[2009] SC (Bda) 58 Civ (9 December 2009)

IN THE SUPREME COURT OF BERMUDA

COMMERCIAL COURT

Civil Jurisdiction

2006: No. 20

BETWEEN:

(1) PHOENIX GLOBAL FUND LIMITED

(2) PHOENIX CAPITAL RESERVE FUND LIMITED

Plaintiffs

and

(1) CITIGROUP FUND SERVICES (BERMUDA) LIMITED

(2) THE BANK OF BERMUDA LIMITED

Defendants

COSTS
RULING AND
REASONS FOR RULING
(Chambers)

Date of Hearing: 4 December 2009

Date of Ruling: 9 December 2009

Victor Lyon Q.C. and Larry Mussenden, Attride-Stirling & Woloniecki, for the Plaintiffs

Andrew Martin, Mello Jones & Martin, for the 1st Defendant

Narinder Hargun and Alex Potts, Conyers Dill & Pearman, for the 2nd Defendant

Introduction

1. This ruling concerns an application for indemnity costs arising from a judgment which I delivered on 4 December 2009. The judgment itself was a lengthy one, dealing with any number of different issues which had arisen during the course of a trial which took place in September and October. I will in this ruling use the same abbreviations as were used in the judgment.

2. The judgment was circulated in draft prior to delivery, and hence all parties had an opportunity to consider the position in relation to costs. I will in due course refer to those findings which I made in the judgment which impact on the issue of costs, but will at this stage just set out the comments I made at paragraph 450 of the judgment, in the following terms:

> "**Costs**
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> 450 The position in relation to costs does of course have to be looked at in the context of my primary findings, and the reality is that the Funds have lost this action comprehensively, not just on the basis of my primary findings, but frequently on the basis of my alternative findings. In these circumstances, it seems to me that an order for costs against the Funds is inevitable, but I do recognise that there might be submissions as to the appropriate type of costs order, so that at this stage I will simply note that I will hear counsel as to costs."

3. Both the Bank and Citigroup then filed written submissions indicating their intention to seek orders that the Funds pay their respective costs of the proceedings to be taxed on the indemnity basis. For the Bank, the application was made both on the basis of the indemnities contained in the administration agreements, the custodian agreements, and the bye-laws of the Funds, as well as in the exercise of the Court's discretion under the provisions of RSC Order 62, rule 3 (4). Citigroup's written submissions relied upon the provisions of RSC Order 62, but Mr. Martin both adopted Mr. Hargun's submissions, and

referred to the Citigroup Administration Agreements, which contained provision for contractual indemnity.

4. At the conclusion of argument, I made an order that both the Bank and Citigroup should have their costs of these proceedings payable by the Funds on the indemnity basis. I indicated that at that stage I was ruling on the basis of the contractual position only, that I would give written reasons for the ruling I had made and would then make a ruling on the outstanding application, in relation to the exercise of my discretion under RSC Order 62 rule 3(4).

Exoneration and Indemnity

5. I dealt with the position in relation to Citigroup between paragraphs 399 and 402 of the judgment. The Citigroup Administration Agreements provided that Citigroup would not be liable to the Funds or their shareholders for any action or inaction on Citigroup's part, relating to any event, in the absence of bad faith, wilful misfeasance, negligence, or the reckless disregard of its duties and obligations under the agreements. There were also provisions whereby the Funds agreed to indemnify and hold harmless Citigroup and a wide class of persons defined as "Forum Indemnitees" from any and all claims, demands, actions, suits, judgments, liabilities, losses, damages, costs, charges, reasonable counsel fees and other expenses of every nature and character arising out of or in any way related to Citigroup's actions taken or failures to act with respect to the Funds, provided that they were consistent with the standard of care set forth in the agreements or based on good faith reliance on, inter alia, the written instruction of any authorised person, as defined. I did not find that there had been any bad faith, wilful misfeasance, negligence or reckless disregard by Citigroup in regard to any of its duties or obligations under the agreements. I did find that there had been reliance upon the written instructions of authorised persons. It follows that Citigroup has a contractual right to the costs which it has incurred in relation to these proceedings. Mr. Hargun relied upon the case of *Gomba Holdings Ltd –v- Minories Finance (No. 2)* [1993] Ch 171 as authority for the proposition that the court's

discretion as to the basis of taxation of a mortgagee's costs, charges and expenses should normally be exercised so as to correspond with the contractual entitlement. Mr. Lyon sought to distinguish *Gomba Holdings* on the basis that the contractual right to indemnity on the facts of the case before me was very different than that relating to a case arising from a mortgage. But it seems to me that I need go no further than say that on the facts of the case before me there is a contractual right to costs, and I should therefore ordinarily exercise my discretion so as to reflect that contractual right. That was the basis upon which I made my order that costs should be taxed on the indemnity basis in relation to the costs of both Citigroup and the Bank.

6. I should next deal with the underlying agreements governing the Bank's position both as custodian and administrator. In relation to the Bank's acts as custodian, I dealt with the position between paragraphs 403 and 407 of the judgment. The relevant agreement provided that the Bank should not in its capacity as custodian be liable to the Funds for any act or omission in the course of or in connection with the services rendered by it in the absence of gross negligence or wilful default. Further, the Funds agreed to indemnify the Bank from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind or nature whatsoever, other than those resulting from gross negligence or wilful default. I took the view that even on the case for the Funds (which of course I had not accepted) gross negligence had not been made out against the Bank in its capacity as custodian, so that in relation to this aspect of matters, I found in favour of the Bank and against the Funds in respect of both their primary and secondary cases. Again, it followed that the Bank, acting as custodian, had a contractual right of indemnity to the cost of these proceedings, and that I should exercise my discretion so as to reflect that contractual right, which I did.

7. Next, in relation to the Bank's position as administrator, I dealt with this in paragraph 408 of the judgment. The relevant agreement provided that the Bank should not, in the absence of fraud, negligence or wilful default, be

liable for any loss or damage, and the Funds agreed to indemnify the Bank against the type of obligation set out above, in the absence of fraud, negligence or wilful default. I did not make any finding of fraud, negligence or wilful default against the Bank, and the position was that the Funds had failed on their primary case. Accordingly, the Bank has a right to a contractual indemnity, and again on the basis of *Gomba Holdings*, I exercised my discretion so as to reflect that contractual right.

8. The Bank also claims a right to a contractual indemnity pursuant to the bye-laws, and this is covered in paragraph 412 of the judgment, in which I held that the Bank had been appointed to the office of administrator, and accordingly became an officer of the Fund companies. The position is no doubt the same in relation to Citigroup. I then found that the indemnity provisions contained in the bye-laws should operate, and their operation would provide a further contractual right upon which to exercise my discretion.

Indemnity Costs pursuant to RSC Order 62

9. Before turning to the various findings which I made in the judgment which both defendants say support an order for costs to be taxed on the indemnity basis, I should refer to the difference in approach to orders for indemnity costs, referring, as Citigroup did, to the Pre-Woolf Indemnity Approach and the Post-Woolf Indemnity Approach in the United Kingdom. Citigroup suggested, no doubt rightly, that in previous cases I had been cautious about adopting the Post-Woolf Indemnity Approach, whereas my brother judge Kawaley J had taken a step towards this approach in the case of *Lisa SA –v- Leamington Reinsurance Company Ltd and Avicola Villalobos SA* [2008] Bda LR 61. The Bank quoted an extract from a judgment I had given on costs in the case of *Wingate –v- Butterfield Trust (Bermuda) Limited* [2008] Bda LR 55, where I said:

> "In my view there does remain a difference in the principles to govern an award of indemnity costs in this jurisdiction under the

> RSC, and those which are now applicable in the United Kingdom under the CPR"

Those words followed a reference to the judgment of May LJ in *Reid Minty –v- Taylor* [2001] EWCA Civ 1723, where he had referred to the fact that the first instance judge had been wrong to constrain himself by reference to pre CPR authorities. Conversely, I was reluctant to place reliance upon post CPR authorities when considering the applicable regime in Bermuda.

10. In *Lisa –v- Leamington*, Kawaley J took the view that Post-Woolf Indemnity principles could be considered in appropriate cases in the local context, expressing himself in the following terms:

> "Although CPR has not been adopted in Bermuda, our current post-January 1, 2006 costs regime (which narrows the financial gap between indemnity and standard costs) combined with Order 1A of the Rules (the Overriding Objective) may in appropriate cases mean that the post-CPR principles may not be wholly irrelevant in the local context. But in the vast majority of cases this will occur where the application for indemnity costs is based on the way the litigation has been conducted; not on the nature of the underlying claim."

So, as Citigroup noted, Kawaley J did emphasise the relevance of the conduct of the litigation, such that in practical terms there may be little between us in terms of approach.

11. However, Kawaley J did note, as one sees from the above extract, that the costs regime in Bermuda since 1 January 2006 has narrowed the financial gap between indemnity and standard costs, and I respectfully agree that this change has significance. Whereas before 1 January 2006 there had been relatively low limits for the hourly rates which could be secured on a taxation on the standard basis, those limits have now gone, so that on a taxation on the

standard basis, there is provision to allow a reasonable amount in respect of all costs reasonably incurred. Mr. Lyon argued that the only difference between a taxation on the standard basis and one on the indemnity basis lay in relation to the burden of proof; both allow costs reasonably incurred, although the provisions governing indemnity costs refer to costs being allowed unless they are unreasonable.

12. I recognised during the course of argument that that appeared to be the position under the rules, although I was concerned at the effect of the practice direction issued by the Chief Justice on 7 July 2006, which had set out guide line figures for hourly rates for the purpose of taxations on the standard basis. For practitioners with more than nine years' post-qualification experience, no upper limit on the hourly rate is set, but for those with less than nine years' post-qualification experience, there are recommended maximum figures, which may or may not accord with those rates charged by the practitioners in question to their clients. One can of course see an argument that if the hourly rates are such that they would not be allowed by the Registrar on a taxation on the standard basis, then such rates should not be allowed on a taxation on the indemnity basis. I indicated to Mr. Lyon that I feared that the practical reality diverged from the theoretical position represented by his position. But when all is said and done, it seems to me that that is an argument which should be made to the Registrar at the time of taxation, and my task is to consider the appropriate basis for taxation without reference to the manner in which the Registrar discharges her function on taxation.

The Test in Bermuda

13. I have referred to the potential difference in governing principles between the operation of RSC in Bermuda and CPR in the United Kingdom. The comments which appear in the 2008 White Book at paragraph 44.4.3 indicate that there is an infinite variety of situations that might justify a court making an order for costs on the indemnity basis. Nevertheless, Ground J in *De Groote –v- MacMillan et 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. That said, the judgment as to whether a particular case is exceptional, and the nature and extent of the impropriety will always be matters for the trial judge before whom the question falls to be determined. And I note that in case of *Stevedoring Services Limited –v- Burgess et al* [2000] Bda LR 33, Meerabux J cited a passage from the judgment of Kerr LJ in the case of Disney –v- Plummer (Unreported, 16 November 1987) in which the learned judge had indicated that he did not accept the submission that indemnity costs are only appropriate if there is some deception or underhand conduct on the part of the losing party. He said that judges could still exercise their discretion under Order 62 rule 3 (4) if the litigation had been fought bitterly or unreasonably. I would just note that Meerabux J's ruling on indemnity costs was set aside by the Court of Appeal on the grounds that the learned judge had not indicated the nature of the material on which he relied to found his order for indemnity costs.

The Plaintiffs' Conduct in this Case

14. At an early stage of the judgment, I described Mr. Moretti as the driving force behind the litigation on behalf of the Funds. When it came to Mr. Moretti's credibility, I found that he had lied in relation to a number of matters in his oral evidence, and that he had also been dishonest in one of the affidavits which he had sworn, and in his witness statement. Having found Mr. Moretti to have been dishonest, I then considered the consequence of such a finding, bearing in mind that much of Mr. Moretti's evidence depended upon the contemporaneous documents and was essentially a re-construction of the events of the material time. I identified one important area where I felt that this was not the case, and that was in relation to the valuations ascribed by Mr. Moretti to those assets of Phoenix Capital which were transferred to Dynagest at the time of the re-structuring in 2004. Those figures are set out in the pleading as representing the primary case in regard to recovery on the Funds' investments, put forward by the Funds in support of their losses. I found those figures to be false, and I rejected them. It is necessary to refer only to two of

them. Before doing so I should reiterate what was said in the judgment as to the significance of the figures in question, because the figures which were used for the purposes of identifying the value of the interest of the underlying shareholder were those which appeared in an NAV calculation undertaken by the Bank of Bermuda as at 15 June 2004. I emphasised in the judgment that these were real numbers. In respect of those shareholders who chose to redeem in cash, they formed the basis of the calculation of the cash payment, and in respect of those shareholders who chose to exchange their shares in Phoenix Capital for shares in Dynagest, they formed the basis of the allotment of shares in Dynagest. But the figures which were used as the basis of the Funds' claim for losses as against Citigroup in particular were but a fraction of those used for the purpose of the re-structuring. In relation to the Equity Trust promissory notes, these were given a value of US $15,422,400 for the purpose of the re-structuring, and yet a value of zero was given for the purposes of the claim, meaning that the claim was that the whole of the investment had been lost. For the Chesterfield Investment, a value of US $11,793,600 was given for the purpose of the re-structuring, yet a figure of US $1,092,000 was given for the purposes of the claim. And of course the recoveries ultimately achieved were very much in line with the figures representing the values used for re-structuring purposes.

15. All of this led me to hold that the pleaded figures put forward by the Funds as representing their primary case were false figures, and I indicated that the notion of the Funds taking one set of figures for one purpose and then at very much the same time adopting a relatively nominal set of values for another purpose, that of its claim against these defendants, seemed to me to be thoroughly dishonest. Hence Mr. Moretti's dishonesty in his oral testimony, his witness statement and his affidavit was not of academic interest only. That said, it does seem to me that comprehensive dishonesty on the part of the principal witness for a party (and who is the representative of that party), in affidavit, witness statement and oral evidence, is a matter which does fall to be taken into account when considering whether to order costs on the indemnity

basis, even if the dishonest evidence is not material. It is an indication how the party has chosen to run its case.

16. There is another area where it seems to me that the conduct of the litigation on the part of the Funds requires adverse comment from me. I referred briefly in the judgment to the highly unsatisfactory manner in which discovery had been given. Perhaps I did not make it clear enough that where late discovery was given, particularly with reference to what were known as the Jones Day documents, these been the subject of a specific request a considerable time before the trial. And there were other examples of failure on the part of the Funds to give discovery on a timely basis.

17. In relation to the Jones Day documents about which the defendants made complaint, it was submitted by Mr. Lyon that Jones Day's clients were Dynagest, rather than Phoenix Capital. In fact, Mr. Moretti accepted in terms when cross-examined by Mr. Sheldon that Jones Day had been instructed by Phoenix Capital. At the same time, it must be acknowledged that when Jones Day wrote to Equity Trust seeking recovery on the promissory notes, which they did in July 2005, they indicated that they were acting on behalf of Dynagest, which of course took possession of the assets as part of the re-structuring. But while there could have been an argument in relation to the discoverability of the documents in question, the reality is that they were produced, well after the start of the trial, when originally there had been no disclosure.

18. The matter which I think calls for particular adverse comment is the position taken by the Funds in relation to the disclosure of its recoveries. Recovery had been effected in respect of the Equity Trust promissory notes in January 2006, and the sale of Chesterfield House had occurred in January 2007. The recoveries in respect of these two investments essentially showed that there had been no loss on them. That, however, represented the alternative case for the Funds, but what was particularly objectionable is the fact that disclosure of the alternative case for the Funds on recovery (which of course I held to be the

appropriate basis for calculation of loss) did not take place until 20 October 2008. Mr. Hargun confirmed during the argument on costs that the defendants had no prior knowledge of the true position before being served with that application for amendment.

19. I do not think that this failure and its consequences can be over emphasised. These are proceedings which were issued on 20 January 2006, and the very detailed statement of claim was first filed on 6 March 2006, when the position in relation to the recovery on the Equity Trust promissory notes must or should have been well known to the Funds. Yet the original pleading made no reference to this recovery. It seems to me that to conceal this recovery for something like two years and nine months in circumstances where both defendants understandably felt they were being targeted as "deep pocket" defendants is thoroughly reprehensible, and is conduct which in and of itself calls for condemnation by the Court in the form of an order that costs should be taxed on the indemnity basis. The whole point about a "deep pocket" defendant being targeted is that the greater the claim, the greater the possibility that such a defendant might feel the pressure to settle. Failure to disclose the potentially substantial reduction in the size of the claim necessarily suggests that the Funds took advantage of the possibility of such pressure to settle for as long as they could. This is all quite separate and apart from the other matters to which I have referred, and I bear in mind that even when disclosure of recoveries was made, the Funds were not prepared to concede that the very substantial double recovery in the hands of the former investors of the Funds, which would be the outcome if the Funds were to succeed, was in any sense disgraceful. On the contrary, the Funds through their counsel Mr. Lyon took a robust position of entitlement in regard to their primary case, while freely acknowledging that success in these proceedings would lead to double recovery in the hands of the former investors. Mr. Lyon saw nothing unjust in such an outcome. I do.

20. Mr. Lyon submitted, in response to the submissions by the Bank that the Funds had submitted a dishonest case, that it was not dishonest to transfer the

Equity Trust promissory notes to Dynagest at a zero value, on the basis that they were not marketable. He said that the argument was one of law, not one of honesty.

21. There are two criticisms to be made of the valuation of the Equity Trust promissory notes at zero. The first is that it was not honest to take one value for commercial purposes, but at the same time to use a zero value for the purposes of the claims in these proceedings; the second, and to my mind more serious act, is to plead a claim based on the zero valuation at a time when the amount of the claim had been recovered, but that fact was not disclosed. And in relation to the former matter, it must be remembered that the Bank of Bermuda NAV of 15 June 2004 came to light from a review of the Bank's own documents, not from disclosure by the Funds. The same comments apply to the very low valuation of the Chesterfield Investment.

22. There is one other matter to which I should refer, which I mentioned during the course of argument on the costs application, but had not referred to in the judgment itself. This relates to the fact that at the time of re-structuring, the class A shareholders were given the option of taking cash based upon the Bank of Bermuda NAV valuation, or redeeming in kind by taking shares in Dynagest. Some eighty-five percent chose to redeem in kind, which effectively means that they must have taken the view that they could do better financially when the assets transferred to Dynagest were converted to cash, than by taking cash at the figures contained in the June 2004 valuation. Given that the Loans to SPVs produced, in broad terms, full recovery, I commented that either those investors knew something which nobody else knew, or they had an extraordinarily optimistic view of the prospects of success of the claim against the Bank based on the Stop Loss Provision; but that comment was not thought through, because the claims against the Bank based upon the Stop Loss Provision remained vested in the Funds, and the claim is pursued on behalf of all those who held class A shares at the time of the re-structuring. Perhaps little weight should be attached to this fact, but it does seem to me to

demonstrate that those shareholders knew something which no one else knows to this day.

23. All of these matters do cause me to conclude that the conduct of this litigation by the Funds which I have described in this ruling necessarily calls for an order for indemnity costs to be made in the exercise of my discretion under RSC Order 62 rule 3 (4), and that is my order.

Mr. Ramseyer

24. I referred in the judgment to the complaints which both Citigroup and the Bank of Bermuda made in regard to Mr. Ramseyer, saying that he was very much behind the litigation, but had not been called to give evidence. I also noted that while Mr. Moretti consulted with Mr. Ramseyer on various issues, there were occasions when he did not do so, despite the fact that he must have known that Mr. Ramseyer had the requisite knowledge, and so was the obvious person to consult. One area where this was the case was in relation to the Chesterfield Investment, where the pleading for the Funds suggested that they did not know the nature of the investment; if that was indeed the case, it would have been a very simple matter for them to find out.

25. The position that the Funds took in relation to Mr. Ramseyer was that an inordinate amount of time had been spent dealing with matters related to him. In their closing submissions, the Funds referred to the fact that there is no tort of being "behind" litigation, and that Mr. Ramseyer was not a party to the litigation. But the essential complaint from the defendants is that Mr. Ramseyer should have given evidence, and it does not seem to me that the defendants should be criticised for asking questions of Mr. Moretti in relation to Mr. Ramseyer. Mr. Lyon suggested that there should be a five percent reduction in the award of costs to reflect the "wasted" time spent on Mr. Ramseyer. It follows from my comments above that I do not think that such time was wasted time. However, if I were to be wrong in my finding that the defendants should not be criticised for asking questions of Mr. Moretti in relation to Mr. Ramseyer, my view is that the time spent on that was, in

relation to the overall length of the trial, so nominal that I would not have ordered any reduction, even had I taken the view in relation to the role of Mr. Ramseyer for which the Funds contend.

The Costs of the Costs Application

26. I indicated at the end of the hearing that I would deal with these on a nisi basis, because Mr. Lyon had suggested there should be a further hearing in relation to costs. In my view costs should follow the event, and I would order (on a nisi basis) that both defendants should be entitled to their costs of the costs application, such order nisi to be made absolute in fourteen days' time in the absence of an application on the part of the Funds to be heard on costs.

Dated this day of December 2009.

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Hon. Geoffrey R. Bell
Puisne Judge