IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO 2010 HCV 1276

IN CHAMBERS

BETWEEN	MICHAEL DISTANT	1ST CLAIMANT
AND	CHARMAINE DISTANT-MINOTT	2ND CLAIMANT
AND	NICROJA LIMITED	1ST DEFENDANT
AND	NICHOLAS GRANT	2ND DEFENDANT
AND	ROXBURGH MANAGEMENT SERVICES LIMITED	3RD DEFENDANT

Mr Brian Moodie instructed by Samuda and Johnson for the Claimants.

Mr Paul Beswick instructed by G. Anthony Levy and Co. for the Defendants.

Civil Procedure – Costs – Application for permission to tax costs immediately – Application for costs on an indemnity basis – Application for special costs certificate – CPR rr. 64.6, 64.12, 65.15, 65.16 and 65.17.

8, 15 February and 8 March 2011

BROOKS, J.

On 24 January 2011, judgment was handed down in the instant claim in respect of an interim application. The judgment was in favour of the defendants and they were awarded the costs of the application. They have now applied for orders for a special costs certificate, for the costs to be taxed on an indemnity basis and for permission to have the costs of that interim application taxed immediately. Although not described as being alternatives, an order for costs to be taxed on an indemnity basis would obviate the need for a special costs certificate.

The Claimants have sought to resist all aspects of the application. They contend that there is no justification for any of the orders which have been sought. I shall address,

in turn, the issues of the immediate taxation, the indemnity costs and finally the special costs certificate.

Before embarking on that exercise however, it should be noted that the interim application mentioned above, required consideration of, among other things, the continuation of a freezing order and the question of the court declining to exercise jurisdiction in the claim. In declining jurisdiction, the court refused to strike out the claim. The court instead ordered the claim stayed pending adjudication, in a court in another country, of the issues raised by the claim.

Immediate taxation

In considering an application for costs to be taxed immediately, the general principle to be observed is that the costs of any interim application "are not to be taxed until the conclusion of the proceedings". The court may, however, "order them to be taxed immediately". That is the import of rule 65.15 of the Civil Procedure Rules 2002 ("the CPR").

I am convinced that, bearing in mind the stay of proceedings (pending adjudication elsewhere) which has been ordered, this is a clear case for costs, thus far incurred, to be taxed immediately and not to await the final disposal of the claim. I base that finding on the following considerations:

a. The fact that there may be proceedings in a foreign court imports an element of uncertainty as to the timeline for the resolution of those matters. This court will have no control over the speed of the relevant process in such other court.

b. Nothing which may result from the process in that court will affect the order of this court declining jurisdiction in respect of the claim.

Even if the claim is revived in this court, the application for this court to decline jurisdiction, having been already made and adjudicated upon, is unlikely to be revisited.

c. The costs involved in the application cannot have been insignificant, bearing in mind the research and submissions which were made. Economic practicalities demand that the issue of costs in this court be dealt with now, rather than await a resolution in the foreign court.

Counsel for the respective parties disagreed on the issue of whether misconduct by a party, was a necessary element in determining whether there should be an order for immediate taxation against that party. It is my view that, whereas misconduct may be a factor to be considered, it is not an essential element for such an order to be made.

In arriving at that conclusion, I have relied, in part, on the reasoning in *Reid Minty (a firm) v Taylor* [2003] 1 WLR 2800. Although the Court of Appeal of England and Wales was considering, in that case, the issue of costs on an indemnity basis, their Lordships espoused the principle of ordering what is "fair and reasonable" in the circumstances (see paragraph 20). That principle is evident in rule 64.6 (dealing with the general principles relating to costs) and the overriding objective set out in rule 1.1 (2) of the CPR. Both rules make it clear, that in deciding which party should pay the costs or any part thereof, and when, the court must "have regard to all the circumstances" (see rule 64.6 (3)). The conduct of the parties is only one of the factors to be considered in making decisions in that regard (see rule 64.6 (4) (a)).

Another question which arises under this heading is whether or not the taxation should await the result of an appeal which has been filed in respect of the order declining jurisdiction. The points, made above, do not apply to an appeal filed in this jurisdiction.

Normally, an appeal does not act as a stay of taxation of costs (rule 65.16 of the CPR). However the court may order such a stay. The issues involved here, having a degree of novelty, would make this an appropriate claim in which to order such a stay, pending the outcome of the appeal. The Court of Appeal's decision could possibly affect the order for costs made in respect of the jurisdiction application. It would, therefore, be inconvenient to allow a bill of costs to be prepared and taxed, only to find that the order for costs has been set aside.

The application for immediate taxation must, therefore, be granted, subject to a stay, pending the outcome of the appeal.

Indemnity Costs

Applications for costs to be granted on an "indemnity basis" have become more frequent in this court in recent times. This trend may be due, at least in part, to the fact that the fixed and basic costs which are set out in the CPR (which costs were set in 2002), have largely become irrelevant to the present day realities of our economy.

"Indemnity costs", as the term is used in England and Wales, are designed, in that country, to attempt to achieve a fairer result for the successful party. Such costs, when taxed by the taxing master, should not, however, enable that party to receive more costs than it has incurred. The practical effect of an order for indemnity costs is to avoid the taxed costs being assessed at a figure, less than the total of the relevant costs that party has actually incurred. The assessment is, however, subject to the costs claimed being reasonably incurred and being reasonably priced.

In *Reid Minty (a firm) v Taylor*, cited above, the court stressed that cases decided before the introduction of the English Civil Procedure Rules, on the question of indemnity costs, may no longer be appropriate. General learning on the point, since the advent of those rules, may be derived from the following passage taken from the judgment of that court in *Petrograde Inc v Texaco Ltd* [2002] 1 WLR 947. That case, I accept, is a case decided in the early years of the English Civil Procedure Rules but the relevant portion states:

> "62 …An order for indemnity costs does not enable a claimant to receive more costs than he has incurred. Its practical effect is to avoid his costs being assessed at a lesser figure. **When assessing costs on the standard basis the court will only allow costs "which are proportionate to the matters in issue"** and "resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party". On the other hand, **where the costs are assessed on an indemnity basis, the issue of proportionality does not have to be considered. The court only considers whether the costs were unreasonably incurred or for an unreasonable amount. The court will then resolve any doubt in favour of the receiving party. Even on an indemnity basis, however, the receiving party is restricted to recovering only the amount of costs which have been incurred**: see rules 44.4 and 44.5.
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> 63. The ability of the court to award costs on an indemnity basis…should not be regarded as penal because costs, even when made on an indemnity basis, never actually compensate a [successful party] for having to come to court…" (Emphasis supplied)

Unlike the CPR, where there is no use of the term "indemnity" in relation to costs, rule 44.4 of the Civil Procedure Rules of England and Wales specifically authorises their courts to assess costs either "(a) on the standard basis; or (b) on the indemnity basis". Rule 44.5 of the Civil Procedure Rules of England and Wales emphasises the distinction between the two methods where the costs are being assessed. It states:

> **"Factors to be taken into account in deciding the amount of costs**
>
> **44.5** - (1) The court is to have regard to all the circumstances in deciding whether costs were –

(a) if it is assessing costs on the standard basis -

(i) proportionately and reasonably incurred; or

(ii) were proportionate and reasonable in amount, or

(b) if it is assessing costs on the indemnity basis -

(i) unreasonably incurred; or

(ii) unreasonable in amount."

The term "proportionate", as used in rule 44.5 cited above, refers to the amount of costs compared to the amount involved in the claim or the "value" of the matters in issue, in that claim. The Court of Appeal of England and Wales examined the question of proportionality, as used in their rules and approved, at paragraph 40 of its judgment in *Jefferson v National Freight Carriers Plc* [2001] EWCA Civ 2082, the following comment on the point:

> "In modern litigation, with the emphasis on proportionality, it is necessary for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate to spend on the various stages in bringing the action to trial, and the likely overall cost. **While it was not unusual for costs to exceed the amount in issue, it was, in the context of modest litigation such as the present case, one reason for seeking to curb the amount of work done, and the cost by reference to the need for proportionality**." (Emphasis supplied)

Section 28E (3) of the Judicature (Supreme Court) Act authorises the court, subject to any rules of court on the point, to "determine by whom and to what extent the costs", between party and party, are to be paid. The rules of court, by virtue of the relevant provisions of the CPR, do attempt to address the issues outlined in section 28E.

Part 64 of the CPR gives general guidance to the court as to orders for the payment of costs. Part 65 of the CPR gives effect to that guidance, by providing for the quantification of those costs.

Rule 64.6 is particularly relevant to this assessment. It states:

> "If the court decides to make an order about the costs of any proceedings, the general rule is that **it must order the unsuccessful party to pay the costs of the successful party**.
>
> (Rule 65.8 (3) (a) contains special rules where a separate application is made which could have been made at a case management conference or pre-trial review.)" (Emphasis supplied)

Although the CPR does not specifically mention awarding costs on an indemnity basis, rule 64.6 (1) does seem, at first blush, to allow for an interpretation that costs are generally to be awarded on a basis which could be defined as an "indemnity basis".

Jones J seems to have been of the view when he ordered one party to pay all the costs of another party in *Bowen v Robinson and others* 2007 HCV 3783 (delivered 8 October 2010). That order turned, in large measure on the provisions of section 28 of the Elections Petition Act, but Jones J did make some general observations, in respect of indemnity costs, in the context of rule 64.6 of the CPR. In rejecting a submission that the CPR did not authorise an order for indemnity costs, the learned judge gave the following reasons at paragraph 18 of his judgment:

> "...First, although there is no use of the term "indemnity costs" in the Jamaican CPR 2002, CPR 64.6 incorporates the traditional indemnity principle by making it clear that where the Court decides to make an Order as to costs of any proceedings "the general rule is that it must order the unsuccessful party to pay the costs of the successful party". In other words, the indemnity principle that "costs follow the event" is alive and well under the CPR 2002. Support for this is found in the following passage from the learned author of **Zukerman on Civil Procedure and Practice 2nd Edition** at page 100 where he makes the point that under the new Civil Procedure Rules:
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> > "The allocation of costs between parties to litigation continues to be governed by the traditional principle, which has three limbs. First the successful party is normally entitled to his litigation costs from the unsuccessful party. Second, the receiving party is not entitled to claim as costs more than he has actually spent or is duty bound to pay. Third, the receiving party is only entitled to recover costs that were reasonably incurred and that are reasonable in the amount.""

After careful comparison of the relevant rules I am, respectfully, in agreement with the interpretation of rule 64.6, by Jones J, that costs when taxed are to be done, generally, on the principle that they are on an indemnity basis. The principle is, however, not identical to that in England and Wales. It is of significance, I find, that Jones J did not use the term "indemnity costs" in making the order in *Bowen v Robinson.* In his usual careful manner, the learned judge ordered as follows:

> "The Respondent (the unsuccessful party) shall pay all the costs of the Claimant (the successful party) in accordance with CPR 64.6 (1) to be taxed by the Registrar of the Supreme Court in accordance with CPR 65.13, if not agreed."

In my view, the framers of the CPR deliberately avoided the use of the term "indemnity costs" because they have provided guidance, in Part 65, for the way the costs are to be quantified. It is to be noted that the approach to costs in the CPR is different in significant ways from the equivalent provisions of the Civil Procedure Rules of the Eastern Caribbean States. In the 3rd edition of their work *Commonwealth Caribbean Civil Procedure,* the learned authors observe, at page 208:

> "The quantification of costs under the CPR of Jamaica differs in some fundamental respects from the position under the CPR of the OECS. The most significant difference is that whereas the Jamaican Rules retain the process of taxation of costs, the OECS Rules have adopted a system of 'fixed', 'prescribed' and 'budgeted' costs to replace taxation. Prescribed and budgeted costs are not included in the Jamaican Rules. On the other hand, the Jamaican Rules provide for 'basic costs' as an alternative to taxation.

On examining Part 65, it will be noted that the framers of the CPR have stipulated in rule 65.13 that where costs "have not been summarily assessed" and the receiving party has "not elected to receive basic costs", "costs **must** be taxed in accordance with Section 2 of [Part 65]" (Emphasis supplied). The mandatory aspect of the rule is worthy of stress. Section 2 of Part 65 includes rule 65.17. This rule sets out the basis for quantifying costs other than fixed or basic costs. Among the provisions of rule 65.17 are

the concepts of the court's "discretion as to the amount of costs to be allowed to a party" (rule 65.17 (1)), what is fair to both the party paying and the party receiving the costs (rule 65.17 (1) (b)), the importance of the matter to the parties (rule 65.17 (3) (c)), whether the matter was appropriate for the seniority of the particular attorney-at-law retained (rule 65.17 (3) (e)) and the novelty, weight and complexity of the matter (rule 65.17 (3) (h)).

An examination of rule 65.17 reveals that there is no mention of the value of the subject of the claim, which is the main reference point to determine proportionality. The question of fairness to the respective parties and issue of the seniority of the attorney retained, as set out in rule 65.17, and which hint at proportionality are, perhaps not surprisingly, not mentioned in rule 44.5 (3) of the Civil Procedure Rules of England and Wales which may be considered the equivalent to rule 65.17.

Whereas there are many similarities between the items mentioned in rule 65.17 and its English equivalent, the differences which exist suggest, I find, that the quantification process in Jamaica cannot be said to be aimed at achieving the payment of costs, on a strict "indemnity basis", as the term is used in England and Wales. Orders for costs in this jurisdiction, on my analysis, may only be taxed in the manner prescribed by Part 65. An order for costs stipulating that costs should be paid "on an indemnity basis", is therefore, in my view, inappropriate for our jurisdiction. The appropriate terminology is that used by Jones J, in conformity with rule 64.6 (1).

If I am incorrect on this issue and this court may make an award on "an indemnity basis" I go on to ask the question, when, therefore, may "indemnity costs", so termed, be awarded? Guidance may be drawn from the judgment of Coulson J in *Noorani v Calver* [2009] EWHC 592 (QB). In that case the learned judge said:

> "In any dispute about the appropriate basis for the assessment of costs, the court must consider each case on its own facts. **If indemnity costs are sought, the court must decide whether there is something in the conduct of the action, or the circumstances of the case in question, 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 Limited v Salisbury Hammer Aspden and Johnson* [2002] EWCA Civ 879. Examples of conduct which has lead to such an order for indemnity costs include the use of litigation for ulterior commercial purposes (see *Amoco (UK) Exploration v British American Offshore Limited* [2002] BLR 135); and the making of an unjustified personal attack by one party by the other (see *Clark v Associated Newspapers* [unreported] 21st September [January] 1998, BAILII: [1998] EWHC Patents 345). Furthermore, whilst the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) may well lead to such an order: see, for example, *Wates Construction Limited v HGP Greentree Alchurch Evans Limited* [2006] BLR 45." (Emphasis supplied)

The portion of the quotation, which has been emphasised, makes it clear that it is not only misconduct which will justify an award of indemnity costs. The circumstances of the case may also be considered for that purpose. That was also the finding in *Reid Minty (a firm) v Taylor*, cited above. In order to warrant an order for indemnity costs on the basis of misconduct, 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" (see *Kiam v MGN Ltd (No 2)* [2002] 1 WLR 2810 *per* Simon Brown LJ at paragraph 12).

Mr Beswick, on behalf of the defendants, submitted that indemnity costs were justified in cases where freezing orders were obtained. In any event, says Mr Beswick (as I understand the submission), the motivation for these claimants seeking the freezing order, which was granted in this matter, was improper and justifies an order for indemnity costs.

I do not agree with the submission. Firstly, although a freezing order is one of the most drastic orders which this court can make before delivering judgment in any matter,

it is, nonetheless, an order made by the court. It is not an act of the claimants. The claimants cannot be punished for having applied for something which this court found worthy of issue. Secondly, the fact of applying for a freezing order in this case, cannot, I find, be deemed conduct which is "unreasonable to a high degree". In my view, if the application were unreasonable, to a high degree, there would have been no grant of a freezing order, or at worst, any freezing order granted would have been set aside after full disclosure. Neither development occurred in this case. It was not an absence of full disclosure which resulted in the discharge of the freezing order in this claim.

I shall make one final reference. In a judgment of the Grand Court of the Cayman Islands, in *Ahmad Hamad Algosaibi and Brothers Company v Saad Investments Company Limited and others* Cause No 359 of 2009 (delivered on 9 April 2010), Anderson J quoted, at paragraph 8, from the Civil Bench Book of the United Kingdom, in dealing with the issue of indemnity costs, thus:

> **"When to order costs on an indemnity basis**
> Ordering costs in this situation seldom occurs. The Court of Appeal has declined to set out circumstances in which indemnity costs are appropriate, except that the facts of the case or the conduct of the parties must be such as to take the case away from the norm. It is not enough to order indemnity costs that a party has simply lost: unreasonableness, underhandedness, deliberate time wasting, pursuing obviously hopeless or misconceived litigation, abuse of the court's procedure and oppressive conduct are examples of occasions for an order on the indemnity basis."

Based on the principles cited above, neither the circumstances of the instant case, nor the manner in which it has been conducted, warrant an order being made against the claimants for costs on an indemnity basis.

On both methods of approach used above, I find that the claim for costs on an indemnity basis, using that terminology, must be refused.

Special Costs Certificate

Having refused the application for indemnity costs, I may now consider the application for a "special costs certificate". Rule 64.12 of the CPR authorises the court to grant a special costs certificate. Paragraph 2 of that rule provides guidance as to the exercise of that authority. It states:

> "In considering whether to grant a special costs certificate the court must take into account-
> (a) whether the application was or was reasonably expected to be contested;
> (b) the complexity of the legal issues involved in the application; and
> (c) whether the application reasonably required the citation of authorities and skeleton arguments.

The application in issue, met all those requirements; it involved areas of law which have been less traversed than most, including the question of the court declining to exercise jurisdiction in the claim. Counsel on both sides prepared extensively for that application and it was comprehensively and well argued.

Based on all the above, it is my view that the application deserves a grant of a special costs certificate. This, of course, would have been appropriate, regardless of which party had been successful.

Conclusion

Based on the reasoning set out above, I find that the defendants should be allowed to tax their bill of costs immediately. A special costs certificate is warranted by the nature of the matter and the effort put in by counsel on both sides. Neither the nature of the matter, nor the manner in which the claimant conducted the litigation can, however, be said to justify an order for costs on an "indemnity basis". The defendants are, however, entitled to have their costs taxed by the Registrar of the Supreme Court in accordance with CPR 65.13, if not agreed."

The order, therefore, is that:

1. The Defendants shall be entitled to tax the costs awarded to them herein, without having to await the determination of the claim;

2. The costs, if not agreed, shall be taxed by the Registrar of the Supreme Court in accordance with CPR 65.13.

3. The application for costs on an indemnity basis is refused;

4. A special costs certificate is granted;

5. Order 1 above is hereby stayed until the judgment in, or earlier determination of, the appeal from the order made herein on 24 January 2011.