[2012] CA (Bda) 3Civ

The Court of Appeal for Bermuda

CIVIL APPEAL No. 12 of 2010

Between:

(1) AMERICAN PATRIOT INSURANCE AGENCY INC
(2) KENNETH A HENDRICKS
(3) **DIANE M HENDRICKS**

Appellants

-v-

(1) MUTUAL HOLDINGS (BERMUDA) LIMITED
(2) MUTUAL INDEMNITY (BERMUDA) LIMITED
(3) GLENN PARTRIDGE
(4) DAVID ALEXANDER
(5) RICHARD TURNER
(6) ANDRW S WALSH

Respondent

Before: Zacca, E. President
Ward, L Austin, JA
Evans, Anthony, JA

Date of Hearing: **5 March 2012**
Date of Judgment **22 March 2012**

Appearances: Mr Jeremy Garrood for the Appellant
Mr Paul Smith for the Respondent

JUDGMENT ON COSTS

EVANS, JA

(1) INTEREST

1. Payments totalling US$1 million were made by AMPAT in respect of notional reinsurance premiums as follows –

18 May 2000	$480,000
5 March 2002	$520,000.

2. Judgment for the sum of $1 million was entered in favour of the Hendricks (hereinafter "the Appellants") against three Respondents (Mutual Indemnity, Partridge and Alexander, hereinafter "the Respondents") by Order of the Court dated 31 October 2011.
3. The Court further ordered that the Appellants` claim for pre-judgment interest was adjourned *sine die* to be restored for hearing by the Court of Appeal if so advised after receiving written submissions from both parties.
4. The adjourned hearing took place on Monday 5 March 2012. Both parties were represented by Counsel.
5. The Appellants claim interest at the statutory rate of 7% (seven per cent.) per annum from the respective dates of payment stated above.
6. The Court is entitled to award interest at the statutory rate under section 10 of the *Interest and Credit Charge Act 1975* "from the date of the accrual of the cause of action until judgment" (per Kawaley J. in *Lisa SA v. Leamington Reinsurance Co. Ltd. and Avicola Villalobos SA* [2008] Bda. L.R.61at para.30). Kawaley J. continued "This period may be abridged where it would be unjust to do otherwise", and he cited "serious delay" by the Plaintiff as a possible ground for doing so (ibid.).
7. The Respondents contend that interest should be awarded only for a period of not more than four years prior to the judgment date. This was on the ground that "in the context of a fraud trial, it was incumbent" upon the Claimants "to prosecute their claims quickly", which it was alleged the Claimants had failed to do, specifically because delay occurred between January 2007 and April 2009 caused by their "insistence that Mr. Walsh was a party to the fraud" and their claim against him.

8. The Court was informed by Counsel for the Appellants that Mr. Walsh was added as a defendant only after the original defendants contended that they had acted in accordance with advice they received from him. This Court dismissed the claim against Mr. Walsh having found that the advice he gave to other defendants was limited to one aspect of the relevant issue (namely, whether the Hendricks and AMPAT were liable for losses which were in excess of the AAP but within the additional reinsurance coverage provided by Article 3A of the Amended Treaty) and that that advice was correct. The Court further found that Mr. Walsh`s advice was not concerned with the issue of liability beyond that limit to which the Mutual Group might be exposed through Legion as the original insurer. The advice given by Mr. Walsh, therefore, did not justify the view, which the Respondents said they formed on his advice, that the Appellants had unlimited liability beyond the AAP, or any liability beyond the limit under Article 3A.

9. The Court finds and holds –

    (i) that it was not unreasonable for the Appellants to join Mr. Walsh as an additional defendant, having regard to the defence of the original defendants that they had acted in accordance with his legal advice, which was incorrect as a matter of fact;

    (ii) the Appellants ought not to be deprived of interest on account of any delay that resulted from pursuing the claim against him; and

    (iii) that the Appellants are entitled to recover interest at the statutory rate of 7% (seven per cent.) per annum, as follows –

        (a) on $480,000 (four hundred and eighty thousand US Dollars) from 18 May 2000 until 5 March 2003; and

        (b) on $1,000,000.00 (one million US Dollars) from 6 March 2002 until the date of judgment, 31 October 2011.

10. The Appellants referred, in their written Submission, to the possibility of the Court ordering that the interest shall be calculated on a compound basis with periodic rests. The Court understands that that has not been the practice of the Bermuda Courts, even in “a commercial case involving allegations of fraud”, and in any event

the Court directs in the present case that interest shall be calculated as simple interest only.

(2) COSTS

11. The Appeal succeeded against four Respondents (Mutual Holdings, Mutual Indemnity, Mr. Alexander and Mr. Partridge) (hereinafter "the Respondents") but it failed against Mr. Turner and Mr. Walsh (hereinafter "the successful Respondents").
12. The Appellants seek an order for costs in their favour against the Respondents and that their costs should be assessed on the indemnity basis, not at standard rates. The successful Respondents claim their costs against the Appellants.
13. The proceedings involved, first, the allegation of fraud, on which the Appellants succeeded in this Court against the Respondents, and secondly, what were called the corporate issues (dealt with in this Court`s judgment at paras.103 and following). There were two major corporate issues, and broadly speaking the Appellants succeeded on one issue and the Respondents (including the successful Respondents) on the other. Counsel gave slightly different estimates of the proportion of total costs that was incurred in relation to the corporate issues.
14. The Court holds, first, that there should be No Order as to Costs incurred in relation to the corporate issues, and secondly, that it is convenient to assess the proportion of the Appellants` total costs that was incurred in relation to these issues (no such costs were incurred by the Successful Respondents, being individuals). It appears that the corporate issues were raised, by the Appellants, only shortly before the trial, and that they occupied only a small amount of time at the trial. At the appeal hearing, as noted in this Court`s judgment (para. 4), they acquired "at least equal prominence" with the fraud issue, and although the fraud was of underlying importance throughout, they took up a significant part of the appeal hearing time. This Court assesses the relevant costs as 10% (ten per cent.) of the Appellants` total costs before the Supreme Court incurred after 1 May 2010, and 20% (twenty per cent) of the Appellants` costs of the appeal.
15. The balance of the Appellants` costs before the Supreme Court and of the appeal were incurred in relation to the fraud issues (hereinafter "the Appellants` fraud

costs"). In outline, the Appellants are entitled to recover these fraud costs from the Respondents, subject to any deduction that may be made on account of the fact that their claim failed against the successful Respondents. The consequences of the claims failing against Mr. Walsh and Mr. Turner, and the claim for indemnity as distinct from standard costs, are the two principal issues raised by this Application.

16. It is an established principle that where a claimant succeeds against one defendant but fails against another, and costs are awarded to follow each of the two events, the claimant may be entitled to receive from the losing defendant the amount of costs that he becomes liable to pay in respect of the claim that has failed. It is also permissible in some cases to order the losing defendant to pay costs direct to the successful co-defendant. This principle is recognised in the well-known 'Sanderson' and 'Bullock' Orders named after the cases in which they were approved (respectively, *Sanderson v. Blyth Theatre* [1903] 2 KB 533, and *Bullock v. The London General Omnibus Company* [1907] 1 KB 264).

17. These cases were considered by Kawaley J. in *Lisa SA v. Leamington etc.* (above) where he called this form of order "exceptional" but quoted, with emphasis, the following passage from the judgment of Collins MR in *Sanderson* –

> *"The common sense underlying this order is clear, because the learned judge when he made it had before him evidence that, owing to the attitude taken up by the [LGOC], it was reasonable for the plaintiff to join the other defendants."* ([2008] Bda./ LR 61 para.22 quoting [1907] 1 KB at 268-9).

Kawaley J. noted on the other hand that the rationale does not exist "where it is possible for both defendants to be held liable and the unsuccessful defendant does not contend that the successful defendant is the culpable party" (para.23). The question is whether the claims were "in substance alternative claims"(per Lord Brandon in *Bankamerica Finance Ltd. v. Nock* [1988] 1 AC 1002 at 1011) (para. 23).

18. In our judgment, the claims against the original defendants and against Mr. Walsh "in substance" were alternative for the purposes of this principle. If they had acted innocently in reliance on legal advice from Mr. Walsh, they would not have been

personally liable for fraud; but their defence made it necessary or at least reasonable for the Appellants to join Mr. Walsh as a defendant in these proceedings so that the issue as to his involvement could be determined also. We hold therefore that this is a case where the Respondents may be ordered to pay the Appellants the costs not only of their proceedings against them, but of those against Mr. Walsh also, and further, they may be ordered to pay Mr. Walsh his costs of the proceedings, either direct or by way of indemnity to the Appellants if the latter are ordered to pay Mr. Walsh`s costs in the first instance.

19. The Respondents and the successful Respondents, Messrs. Walsh and Turner, were jointly represented throughout the proceedings, and the Court was informed at the hearing that this was done on the basis of an agreement between all the Defendants/ Respondents that Mr. Walsh was liable for 20% (twenty per cent.) of their total costs and the companies for the remaining 80% (eighty per cent.). Counsel for the Respondents (including the successful Respondents) confirmed that Mr. Turner was not liable to pay any of the Respondents` costs.

20. We order the Respondents –

    (i) to pay the Appellants their costs of the proceedings, subject to deductions as follows-

        (a) 10% (ten per cent.) of costs incurred in the Supreme Court proceedings after 1 May 2010; and

        (b) 20% (twenty per cent.) of their costs of the appeal,

    the amount of such costs to be taxed, if not agreed; and

    (ii) to indemnify Mr. Walsh against his costs of the proceedings, namely, 20% (twenty per cent.) of the Respondents` total costs; no taxation is necessary, having regard to their existing Agreement.

21. Mr. Turner is in a different position from Mr. Walsh, and being under no liability for any costs of the proceedings he cannot claim to be indemnified against them. The amount of any additional costs incurred by the Respondents by reason of his being made a defendant is likely to be small and inconsequential, and in any event we hold that no deduction from the Appellants` costs shall be made for this reason.

Indemnity or Standard Basis

22. Counsel prepared a Joint Note after the hearing on the current statutory position in Bermuda, and we are indebted to them. It is not disputed that the Court has power to award indemnity costs i.e. to order that costs shall be taxed on the indemnity basis The power exists under Order 62 Rule 3(4) of the Rules of the Supreme Court 1985, as amended in 2005, which provides –

> *"(4) The amount of his costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis……..unless it appears to the Court to be appropriate to order costs to be taxed on the indemnity basis".*

23. It is not disputed that the Court of Appeal has an equivalent power, nor that costs taxed on the standard basis are assessed in accordance with scale fees which were up-dated by the RSC Amendment Rules (BR55 of 2055).

24. The difference between standard costs and indemnity costs is spelled out in Order 62 Rule 12, as follows –

> "**Basis of taxation**
>
> *12 (1) On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party;…….*
>
> *(2) On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubt which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party;……".*

25. The wording of Rule 12 (above) reflects that of the corresponding provision in the Rules of the Supreme Court of England and Wales, which was introduced in 1986 following the judgment in *E.M.I.Records v. Ian Wallace Ltd.* [1983] Ch. 59 where Sir Robert Megarry V-C gave the first judicial definition of "indemnity costs" in

substantially those terms (see p.71). In practice, the difference between `standard` and `indemnity` is greater than a mere change in the burden of proof might suggest, and particularly in Bermuda where standard fees apply it is likely to be substantial.

26. In *Phoenix Global Fund Ltd. v. Citigroup Fund Services (Bermuda) Ltd.* [2009] Bda LR 70, Bell J. cited the present Chief Justice, as follows –

> *"Ground J. in De Groote v. MacMillan at al [1993] Bda LR 66 was clearly making comments of general application when he indicated that he considered that an award of indemnity costs as against a defendant should be reserved for exceptional circumstances, involving grave impropriety going to the heart of the action and affecting its whole conduct."*

27. In *Lisa SA v. Leamington etc and Avicola* (above) Kawaley J was concerned with a case where in the course of the proceedings the unsuccessful defendant, against whom a costs order was made, had filed a false affidavit in support of an earlier (and aborted) application to discharge an *ex parte* Mareva injunction (see para.4). It was contended that indemnity costs should be awarded by reason of that previous misconduct, but Kawaley J. ordered costs at the standard rate, because "The false affidavit had no material impact on the aborted application in relation to which it was filed, and Lisa`s claim was not in any material sense seeking relief for the misconduct of proceedings before this Court" (para.7).

28. In the present case, the Appellants submitted that the Respondents "were dishonest in relying on untrue evidence, which they knew to be untrue, which went to the heart of the matters in issue" (Submissions para.9). The Respondents on the other hand said that indemnity costs should not automatically be awarded in every case where fraud is proved (citing *Lisa SA v. Leamington and Avicola* where standard costs were ordered), and that they should be reserved for cases where a fraud is practised on the Court or there is some impropriety in the conduct of the case (Submissions para.12 and 13(a)).

29. In our judgment, it would be wrong to say that indemnity costs should be ordered in every case where fraud is proved, but equally wrong to suggest that they can only be ordered when the proceedings have been misconducted by the losing party. Both "the way the litigation has been conducted" and the "underlying nature of the claim"

(per Kawaley J. in *Lisa SA v. Leamington and Avicola* at para.6) may be relevant in determining whether or not the circumstances are such as to make an indemnity costs order just.

30. In the present case, on this Court`s findings, Mr. Partridge and Mr. Alexander realised that the Mutual Group was exposed to the risk of unlimited liabilities in excess of the Article 3A additional reinsurance coverage, and they took advantage of the Hendricks` erroneous belief regarding the legal position by requiring them to pay the cost of re-insuring against such losses in respect of previous years of cover, and to undertake liability for them in future, as a condition of renewing the cover for the year 2000. They chose not to involve Mr. Walsh in that process, yet when the fraud allegations were made against them and they gave evidence in Court they contended that he had approved what they did. In all the circumstances, in our judgment, an order for indemnity costs is clearly justified in the present case.

Conclusion

31. For these reasons, we order with regard to Costs –

    (1) that the unsuccessful Respondents (Mutual Holdings, Mutual Indemnity, Mr. Partridge and Mr. Alexander) shall pay the Appellants their costs of the proceedings, subject to deductions as follows –

        (a) 10% (ten per cent.) of costs incurred in the Supreme Court proceedings after 1 May 2010; and

        (b) 20% (twenty per cent.) of their costs of the appeal;

    (2) such costs shall be taxed on the indemnity basis, subject to paragraph (4) below, unless agreed;

    (3) the unsuccessful Respondents (Mutual Holdings, Mutual Indemnity, Mr. Partridge and Mr. Alexander) shall indemnify the successful Respondents (Mr. Walsh and Mr. Turner) against their liability, if any, for costs incurred in the Supreme Court proceedings and of the appeal;

(4) the unsuccessful Respondents (as above) shall pay the Appellants their costs of these Interest and Costs proceedings, to be taxed on the standard basis, if not agreed; and

(5) all parties have liberty to apply to the Supreme Court and/or to the Court of Appeal if any further Order or Directions are required for the purpose of drawing up a final Order.

32. No reference has been made in the parties` Submissions to any costs incurred by AMPAT (which, as we understand it, did not pursue its appeal) or by CRS (Commonwealth Risk Services (not a party to the appeal)). If any party seeks any further Order or Directions in this regard, they have liberty to apply to the Supreme Court and /or to the Court of Appeal within 28 (twenty eight) days from the date this Judgment is handed down.

Signed

Evans, JA

Signed

Zacca, P

Signed

Baker, JA