Michelle I. Deveaux for the Claimants

**Mr. Christopher Jenkins KC, Mr. Ramonne Gardiner and
Mr. McFallough Bowleg Jr. for the Defendants**

Judgment Date: 15 March 2024

**Civil Procedure Rules, 2022 — Part 37 - Discontinuance and Withdrawal - Part 71
Court's Discretion as to an award of Costs— Indemnity Costs – Costs on a
Standard Basis - Appropriate Order as to Costs**

RULING ON COSTS

*Re: Costs for the Defendants' costs for their extant Application to Set Aside the Interim
Injunction and Costs emanating from the Claimants' Discontinuance Application*

(Heard on the Papers)

1. This is my ruling on costs emanating from the Claimants' decision to withdraw and discontinue their Action as against the Defendants and resulting costs relating to the Action as well as the extant and now fruitless Defendants' application to set aside an interim injunction granted on 03 October 2023.

Background

2. The Parties do not appear to agree the facts of this case. I will, therefore, only reference facts which do not appear to be in dispute. On 03 October 2023, the Claimants commenced a derivative action against the Defendants by way of a Standard Claim Form and Statement of Case ("**Action**"). The Action concerned, inter alia, allegations of breaches of the Defendant directors' fiduciary and statutory duties owed to the Fifth Defendant's, NYMOX Pharmaceutical Corporation ("**NYMOX**") shareholders. The Claimants were some minority shareholders of NYMOX and a US incorporated association.
3. On that same day, the Claimants made an ex-parte application requesting an interim injunction ("**Interim Injunction**"). The Interim Injunction was granted on 03 October 2023, with an undertaking as to damages attached. The Interim Injunction reads as follows:

“...IT IS HEREBY ORDERED AND DIRECTED THAT:

1. Mandatory and Prohibitory Injunctions:

(1) The Defendants shall forthwith give notice of the convening of the 2023 Annual General Meeting or alternatively a Special Meeting to be held on a date not more than 28 days from the date of such notice for the purpose of considering, inter alia the matters set out in the draft Notice of Shareholders Meeting exhibited to the Affidavit of Randall Lanham, a copy of which is attached to this Order.

(2) If by close of business at 5:00pm Bahamas time on the 9th day of October 2023 the Defendants have failed to comply with the order at paragraph 1 above by giving such notice, the Claimants shall be permitted themselves to give notice of such Meeting to be convened in accordance with paragraph 1 above.

(3) The [Fifth Defendant] acting by it board of directors, shall give effect to all resolutions passed at the General/Special

Meeting held pursuant to the Court's Order.

2. Until such time as the Special or General Meeting is held or until further order, that save for ordinary business expenses, the Defendants [shall] not whether by themselves, their servant[s], agents or assigns, dissipate reduce charge or assign or in any way diminish or reduce the assets of the Fifth Defendant company or issue any shares in the Company to themselves or to any agent or person connected to them.

3. Until trial of this Action the First and Third Defendants be restrained from voting the Averback Excess Shares and the Robinson Excess Shares (as defined in paragraphs 43 and 53 in the Affidavit of Randall Lanham filed herein on the 3rd day of October 2023), at the Meeting convened pursuant to this order and any other meeting of shareholders of the Fifth Defendant company until trial or further order.

4. Costs of this application be cost in the cause.

5. Liberty to any party to apply to the Court at any time to vary or discharge this Order by not less than two (2) days' notice to the other parties."

4. Subsequently, an urgent application for a Stay of the Interim Injunction was made by the Defendants on 10 October 2023 and a Stay was granted by this Court on 03 November 2023.
5. Thereafter, the Court gave directions in relation to two applications brought by the Defendants, namely: (i) an application to set aside the Interim Injunction; and (2) an application for Security for Costs.
6. Prior to the hearing of either of those applications, the Claimants filed an application for Discontinuance of the Action, pursuant to Part 37 of the Supreme Court Civil Procedure Rules, 2022 ("CPR") on 08 February 2024. The Parties have agreed costs in relation to all other aspects of the Action, save and except costs relating to the application to set aside the Interim Injunction.
7. The Claimants submit that the issue of costs should be determined on the standard basis whereas the Defendants assert that costs ought to be on an indemnity basis. They have asked the Court to rule on the issue.

ISSUE

8. The issue that this Court must decide is whether, based on the circumstances of this case, the Defendants should be granted costs on the standard basis or on an indemnity basis?

DISCUSSION AND ANALYSIS

9. The Parties provided written submissions, which the Court reviewed and considered. I will now provide my analysis of the relevant law in relation to the facts of this case and render a decision.

10. Part 37 of the CPR governs Discontinuance of an action. **Rule 37.2 of the CPR** provides:

“37.2 Right to discontinue claim.

(1) The general rule is that a claimant may discontinue all or part of a claim without the permission of the court.

(2) Notwithstanding paragraph (1) —

(a) a claimant needs permission from the court to discontinue all or part of a claim in relation to which —

(i) any party has given an undertaking to the court; or

(ii) the court has granted an interim injunction...”

11. There is an Interim Injunction in place with an undertaking as to damages. Consequently, the Claimants require the Court’s permission to discontinue the Action. The Claimants have indeed made formal application to discontinue the Action on 08 February 2024. The consequential costs flowing from a discontinuance is also addressed under Part 37 of the CPR. **Rule 37.6 (1) of the CPR** states:

“37.6 Liability for costs.

(1) Unless the —

(a) parties agree; or

(b) court orders otherwise,

a claimant who discontinues is liable for the costs incurred by the defendant against whom the claim is discontinued, up to the date on which notice of discontinuance was served *(emphasis added).*

12. Accordingly, the Claimants must pay the Defendants’ costs up to the date on which the Notice of Discontinuance is served. This does not appear to be in dispute. I am aware of the Court’s power to award indemnity costs as opposed to costs on the standard basis.

13. The Court is imbued with the power to award costs by virtue of **section 30(1) of the Supreme Court Act, 1997**. That section provides:

“30. (1) 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.”

14. The Supreme Court’s power to award costs is also expressly provided in Part 71 of the CPR. It also overtly states the discretionary nature of awarding costs and factors which ought to be considered when making an order as to costs. Whereas I acknowledge Part 71 speaks to the discretionary nature of costs and that costs relating to the discontinuance of the Action is what is before me (and attaches a mandatory costs penalty in favor of the Defendants), I believe that some of the factors are still applicable to the instant case – particularly where I must decide whether I ought to award costs on an indemnity basis. **Rule 71.10 of the CPR** reads:

“(1) In deciding what order, if any, to make about costs, the Court must have regard to all the circumstances, including —

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful;

(c) any payment into court or admissible offer to settle made by a party which is drawn to the Court’s attention and which is not an offer to which costs consequences under Part 35 and 36 apply.

(2) For the purposes of paragraph (1)(a), the conduct of the parties includes —

(a) conduct before, as well as during, the proceedings;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim; and

(e) unreasonable conduct of any kind by any party in relation to the inclusion or exclusion of documents or authorities in any bundle and whether a joint bundle or otherwise.

(3) The Court may make an order that a party must pay —

(a) a proportion of another party’s costs;

- (b) a stated amount in respect of another party's costs;
- (c) costs from or until a certain date only;
- (d) costs incurred before proceedings have begun;
- (e) costs relating to particular steps taken in the proceedings;
- (f) costs relating only to a distinct issue in or part of the proceedings; and
- (g) interest on costs from or until a certain date, including a date before judgment (emphasis added)."

15. The court generally exercises its power to award costs on an indemnity basis as a form of punishment to the paying party, based on their conduct during the proceedings.
16. There is a plethora of case law on the point. I will highlight a few. In the case of **Kiam v MNG No. 2 [2002] EWCA Civ 66**, the Court had to consider whether a party's refusal to accept a reasonable settlement offer warranted indemnity costs. At paragraph 12, the Court opined:

*"...To my mind, however, such **conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under Rule 44 [which is similar to our Rule 71.10 of the CPR] (unlike one made under Rule 36) does, I think, carry at least some stigma. It is of its nature penal rather than exhortatory** (emphasis added)."*

17. Another UK decision relating to indemnity costs is the case of **Reid Minty v Taylor [2001] EWCA Civ 1723**. There, the Court made the following pronouncements at paragraphs 27 and 28:

*"27...Under the CPR, it is not, in my view, correct that costs are only awarded on an indemnity basis if there has been some sort of moral lack of probity or conduct deserving moral condemnation on the part of the paying party. **The court has a wide discretion under Rule 44.3 which is not constrained, in my judgment, by authorities decided under the rules which preceded the introduction of the CPR. The discretion has to be exercised judicially, in all the circumstances, having regard to the matters referred to in Rule 44.3(4) and Rule 44.3(5). The discretion as to the amount of costs referred to in Rule 44.3(1)(b) includes a discretion to decide whether some or all of the costs awarded should be on a standard or indemnity basis.** Rule 44.4 describes the way in which an assessment on each basis is to operate, but does not prescribe the circumstances in which orders on one or the other of the bases is to be made.*

*28 **As the very word "standard" implies, this will be the normal basis of assessment where the circumstances do not justify an award on an***

indemnity basis. If costs are awarded on an indemnity basis, in many cases there will be some implicit expression of disapproval of the way in which the litigation has been conducted, But I do not think that this will necessarily be so in every case. What is, however, relevant to the present appeal is that litigation can readily be conducted in a way which is unreasonable and which justifies an award of costs on an indemnity basis, where the conduct could not properly be regarded as lacking moral probity or deserving moral condemnation (emphasis added).”

18. A case with facts which almost mirror those of the instant case is **Taihu International Cruise Co. Limited v Diamond Cruise International C. Limited [2020] 1 BHS J No. 45** (“Taihu”). Much like the instant case, Moree CJ (as he then was) was tasked with determining whether the defendant ought to be awarded indemnity costs based on the plaintiff’s conduct, where the plaintiff applied for discontinuance and also had an injunction (which restrained Taihu from changing its register of members or directors and dealing with, disposing of or diminishing the value of its assets) with an undertaking as to damages attached. His Lordship went into a comprehensive discourse on indemnity costs. At paragraphs 42 to 44 the learned judge opined:

“42 A useful summary of the principles relating to indemnity costs is set out in *Van Oord v All Seas Ltd* [2015] EWHC 3385. In his judgment in that case *Coulson J* referred to his summary of the applicable principles in his earlier decision in *Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd* [2013] 4 Costs LR 612 when he stated:

“ 16. **(a) Indemnity costs are appropriate only where the conduct of a paying party is unreasonable “to a high degree”. ‘Unreasonable’ in this context does not mean merely wrong or misguided in hindsight”: see Simon Brown LJ (as he then was) in Kiam v MGN Ltd [2002] 1 WLR 2810.**

(b) The court must therefore decide whether there is something in the conduct of the Action, or the circumstances of the case in general, which takes it out of the norm in a way which justifies an order for indemnity costs: see Waller LJ in Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson [2002] EWCA (Civ) 879.

(c) The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, provided that the claim was at least arguable. But the pursuit of a hopeless claim (or a claim which the party pursuing it should have realized was hopeless) may well lead to such an order: see, for example, Wates Construction Ltd v HGP Greentree Alchurch Evans Ltd [2006] BLR 45.

(d) If a claimant casts its claim disproportionately wide, and requires the defendant to meet such a claim, there was no injustice in denying the claimant the benefit of an assessment on a proportionate basis given that, in such circumstances, the claimant had forfeited its rights to the benefit of the doubt on reasonableness: see Digicel (St Lucia) Ltd v Cable and Wireless PLC [2010] EWHC 888 (Ch)."

43 The case of *Bacon v Jones Communications Limited* and another [2018] BHS J. No. 51 in the Supreme Court of The Bahamas is instructive on the subject of indemnity costs. In that case, Justice Charles had to consider an application by the Plaintiff for an order that the Defendant pay his costs on an indemnity basis. After reviewing the authorities including *Levine v Callenders & Co. et al* [1998] BHS J. No. 75; *Connaught Restaurants Ltd. v Indoor Leisure Ltd.* [1992] C.I.L.L. 798; and *Atlantic Bar & Grill Limited v Posthouse Hotels Ltd.* [2000] C.P. Rep. 32, the judge stated:

"18. A common thread running through these judicial authorities suggests that 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."

44 Later at paragraph 32 of the judgment, Charles J distilled the principles to be gleaned from the authorities in this way:

" 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 course when there are exceptional and egregious circumstances to do so. It is not possible to define the exact circumstance in which indemnity costs might be ordered. Overall, it remains a matter for the judge exercising his discretion based on judicial principles but, as a rule, an award for indemnity costs 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. Undoubtedly, each case will depend on its own peculiar facts and circumstances (emphasis added)."

19. In *Taihu*, the Court did not award costs on an indemnity basis as it did not believe that the conduct of the Plaintiff rose to the level of moral condemnation or

egregious behavior. His Lordship stated that the facts were highly contested, based on the affidavit evidence before him and the submissions of the parties were equally contentious. Moree CJ (as he then was) also observed that the Plaintiff did apply for discontinuance at an early stage – so much so that there was no opportunity to consider the evidence fully, thus the court was unable to make any findings of facts based on the dense facts and allegations stated by the respective parties. His Lordship also noted that the failure to provide the notes from the ex-parte application, which occurred in that case, did not rise to the level of egregious behavior. The Court did say that it, however, should be provided in the event an *inter partes* hearing to discharge the injunction was to take place. In any event, the Court was not satisfied that such conduct warranted costs on an indemnity basis.

20. Based on the foregoing and the circumstances of this case, I do not believe the conduct of the Claimants rise to a level which warrants the Defendants being awarded indemnity costs. Having reviewed the numerous and voluminous relevant affidavits in this matter (specifically the Affidavit of Randall Lanham (exhibited to the Devaughn Rolle Affidavit filed 18 October 2023) and the Latoya Garland Affidavit filed on 13 October 2022), there were numerous material disputes, which I will not go into at this stage of the proceedings. I will, however note that it appears that the Claimants did what they believed was in the best interest of NYMOX and its shareholders. Further, when there seemed to be some stabilization or middle ground as to the dispute, the Claimants applied to discontinue the action four (4) months after its commencement.
21. There was no return date provided in the Interim Injunction, however, there was a direction stating that any party has liberty to apply to vary or discharge the Interim Injunction. Based on the Claimants' submissions, a return date was sought by the Claimants, but it was ultimately decided to make a provision in relation to liberty to apply (as the matter was before a duty judge who was not able to provide a return date for the matter). It therefore, cannot be refuted that there was an opportunity afforded to the Defendants to address the Court at an *inter partes* hearing.
22. In addition, though there does seem to be allegations of failure on the part of the Claimants to give full and frank disclosure as alleged in an affidavit of Paul Averback, it was not relied on by the Defendants in this application. Furthermore the aforementioned affidavit contained only allegations which the Claimants did not respond to as they filed a Notice of Withdrawal and Discontinuance thereafter. The evidence also shows that there was an undertaking as to damages in the event such an injunction should not have been granted (as indicated at paragraph 103 of the Affidavit of Randall Lanham sworn 03 October 2023).

23. Whereas the Defendants had to go through the exercise of instructing counsel to address the Interim Injunction on short notice (having only been served with the Interim Injunction on 05 October 2023 when it was made on 03 October 2023), instructing counsel to defend the claim and prepare several applications relating to the Action, I do not believe any behavior of the Claimants reaches the high threshold of egregious behavior or moral condemnation which warrants an award of costs on an indemnity basis. Ultimately, the Defendants will be awarded costs in any event.

24. In the premises, I believe it is appropriate to award the Defendants their costs for the Action as well as for the application to set aside the Interim Injunction on the standard basis (up to the date when the Notice of Discontinuance is served on the Defendants).

25. I am also aware of the possibility of subsequent proceedings being brought after a discontinuance, **Rule 37.8 of the CPR** provides:

“37.8 Discontinuance and subsequent proceedings.

If the claimant —

(a) discontinues a claim after the defendant against whom the claim is discontinued has filed a defence; and

(b) makes a subsequent claim against the same defendant arising out of facts which are the same or substantially the same as those relating to the discontinued claim; and

(c) has not paid the defendant’s costs of the discontinued claim, the court may stay the subsequent claim until the costs of the discontinued claim are paid.”

26. I will, therefore, make an appropriate order, should such subsequent proceedings arise.

CONCLUSION

27. In the circumstances and based on the authorities referred to above, the Court exercises its powers under the common law and Parts 37 and 71 of the CPR and makes the following order:

(a) The Interim Injunction is hereby set aside;

(b) The damages caused to the Defendants, if any, resulting from the Interim Injunction shall be paid by the Claimants and assessed by a Registrar.

(c) The Claimants shall pay the costs of the Defendants’ extant application to set aside the Interim Injunction on the standard basis, to be assessed by a Registrar, if not agreed.

- (d) The Defendants shall pay the Claimants' costs for this application on the standard basis, to be assessed by the Registrar, if not agreed.
- (e) The Claimants shall pay the costs of the Defendants for the entire Action, to be assessed by a Registrar if not agreed.
- (f) None of the Claimants shall be entitled to bring any new action in the future arising out of facts which are the same or substantially the same as those in this Action unless and until all costs and damages, if any, awards in this Action have been paid in full.
- (g) Subject to the terms of this Order, the Claimants are granted leave to file and serve on the Defendants a Notice of Withdrawal and Discontinuance of the Action.

28. This is my ruling.

Senior Justice Deborah Fraser

Dated this 15th day of March 2024