



# In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 447

**BETWEEN:**

**ST JOHN'S TRUST COMPANY (PVT) LIMITED**

**Plaintiff**

**-and-**

**(1) JAMES WATLINGTON**

**(2) GLENN FERGUSON**

**(3) CABARITA (PTC) LIMITED**

**(Sued in its personal capacity and in its capacity as trustee of The Waterford Charitable Trust)**

**(4) THE ATTORNEY GENERAL**

**(5) JAMES GEOFFREY STEPHEN GILBERT**

**Defendants**

**(6) MEDLANDS (PTC) LIMITED**

**(7) CONYERS DILL & PEARMAN LIMITED**

**Non-Parties**

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**Before: Hon. Chief Justice Hargun**

**Appearances: Mark Diel of Marshall Diel & Myers Limited  
for the Plaintiff and the First and Second Defendants**

**Paul Harshaw of Canterbury Law Limited for the Third  
Defendant**

**Kevin Taylor of Walkers (Bermuda) Limited for the Fifth  
Defendant**

**Matthew Mason of Wakefield Quin Limited for Medlands  
(PTC) Limited**

**John Wasty of Appleby for Conyers Dill & Pearman Limited**

**Date of Hearing: 30 June 2021**

**Date of Ruling: 6 August 2021**

### **RULING ON COSTS**

*Whether costs order should be made against the defendants on a joint and several basis; whether the Court should apportion costs amongst the defendants on a percentage basis; relevance of the potential existence of indemnity available to the defendants*

#### **Hargun CJ**

1. This Ruling deals with the application on behalf of (1) St. John’s Trust Company (PVT) Limited (“**SJTC**” or the “**Plaintiff**”); (2) James Watlington; (3) Glenn Ferguson; and (4) Cabarita (PTC) Limited (“**Cabarita**”) for costs arising from the Court’s judgment dated 14 December 2020 (the “**December 2020 Judgment**”) in respect of the hearing from 2-5 November 2020 (“**November 2020 Hearing**”). Costs are sought against James Gilbert, the Fifth Defendant, Conyers Dill & Pearman Limited (“**Conyers**”), and Medlands (PTC) Limited (“**Medlands**”).
2. Background to these proceedings is set out in the Court’s judgment of 26 March 2020 (the “**March 2020 Judgment**”) and the December 2020 Judgment. By the March 2020 Judgment the Court ordered that the Plaintiff’s Amended Writ of Summons be struck out and the *ex parte* Order dated 6 November 2019, restraining Mr. Watlington and Mr. Ferguson from acting as directors of SJTC be discharged.
3. The Court subsequently heard the parties on applications for consequential relief following the March 2020 judgment. In the December 2020 Judgment the Court substantially granted the consequential relief sought by SJTC, Mr. Watlington, Mr. Ferguson and Cabarita.

4. The December 2020 Judgment determined the following issues in favour of SJTC, Mr. Watlington, Mr. Ferguson and Cabarita:

- (1) An application for costs orders against Mr. Gilbert up to 26 March 2020. The Court ordered that Mr. Gilbert do pay those costs on the indemnity basis.
- (2) An application under the Court's inherent jurisdiction, for costs orders against Conyers. The Court ordered Conyers to pay 30% of the costs incurred between 3 December 2019 and 26 March 2020 on the indemnity basis.
- (3) An application against Mr. Gilbert for the provision of information and documents. Mr. Gilbert was ordered to provide substantially all of the information and documents which had been sought from him.
- (4) An application against Conyers for the provision of information and documents. Conyers were ordered to provide substantially all of the information and documents which had been sought from them.
- (5) Medlands intervened in the proceedings which led to the December 2020 Judgment asserting that it had an interest in preserving privilege in relation to the Brockman Trust documents. By consent, Medlands was represented at the hearing and made submissions on issues of privilege said to arise from the applications against Mr. Gilbert and Conyers for the provision of information and documents. The Court determined the issues in relation to privilege against Medlands.
- (6) Mr. Gilbert's application for leave to appeal against the Court's March 2020 Judgment. The Court refused leave to appeal on the basis that the putative appeal was both academic and had no real prospect of success.

## **Position of the parties in relation to the issue of costs**

### ***(1) SJTC, Mr. Watlington and Mr. Ferguson***

5. The position taken on behalf of SJTC, Mr. Watlington and Mr. Ferguson is that given the extensive overlap between the various aspects of the relief sought and obtained, the correct order is that Mr. Gilbert, Conyers and Medlands should be ordered to pay their costs on a joint and several basis. On this basis it would be open to SJTC, Mr. Watlington and Mr. Ferguson to recover 100% of the costs from any one of Mr. Gilbert, Conyers or Medlands and leave that party to recover any contribution from the other parties.
6. Mr. Diel argues that given that both Mr. Gilbert and Conyers are indemnified by Medlands, such an order would also reflect the reality in any event.
7. If the Court is against Mr. Diel's primary submission, he submits in the alternative that the Court should adopt a high-level approach to apportioning costs payable by Mr. Gilbert, Conyers and Medlands. He submits that the appropriate apportionment would be that Conyers should meet 40% of the total costs, Mr. Gilbert should also meet 40% of the total costs and Medlands should bear the remaining 20%. Despite this apportionment by the Court, Mr. Diel submits that Mr. Gilbert, Conyers and Medlands should continue to be responsible for all the costs payable to SJTC, Mr. Watlington, Mr. Ferguson and Cabarita on a joint and several basis. Under this scenario the real purpose of apportionment of costs amongst Mr. Gilbert, Conyers and Medlands would be to allow any one of them to recover the overpayment from the others.

*(2) Cabarita*

8. Mr. Harshaw explained that Mr. Gilbert apparently has confirmed that he agrees to an order that he should be liable to pay all of Cabarita's costs, to be taxed on the standard basis if not agreed. He argues that since Medlands has agreed to indemnify Mr. Gilbert and Conyers, it follows that whatever else the Court may decide, Medlands will also be liable to pay Cabarita's costs of applications for consequential relief. Therefore, he argues that the Court only needs to consider the position of Conyers. His submission in that regard is that the appropriate order in this case is that Medlands and Conyers should be jointly and severally liable with Mr. Gilbert for the costs of all consequential relief applications, which mirrors the submission made by Mr. Diel.
9. Mr. Harshaw submits that the arguments in respect of the applications for relief against Mr. Gilbert and Conyers very substantially overlapped. Consequently, he argues, the appropriate order is that Mr. Gilbert and Conyers should be jointly and severally liable for the costs of all consequential relief matters.
10. Mr. Harshaw points out that since, for the most part, all the various consequential matters were dealt with compendiously in submissions and at the same hearing, attempting to distinguish precisely between work carried out in relation to the particular aspects of the consequential relief applications involving particular parties on taxation is wholly impractical (and would require a very time-consuming, complicated, and expensive exercise even on an approximate basis). These practical matters, he argues, also justify an order for joint and several liability against Mr. Gilbert and Conyers in respect of all consequential matters.
11. Like Mr. Diel, Mr. Harshaw states that it is now well known that (1) Mr. Gilbert has had an express contractual indemnity from Medlands for all his costs in relation to the consequentials since he entered into a Deed of Indemnification dated 5 June 2020; and (2) Conyers have had an express contractual indemnity from Medlands for all of their costs in relation to the consequential relief since they entered into an Indemnity Agreement in July 2020. In the circumstances, he argues, where Medlands has agreed to

indemnify both Conyers and Mr. Gilbert for all of their costs of these consequential matters it would be artificial and wasteful of the resources of the Court and the parties to require a detailed accounting exercise to be undertaken on taxation to attempt to distinguish between costs incurred in relation to particular applications against different paying parties. This again, he argues, supports that the most appropriate costs order is that Medlands, Mr. Gilbert, and Conyers should be jointly and severally liable for costs of all the consequential matters, to be taxed on the standard basis if not agreed.

12. Alternatively, he invites the Court to order the respective paying parties to pay a percentage of the overall costs of all consequential matters, on a rough and ready basis, reflecting the amount of costs incurred in relation to relevant applications without imposing an onerous task on taxation of precisely accounting for the costs of each consequential matter. In this regard, Cabarita suggests that the appropriate proportions are: (1) Mr. Gilbert should bear 45% of the overall costs of the consequential matters (to reflect the costs incurred in relation to the costs application, the information application and the leave to appeal application); (2) Conyers should bear 40% of the overall costs of consequential matters (to reflect the costs incurred in relation to the Conyers costs application and the Conyers information application); and (3) Medlands should bear 15% of the overall costs of the consequential matters (to reflect the additional costs incurred in relation to the submissions raised by Medlands in the course of its intervention).
13. In his reply submissions Mr. Harshaw accepted that if the Court was minded to apportion costs on a rough and ready basis then that costs order against Mr. Gilbert, Conyers and Medlands should be on the several basis (and not on a joint and several basis) so that costs against Mr. Gilbert, Conyers and Medlands can only be recovered up to the amount apportioned by the Court.

***(3) Mr. Gilbert***

14. Mr. Taylor, appearing for Mr. Gilbert, stated that Mr. Gilbert would be content with the position that he be responsible for all the costs of the November 2020 Hearing provided that both Conyers and Medlands accept the same position. Mr. Taylor made it clear that Mr. Gilbert was not prepared to accept that he be responsible for all the costs of the November 2020 Hearing if a different costs order was made against Conyers and Medlands.
15. In the alternative the Court should make a costs order against Mr. Gilbert in relation to issues upon which he lost in the December 2020 Judgment. Mr. Taylor accepted that it might be difficult and costly to tax costs on that basis and in the circumstances suggested a further alternative whereby the Court apportions the costs amongst Mr. Gilbert, Conyers and Medlands on a rough and ready basis. Mr. Taylor advised the Court that his client would not take issue with the apportionment whereby Mr. Gilbert was responsible for 40% of the recoverable costs, Conyers were also responsible for 40% of the costs and Medlands was responsible for the remaining 20%.
16. Mr. Taylor cautioned the Court not to make orders on the basis that all the costs awarded against Mr. Gilbert and Conyers were recoverable under the relevant indemnities from Medlands. He advised that the issue of indemnities provided by Medlands was up in the air and the Court should not assume that the indemnities would necessarily be honoured.

***(4) Medlands***

17. In his written submissions filed on behalf of Medlands, Mr. Mason advised the Court that Medlands was seeking an order that its costs should be paid by Mr. Gilbert and Conyers, on a joint and several basis. In the alternative, his written submissions state that the Court should make an order that Medlands is to meet its own costs, with no further costs orders made against Medlands in favour of any of the parties.
18. In his oral presentation, Mr. Mason stated that the parties agree that the lion's share of the recoverable costs should be borne by Mr. Gilbert and Conyers and, as Medlands had a

minor role at the November 2020 Hearing, no costs order should be made against it at all or should be in the range of 15 to 20% of the total costs. Mr. Mason advocated a percentage apportionment approach amongst Mr. Gilbert, Conyers and Medlands.

19. Mr. Mason submitted that the court should not make a costs order on a joint and several basis against the parties and that the costs order should be made on the several basis so that the relevant party is only responsible for the costs apportioned to it by the Court.

20. Mr. Mason also submitted that it was wrong as a matter of principle for the Court to make a costs order based upon the assumption that the parties were indemnified by Medlands. He said such an approach was wrong in principle because there was a serious issue as to whether the existing indemnities would be honoured as they are being reviewed in order to determine whether it was appropriate, in all the circumstances, for Medlands to have provided the indemnities.

#### *(5) Conyers*

21. Mr. Wasty, appearing for Conyers, submitted that it was wrong in principle and unjust to award costs against Conyers for the entire amount on a joint and several basis. Mr. Wasty submitted that the proper order in this case was that Mr. Gilbert, Conyers and Medlands should be responsible for the costs in respect of issues and claims which they lost in the December 2020 Judgment.

22. Mr. Wasty accepted that it may be difficult and costly to tax the costs in the present circumstances as aspects of the relief against Mr. Gilbert and Conyers were overlapping and submitted that in those circumstances it was appropriate for the Court to apportion liability for costs on a rough and ready basis. Mr. Wasty stated that Conyers would accept an apportionment whereby Mr. Gilbert was responsible for 40%, Conyers were responsible for 40% and Medlands was responsible for the remaining 20% of all the recoverable costs incurred by SJTC, Mr. Watlington, Mr. Ferguson and Cabarita relating to the 2020 November.



### **Issues for determination**

23. Having regard to the submissions of Counsel the Court needs to determine the following issues:

- (1) Whether costs should be awarded against Mr. Gilbert, Conyers and Medlands on the joint and several basis or confined to the several basis.
- (2) Whether the Court should take into account the existence of any indemnities granted by Medlands to Mr. Gilbert and Conyers.
- (3) Whether it is appropriate to apportion liability for costs amongst Mr. Gilbert, Conyers and Medlands and if so, what are the appropriate proportions.

### **Joint and several liability**

24. The leading case in relation to whether and if so when it is appropriate for the Court to make an order for costs on a joint and several basis is *Stumm v Dixon* (1889) 22 QBD 529. This was an action in tort against two defendants where both defendants pleaded jointly payment into court as the sole defence. The plaintiff replied, denying the sufficiency of the payment. One of the defendants then obtained leave to amend his statement of defence, and added an alternative separate defence, denying any liability to the plaintiff. At the trial a verdict was found against both defendants for an amount beyond the sum paid into court, and judgment was entered for the plaintiff for that amount, with costs to be taxed. Lord Esher MR, affirming the judgment in the court below, held that the defendant who delivered the separate defence was alone liable for the costs occasioned to the plaintiff by and in consequence of the separate pleading, and that the other defendant was not liable for those costs. In so holding Lord Esher stated that: “*I cannot help saying that to compel the other defendant to pay those costs would be absolutely contrary to natural justice.*” Lord Esher held, at 533, the true rule to be as follows:

*“In my opinion the true rule is this: When an action is tried against two or more defendants, and any defendant separates in his defence, and the judgment is against all, the law is that each of them is liable for the damages awarded by the judgment, and each of them is liable to the plaintiff for all costs taxed on his behalf as a properly incurred by him in the maintenance of his action, except as to costs caused to him by so much of the separate defence of any defendant as is, and can only be, a defence for that defendant as distinguished from other defendants.”*

25. In this regard I accept Mr. Wasty’s submission, made on behalf of Conyers, that the bases upon which costs were sought against Mr. Gilbert and Conyers (while including overlapping issues and being based on a largely common factual matrix) were different. Thus, costs were sought against Conyers based on breach of warranty of authority (a ground upon which the applicants were unsuccessful) and pursuant to the wasted costs jurisdiction (where the applicants succeeded). Conyers argued in response that SJTC was not the recipient of any such warranty and there was no evidence of any improper or unreasonable conduct to justify a wasted costs order.
26. On the other hand, costs were sought against Mr. Gilbert on the basis of lack of authority and that his causing SJTC to bring the proceedings was an “abuse of process”. Mr. Gilbert argued that SJTC ratified the commencement of the proceedings such that he could not be held liable for incurring costs without authority, that he derived no personal benefit from commencing the proceeding, and that a costs order against him would be circular because he had a right to an indemnity under SJTC’s Bye-Laws.
27. I also accept Mr. Wasty’s submission that the position in relation to the disclosure and information applications was even more distinct. Disclosure was sought from Conyers on the basis that it had no authority to commence proceedings and that it assumed fiduciary duties towards SJTC by purporting to act as its agent. Conyers argued in defence that such a proposition would only apply to the giving of an account of an unjust benefit and

not to the disclosure of documents, that it was never properly instructed by SJTC, and that there was no obligation on it to provide information to SJTC because there was never any attorney/client relationship.

28. On the other hand, information and documents were sought from Mr. Gilbert upon the principle that, upon reversing a wrongly made order, the court should restore the parties to the position that they were in before the order was made, that he was in a position analogous to an officer of the court, and that he breached his fiduciary duties to SJTC by retaining the materials. Mr. Gilbert argued in defence he had not been properly served out of the jurisdiction, that he acted properly in his capacity as director and intended to honour any residual fiduciary duties to SJTC to deliver up company property.
29. In the circumstances, in accordance with the rule stated by Lord Esher in *Stumm v Dixon* the costs orders should distinguish between the applications for costs against Mr. Gilbert and Conyers and between the applications for disclosure against Mr. Gilbert and Conyers, reflecting the overall outcome of each application. In the Court's judgment this is not an appropriate case where the court should make all the parties jointly responsible for the entirety of the costs recoverable by SJTC, Mr. Watlington, Mr. Ferguson and Cabarita.

### **Relevance of indemnities**

30. As noted, Mr. Diel and Mr. Harshaw emphasised the existence of the contractual indemnities provided to Conyers and Mr. Gilbert by Medlands. They urge the Court to make a costs order on a joint and several basis against Conyers and Mr. Gilbert emphasising that such an order would merely reflect commercial reality.
31. In my judgment the existence of an indemnity or guarantee in respect of any costs order the Court may make is in principle not relevant. The Court exercises jurisdiction to make costs orders by reference to established rules and practice. The existence of any such indemnity is not a material consideration under the rules or established practice.

32. In any event it would not be appropriate for the Court to pay any regard to the indemnities in the circumstances of this case as there is no assurance that the indemnities would be honoured by Medlands. Mr. Mason advised the Court, on behalf of Medlands, that the indemnities were being reviewed with an eye to determining whether it was appropriate for Medlands to provide the indemnities in the then-prevailing circumstances.

### **Apportionment of costs**

33. All counsel appeared to accept that since various matters were dealt with compendiously in submissions and at the same hearing, attempting to distinguish precisely between work carried out in relation to particular aspects of the applications involving particular parties on taxation is wholly impractical and would be a very time-consuming, complicated, and expensive exercise. I accept that this submission is well-founded. In all the circumstances the Court is prepared to apportion liability for costs on a rough and ready basis.

34. Counsel for Mr. Gilbert and Conyers appeared to accept that to apportion 40% of the liability to each of their respective clients would be reasonable in all the circumstances. The Court accepts that such an apportionment would appear to be reasonable on a rough and ready basis.

35. There remains the outstanding issue of the appropriate apportionment for Medlands. As noted above, Mr. Mason suggested, at the commencement of his oral presentation, that the range for Medlands should be 15 to 20% and then suggested that the appropriate figure was on the lower side. In support of his submission Mr. Mason made several points.

36. First, he submitted that Medlands was duty bound to join the proceedings pursuant to its fiduciary duty to the Brockman Trust and in the circumstances the Court should either

make no order as to costs against Medlands or a nominal order. I am unable to accept the submission. It seems to me that if a party voluntarily joins proceedings and subsequently is found to be unsuccessful then the ordinary rule in relation to costs applies. The fact that the party may well have joined the proceedings in the discharge of its fiduciary duties is not an answer to the ordinary application of the rule relating to costs.

37. Secondly, Mr. Mason submitted that Medlands participated in the proceedings with the agreement of the other parties. The position of the other parties not to object to Medlands' application to join the proceedings clearly avoided any hearing to determine whether Medlands should be allowed to make representations. However, that fact, it seems to me, does not affect the ordinary operation of the rule relating to the incidence of costs if the position advanced by Medlands in the proceedings is found to be unsuccessful.

38. Thirdly, Mr. Mason submits that Medlands' brief submission made by Mr. Malek QC was accepted by the Court. The Court's recollection of Medlands participation in these proceedings is somewhat different. First, Medlands filed the initial written submissions in May 2020 (51 pages) and further written submissions in September 2020 (34 pages). Second, the application made by Mr. Malek QC on behalf of Medlands was over a period of a day and a half. Third, the Court held that the contention advanced on behalf of Medlands in relation to legal professional privilege was not well-founded (see paragraph 156 of the December 2020).

39. Fourthly, Mr. Mason submits that the Court should consider that Conyers was found to have committed serious negligence and that Medlands itself received Bermuda law advice from Conyers. Again, it is difficult to see how this issue is relevant to an application for costs made by SJTC, Mr. Watlington, Mr. Ferguson and Cabarita against Medlands.

40. In all the circumstances and having regard to the role played by Medlands at the November 2020 Hearing the appropriate apportionment of costs against Medlands is that

it should be liable for 20% of all the recoverable costs by SJTC, Mr. Watlington, Mr. Ferguson and Cabarita in relation to the November 2020 Hearing.

## **Conclusion**

41. In conclusion the Court declines to make a costs order against Mr. Gilbert, Conyers and Medlands on a joint and several basis. Instead, the Court orders that Mr. Gilbert should pay 40%, Conyers should pay 40% and Medlands should pay the remaining 20% of all recoverable costs of SJTC, Mr. Watlington, Mr. Ferguson and Cabarita, to be assessed on the standard basis if not agreed. The liability of Mr. Gilbert, Conyers and Medlands in respect of costs is on the several basis such that Mr. Gilbert, Conyers and Medlands are only responsible for their respective share of the costs. The Court also grants certificates for two counsel to all the parties represented at the hearing.

42. In the event any party wishes to make an application for costs in relation to this application, such an application must be made to the Registrar within 21 days.

Dated this 6<sup>th</sup> day of August 2021

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NARINDER K HARGUN  
CHIEF JUSTICE