The Court of Appeal for Bermuda

CIVIL APPEAL No. 1 of 2019

B E T W E E N:

IMRAN SIDDIQUI

1st Appellant

-and-

STEPHEN CERNICH

2nd Appellant

-and-

CALDERA HOLDINGS LTD

3rd Appellant

-v-

ATHENE HOLDING LIMITED

Respondent

Before: **Clarke, President**
Kay, JA
Smellie, JA

Appearances: Alexander Potts QC, Kennedys, for the Appellants;
Kevin Taylor and Benjamin McCosker, Walkers, for the Respondent

Date of Hearing: **3rd, 4th and 5th June 2019**
Date of Judgment: **2 March 2020**

RULING ON COSTS

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CLARKE P

1. By our order dated **20th September 2019**, made in two consolidated appeals, we refused leave to appeal from the Ruling of Hellman J dated 28 June 2018 ("the Hellman Ruling") and dismissed the appeal against the Ruling of the Chief Justice

dated 14 January 2019 ("the Hargun Ruling"). We ordered that, unless the parties wished to be heard on costs, then costs should follow the event.

2. On **22 November 2019** we refused the Appellants leave to appeal to the Privy Council. We now have to determine whether any and, if so, what, order should be made in respect of costs both here and below. This is the Ruling of the Court on that issue.

3. The course of events in these proceedings is well known to the parties and is apparent from the two Rulings and our judgment in the Appeal. We shall not, therefore, refer to it in any detail.

4. In essence, the Respondent ("Athene") commenced proceedings in the Supreme Court, by Writ endorsed with a Statement of Claim (the "Writ"), on **3 May 3018**. The Third Appellant ("Caldera") filed an application seeking to set aside, stay or strike out the Writ on the grounds of *forum non conveniens,* or, alternatively, a stay of the Writ on case management grounds. The latter application, which was the subject of the Hellman Ruling, failed.

5. The Appellants filed the following applications:

   (a) an application by the First and Second Appellants ("Mr Siddiqui" and "Mr Cernich") to stay or set aside the Writ, again on the grounds of *forum non conveniens;*

   (b) an application by Caldera (which was part of the application referred to in [4] above but which was determined separately in the Hargun Ruling) for an order that the Writ be struck out pursuant to Order 18, rule 19 of the Rules of the Supreme Court 1985 and the inherent jurisdiction of the Court;

(c) an application by Caldera for leave to appeal the Hellman Ruling. These matters were the subject of the Hargun Ruling. The appellants failed to secure any of the relief sought.

6. No order has yet been made in respect of the costs of the Hellman or the Hargun Ruling. On **17 January 2019** counsel for the Respondent ("Athene") wrote to counsel for the Appellants, attaching draft orders reflecting the Hellman Ruling and the Hargun Ruling. As to costs the email stated that:

> "*The draft orders reflect the award of costs in our client's favour for the hearings of 28 June 2018 and 14 January 2019. We can't imagine a scenario in which your client could reasonably oppose such orders in relation to costs, but if you do not agree to this please let us know so that we can move to apply for our client's costs".*

7. In the event, counsel for the Appellants did not agree that orders should be made in the form proposed and on 21 January 2019 indicated that he planned to revert within the next 21 days. In fact, there was no further response; nor did Athene make any application to the Supreme Court for an order as to costs.

8. Athene now seeks an order that the costs of the proceedings below, culminating in the Hellman and Hargun Rulings, should be paid by the Appellants on the standard basis; and that the costs of the consolidated appeals should be paid by the Appellants on the standard basis, save for those costs incurred in relation to the allegation of apparent bias/predetermination on the part of Hargun CJ which, Athene submits, should be paid on the indemnity basis. Alternatively, if we were not minded to deal with the costs below Athene has indicated that it will apply forthwith to the Supreme Court for that Court to deal with that issue.

9. The Appellants submit that we should make no order as to the costs of the consolidated appeals or as to the costs below. Alternatively, the costs of the consolidated appeals should be reserved; or be in the cause; or should be Athene's

costs in the cause. Lastly, they say that, if the Appellants are to be ordered to pay Athene's costs of the consolidated appeals, such costs should not be taxed until after the conclusion of the proceedings at first instance and Athene should not be permitted to enforce payment of any such costs order against any of the Appellants until the conclusion of the proceedings at first instance.

10. The Appellants accept that they lost the consolidated appeals. Their primary submission is that no order for costs should be made against them because they are, under Athene's Bye-Laws, entitled to a contractual indemnity in respect, *inter alia*, of any costs which we might order them to pay. There is, thus, no point in making any costs order since to do so would create a legal circuity.

11. Bye-Law 56 of Athene's Eighth Amended and Restated Bye-Laws (the "Eighth Bye-laws"), adopted on 14 October 2014, was applicable on 30 June 2016 when the termination of Mr Cernich's employment relationship with Athene and of his (alleged) status as an Officer of Athene became effective. At this stage Mr Siddiqui was still a director of Athene.

12. The applicable parts of Bye Law 56 of the Eighth Bye- Laws are as follows:

> "56.1 … *the Directors* [including the First Appellant] … *and other Officers* [including, as we found was "seriously arguable" in our judgment of 20 September 2019, the Second Appellant] (*each a "Covered Person") for the time being acting in relation to the affairs of the Company [the Respondent] … shall be indemnified and secured harmless by the Company from and against all Liabilities*[1] *and Expenses*[2] *arising from any and all threatened, pending or*

[1] Defined in the Eighth Bye-Laws at Clause I as meaning *"Losses, claims, damages, liabilities, joint or several, judgments, fines, penalties, interest, settlements or other amounts*".

[2] Defined in the Eighth Bye-Laws at Clause I as meaning "*all fees, costs and expenses incurred in connection with any Proceeding, including, without limitation, attorneys' fees, disbursements and retainers, fees and disbursements of ..professional advisors … , court costs, transcript costs, fees of experts, travel expenses, duplicating, printing and binding costs, telephone and fax transmission charges, postage, delivery services, secretarial services and other disbursements and expense*s"; and "*Proceeding*" is defined as "*claims, demands, actions, suits or proceedings,*

> *completed Proceedings*[3] *, in which any Covered Person may be involved ... by reason of its status as a Covered Person whether arising from acts or omissions to act occurring before or ... after the date of the adoption of these Bye-laws; provided, however, that a Covered Person shall not be indemnified and held harmless if there has been a final and non-appealable judgment entered by a court of competent jurisdiction determining that, in respect of the matter for which the Covered Person is seeking indemnification pursuant to this Bye-law 56, the Covered Person acted* ***fraudulently and/or in bad faith or engaged in willful misconduct ...*** " [Bold added here and elsewhere]
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> "56.9 *No amendment, modification or repeal of this Bye-law 56 or any provision hereof shall in any manner terminate, reduce or impair the right of any past, present or future Covered Person to be indemnified by the Company, nor the obligations of the Company to indemnify any such Covered Person under and in accordance with the provisions of this Bye-law 56 as in effect immediately prior to such amendment, modification or repeal with respect to claims arising from or relating to matters occurring, in whole or in part, prior to such amendment, modification or repeal, regardless of when such claims may arise or be asserted."*

13. This provision, the Appellants contend, indemnifies Mr Siddiqui, who was a director, and Mr Cernich, who was, as Athene contends (and as we found to be seriously arguable), an Officer of Athene, against all expenses relating to these proceedings, except where there has been a final and non-appealable judgment determining that Mr Siddiqui or Mr Cernich has acted fraudulently and/or in bad faith or engaged in wilful misconduct. It also, they submit, indemnifies Caldera which, on Athene's case, was the "alter ego"/"nominee"/"agent" of Mr Siddiqui and Mr Cernich.

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whether civil, criminal, administrative or investigative, and whether formal or informal and including appeals, at law or in equity ... "

[3] See previous footnote.

14. Bye-Law 56 of Athene's Ninth Amended and Restated Bye-Laws (the "Ninth Bye-Laws"), adopted on 14 November 2016, was applicable on 20 March 2017 when Mr Siddiqui's resignation from Athene became effective.

15. The applicable parts of Bye Law 56 of the Ninth Bye- Laws are as follows:

> *"56.1 ... (i) the past, present and future ... Directors ... and other Officers ... (each, a "Covered Person ") shall be indemnified and secured harmless by the Company .from and against all Liabilities and Expenses arising .from any and all threatened, pending or completed Proceedings[4], in which any Covered Person may be involved, ... by reason of .. its status as a Covered Person ..., whether arising. from acts or omissions to act occurring before or after the date of the adoption of these Bye-Laws; provided, however, that a Covered Person shall not be indemnified and held harmless if there has been a final and non-appealable judgment entered by a court of competent jurisdiction determining that, in respect of the matter for which the Covered Person is seeking indemnification pursuant to this Bye-law 56, the Covered Person* ***acted fraudulently and/or dishonesty in relation to the Company*** *... "*

16. This Bye-Law, the Appellants submit, provides even greater protection to the Appellants indemnifying them against all expenses relating to these proceedings except where there has been a final and non-appealable judgment determining that Mr Siddiqui or Mr Cernich have been guilty of "*fraud and/or dishonesty*".

17. It is common ground that there has been no such judgment as is referred to in either version of Bye-Law 56.

18. Section 98 of the *Companies Act 1985* expressly permits indemnification in the manner contemplated by these Bye-Laws. Section 98 provides:

[4] Liabilities", "Expenses" and "Proceeding" have the same definition in Clause 1 of the Ninth Bye-Laws as in Clause 1 of the Eighth Bye-Laws.

> *"(1) Subject to subsection (2), a company may in its bye-laws or in any contract or arrangement between the company and any officer, or any person employed by the company as auditor, exempt such officer or person from, or indemnify him in respect of, any loss arising or liability attaching to him by virtue of any rule of law in respect of any negligence, default, breach of duty or breach of trust of which the officer or person may be guilty in relation to the company or any subsidiary thereof.*
>
> *(2) Any provision, whether contained in the bye-laws of a company or in any contract or arrangement between the company and any officer, or any person employed by the company as auditor, exempting such officer or person from, or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any fraud or dishonesty of which he may be guilty in relation to the company shall be void …"*

19. The Appellants submit that a claimant cannot claim against a defendant in respect of matters against which the claimant has agreed to indemnify the defendant and that this applies as much to a liability for costs as to any other liability. Thus in *Petris v Daniels* [2015] BdaLR 16 Hellman J held, in respect of an indemnity similar to those contained in the Bye-Laws, but without the exceptions:

> "[The indemnity clause] does *not purport to exempt the Company's directors from liability but rather to indemnify them in respect of it. However, the legal consequence would be the same in either case. A company has no cause of action against a director in respect of a matter in which the company has agreed to indemnify him".*

20. Hellman J cited the Privy Council case of *Viscount of Royal Court v Shelton* [1986] 1 WLR 985 in which the principal question was whether a director could rely on an indemnity clause to escape liability for a loss suffered by the company as a result of his causing the company to do an act alleged to have been ultra-vires the company. The clause included a provision that "*every director, officer or servant of the company shall be indemnified out of its funds against all costs, charges,*

expenses, losses and liabilities incurred by him ... in the conduct of the company's business".

21. The Board held that the directors were fully protected by the indemnity. Lord Brightman stated at 991 E-F:

> "*The directors, as a matter of construction of* [the indemnity clause] *are therefore not liable for the loss which has happened to the company …. A company has no cause of action against a director in respect of a matter against which the company has agreed to indemnify him".*

22. The Appellants also rely on cases in which the Courts have held that, where there is a contractual right to costs, the court should ordinarily exercise its discretion to reflect that right: *Phoenix Global Fund Ltd v Citigroup Financial Services (Bermuda) Ltd* MB 2009 SC 57 (per Bell J, as he then was) and *Rabilizirov v A2 Dominion London Ltd* [2019] EQHC 863 [12] – [3] (in relation to appeal proceedings).

23. Athene submits that considerations as to the scope of the indemnity go to the question of enforcement of any order as to costs and not to the matter with which this Court is presently concerned, namely what order, if any, to make in respect of the costs of these proceedings both here and below. Athene has not, therefore, made submissions on the extent or limit of the indemnity provided for by the Bye-Laws.

Discussion

24. Whether or not any of the Appellants are entitled to an indemnity from Athene pursuant to the Bye-Laws depends on a number of considerations. These appear to us to include the following.

25. **Mr Siddiqui** was a director of Athene and is involved in this action by reason of that office. On the assumption that the relevant provisions of the Bye-Laws were expressly or impliedly incorporated in the contract between him and Athene, he will

be entitled to an indemnity under the Ninth Bye-laws unless there has been a final and non-appealable judgment entered by a court of competent jurisdiction determining that, in respect of the matter for which he seeks indemnification, he has acted fraudulently or dishonestly in relation to Athene.

26. **Mr Cernich** never was a director of Athene. His entitlement to an indemnity under the Bye-Laws (on the same assumption as in [25] above) depends on whether he was an Officer, which is in dispute. If he was, he will be entitled to an indemnity unless there has been a judgment against him determining that, in respect of the matter for which he seeks indemnification, he has acted fraudulently and/or in bad faith or engaged in wilful misconduct. These are the words of Bye-Law 56 of the Eighth Bye-Laws. It may be that, if he is an Officer, he can, also, avail himself of the more favourable provisions of the Ninth Bye-Laws, but that appears to us to be far from clear. If he was an Officer, he could claim to be contractually entitled to the indemnity provided by the Bye-Laws in force when he was an Officer. However, it seems to us doubtful, to put it no higher, that he could rely on an indemnity in terms contained in the terms of a Bye-Law which was not in force when he was an Officer, even though those terms extended to "*past, present and future ---Officers*".

27. He may, also, be able to avail himself (whether he was an Officer or not) of the indemnity contained in his Separation Agreement and General Release made between him and Athene which provides an indemnity against "*any and all claims*..." but not in respect of "***any claims arising out of any criminal fraudulent, internationally wrongful or reckless conduct by you***". It may, also be the case that the operative release is to be regarded as the release contained in the Separation Agreement as opposed to any release in either of the Bye-Laws.

28. **Caldera** was never a director nor an officer of Athene. Whether it is entitled to an indemnity (a matter which appears to us to be debatable) will depend on whether it is so entitled because it was, as it was described in the original Statement of Claim,

the "*alter ego*" of Mr Siddiqui or Mr Cernich, or was their agent or nominee. If it is *prima facie* so entitled, its entitlement will then depend upon whether a judgment of the relevant character is entered against Mr Siddiqui and/or Mr Cernich.

29. We are, thus faced with a position where, absent any possible indemnity in favour of the Appellants from Athene, it would simply fall to us to decide who should bear the costs of the appeal. But the Appellants assert an entitlement to an indemnity, the present existence of which is in dispute, at least so far as Mr Cernich and Caldera is concerned, and which may, in the case of each Appellant, be defeated if the requisite judgment is given against the relevant Appellant(s). What, in those circumstances, should we do?

30. If it was clear that the Appellants are, and would remain, entitled to an indemnity we would not think it appropriate to make any costs order against them. There would then be a complete circuity of action. If such an order was made the costs ordered would have to be paid to Athene but Athene would be bound to indemnify the Appellants either by paying them back or ensuring that the costs were not paid by them in the first place.

31. It is not, however, at all clear that the Appellants are, or will remain, entitled to an indemnity. In the case of Mr Cernich and Caldera they may not be entitled to an indemnity at all (regardless of whether the requisite judgment is given). In the case of all three Appellants any claim to indemnity may be excluded by the delivery of the requisite judgment; particularly given the fact that in the Hargun Ruling the Chief Justice found it to be strongly arguable that the pleaded conduct of the Appellants was dishonest.

32. In the light of the indemnity said to be available to them the Appellants invite us to make no order (although they have alternative submissions). But that course would, itself, be inappropriate since, if it turns out that one or more of the Appellants is not entitled to an indemnity, and, but for the supposed indemnity, we would have

ordered the Appellant(s) to pay costs, our failure to make any order would, itself, deprive Athene of an award of costs to which it would turn out to have been entitled.

33. In our view the appropriate course for us to take is first to determine what costs order should be made, leaving aside any question of indemnity. But we should order that any costs order in favour of Athene is not to be enforced, nor should any taxation take place, without a further order of the court.

34. We do not ignore the finding of the Privy Council that a company such as Athene has no cause of action against a director in respect of a matter against which the company has agreed to indemnify him. We are not, however, here concerned with whether Athene had a cause of action against the Appellants for costs but as to what order, if any, we should make in relation to costs pursuant to the jurisdiction given to us by Statute (section 8 (1) of the *Court of Appeal Act 1964*) and the RSC (Order 2 Rules 19 and Rule 25). Further, it seems to us unsatisfactory that the question as to who should, *prima facie*, bear the costs of the appeal should be left unresolved by this Court for an indefinite, and possibly substantial, period of time. We would not, however, regard it as appropriate for taxation of those costs (which may never become necessary) to take place now.

35. As to the costs of the appeals, our view is that the Appellants should pay Athene its costs of the consolidated appeals. The Appellants have, as they acknowledge, lost, and costs should follow the event. We see no good reason, let alone a compelling reason, why that should not be so. The Appellants submit that, if we make such an order, it may turn out at trial (i) that Athene's claims and its allegations should be dismissed, including for the same or substantially the same reasons advanced before us in support of the jurisdictional challenge of Mr Siddiqui and Mr Cernich and Caldera's strike out application; (ii) that the Appellants' position before us may be vindicated; and (ii) that the costs of the appeal will then turn out to have been unjustly awarded to Athene.

36. We do not accept this approach. The question before the Supreme Court and before us was, in essence, whether the proceedings should continue here. The costs of these proceedings could have been avoided if the appellants had accepted that the proceedings should continue, without prejudice, of course, to their contention that the claims made against them therein are ill founded. If that contention should turn out to be correct it would not alter the fact that the costs of the appeals could have been avoided if the Appellants had not maintained objections to jurisdiction which both the Supreme Court and this Court have held to be ill founded.

37. These costs should be payable on the standard scale. We are not persuaded that we should order that the costs in relation to the issue of apparent bias or pre-determination should be taxed on the indemnity scale. The contention was entirely ill-founded and effectively abandoned. But it can only have played a limited part in any consideration by Athene of its response and took practically no time in oral argument; it would be difficult to determine what costs were incurred by specific reference to that issue; and the issue represents a very small fraction of the scope of the appeal.

38. As to the costs below, although we accept that we have power to make an order in respect thereof, we take the view that the incidence of those costs should be determined by the Supreme Court. The costs associated with Hellman J's Ruling on Caldera's application were expressly reserved to the conclusion of the hearing of Caldera's summons seeking to strike out the writ[5]; and no application has ever been made by Athene for them. The costs associated with the Hargun Ruling on the application by Mr Siddiqui and Mr Cernich to contest jurisdiction and the application by Caldera to strike out the claims against it were also reserved for consideration in the event of an application by the parties;[6] but Athene has so far

[5] Hellman J said, in terms, that he anticipated that any order for costs would reflect the fact that, on the issue tried before him, Athene was the successful party.
[6] The Chief Justice said, in terms, that he would hear any application in relation to the issue of costs.

made no application to the Supreme Court for a costs order against any of the Appellants.

39. We do not regard it as appropriate for us to deal with arguments relating to costs before the Supreme Court in circumstances where (a) no application has yet been made to the Supreme Court itself, nor any submissions made to it; and (b) the order of the Court of Appeal does not set aside any part of the Orders made below (had that been the case the question of costs would probably have needed to be revisited by this Court). It is the Supreme Court which, in the circumstances of the present case, should deal with the costs of the applications before it, taking into account such submissions as may be made to it in respect of the different position of the respective Appellants and the effect on costs, if any, of the Appellants' success on some issues. Although the Chief Justice is not to be the trial judge, we would think it appropriate, subject to any view of his, that he should deal with any application in relation to the costs of the Hellman and Hargun Rulings

40. As to the restriction on enforcement, it seems to us, as we have said, that Athene's costs of the appeal should neither be taxed, nor payable by any of the Appellants, without a further order of the Supreme Court, for which Athene shall have liberty to apply.

41. What will need to be determined before any order is made for payment by any of the Appellants is whether or not the Appellant in question is entitled to an indemnity under either of the Bye-Laws or, in the case of Mr Cernich, the Separation Agreement,

42. That appears to us to involve determination of the following questions in relation to the Appellants:

(i) In relation to **Mr Siddiqui**, whether or not a final and non-appealable judgment has been made against him which determines that he has acted

fraudulently and/or in bad faith, or engaged in wilful misconduct, or (if this be a stricter test) whether he has acted fraudulently or dishonestly in relation to Athene[7];

(ii) In relation to **Mr Cernich**,

a. whether he was ever an Officer of Athene (since if he was not, he is not entitled to any indemnity under either of the Bye-Laws); and

b. whether, if he was such an Officer, a judgment has been made against him which determines that he has acted fraudulently and/or in bad faith or engaged in wilful misconduct – the test under the Eight Bye-Law;

c. whether he is entitled to rely on the Ninth Bye-Law, in which case it would be necessary to determine whether a final and non-appealable judgment has been made against him which determines that he has acted fraudulently or dishonestly in relation to Athene;

d. whether the operative indemnity is the indemnity in the Eighth and/or Ninth Bye-Law and/or that contained in the Separation Agreement (in the latter case the question will be whether Athene's claims arise out of any criminal, fraudulent, intentionally wrongful or reckless conduct by him).

(iii) In relation to **Caldera**, whether or not it is *prima facie* entitled to an indemnity because of its relationship with Mr Siddiqui and Mr Cernich (or otherwise) and whether, if it is, it is disentitled to such an indemnity because a judgment

[7] A matter which cannot be determined until such a judgment has been entered.

has been entered against Mr Siddiqui and/or Mr Cernich in the terms summarised in (i) and (ii) (b) above.

43. Since we have not had full submissions from Athene as to the scope of the indemnities in the Bye-Laws, these questions should not be regarded as necessarily definitive or comprehensive. There may be others that arise.

44. So far as taxation of Athene's costs of the appeal is concerned we would not regard that as appropriate until the conclusion of the proceedings, i.e. the standard position under Order 62 Rule 8; but we do not propose to specify that in terms because it is possible that circumstances in future may justify an earlier date.

45. We would expect the Supreme Court to follow the same course in respect of the costs of the applications before it as we have followed, i.e. to determine what is the appropriate order for costs in respect of the matters before it but to order that no such costs shall be payable until further order. The matters to which we refer in [41] above will then fall to be addressed.

46. We would invite Counsel for Athene to draw up an order giving effect to the above.

KAY, JA

47. I agree

SMELLIE, JA

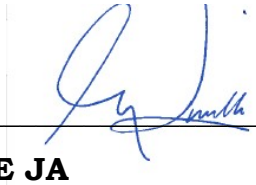
48. I also agree.

C.S.P.S. Clarke

CLARKE P

Maurice Kay

KAY JA



SMELLIE JA