



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 152

BETWEEN:

BS&R GROUP LIMITED

Plaintiff/Defendant by Counterclaim

-and-

WESTPORT ARCHITECTURE

First Defendant/First Plaintiff by Counterclaim

- and -

C.W. CONSTRUCTION AND LANDSCAPING LIMITED

Second Defendant/Second Plaintiff by Counterclaim

RULING (INDEMNITY COSTS)

Application for indemnity costs

Date of Hearing: 6 July 2022

Date of Ruling: 6 September 2022

Appearances: Allan Doughty, Safia Gardener, MJM Limited, for the Plaintiff

Scott Pearman for First Defendant

RULING of Mussenden J

Introduction

1. A trial of this matter took place and I issued a Judgment dated 22 December 2021. I directed that unless either party filed a Form 31TC within 7 days of the date of the Judgment to be heard on costs, that costs would follow the event in favour of BS&R Group Limited (“**BS&R**”) on a standard basis, to be taxed by the Registrar if not agreed.
2. BS&R did file an application to be heard on costs and now apply for an award of costs on an indemnity basis.
3. The total of the Judgment for the three construction jobs performed by BS&R (the “**Three Jobs**”) was in favor of BS&R against the First Defendant Westport Architecture (a Firm) (“**WA**”) in the amount of \$85,780.03. The partners of WA are Mr. Frederick Stephen West (“**Mr. West**”) and his son Arthur (‘Tripp’) West (“**Tripp West**”). Also, I found that C.W. Construction and Landscaping Limited (“**CWC**”) was not the entity that WA had contracted with for the Three Jobs.

Case Law on Indemnity Costs

4. In *Phoenix Global Fund Ltd. v Citigroup Funds Services (Bermuda) Ltd. & Ano* [2009] Bda L.R. 70 (SC) Bell J set out the test for indemnity costs as follows:

“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.”

BS&R’s Application

5. Mr. Doughty submitted that indemnity costs were warranted in this case because WA engaged in: (i) grave impropriety during the course of the proceedings; (ii) going to the heart of the action; (iii) that affected the whole litigation. Further, WA engaged in comprehensive dishonesty through: (i) its pleadings; (ii) the written evidence on its behalf; and (ii) the oral evidence given by its partners Mr. West and Tripp West.
6. Mr. Doughty submitted that there were a number of issues to be considered as follows:
 - a. Whether there was grave impropriety on the part of the Defendant in its conduct of the litigation:
 - i. Misleading the Court as to the status of WA’s legal personality;
 - ii. The adjournment of the 21 January 2019 trial date;
 - iii. The second request for an adjournment on 4 July 2019;

- iv. The discussion of Trip West's discussion of Mr. West's evidence while Mr. West was given his evidence in chief;
 - v. Interference by Tripp West during the examination of Mr. West;
 - vi. Phantom Punch Lists;
 - vii. The claim that CWC was a party to the proceedings;
- b. Whether the dishonesty found by the Court concerning the Partners is sufficient to justify an award for indemnity cost;
 - c. Whether the allegations of WA that the Plaintiff "padded" its bills amount to unjustified allegations of fraud;
 - d. Whether the actions of WA in delaying the hearing of the trial were unreasonable and garner a costs consequence;
 - e. Whether the failure of WA to cross-examine the Plaintiff's witnesses in a meaningful manner, or at all, amounted to an admission of the Plaintiff's case and thereby struck at the heart of how WA conducted its litigation; and
 - f. Whether the Court should exercise its discretion in favour of BS&R in granting an award for indemnity costs.

Westport Architecture's Reply

- 7. Mr. Pearman submitted that an order for indemnity costs is exceptional, firstly because such an order reduces the judicial scrutiny of the Registrar on taxation and secondly because such an order increases costs recovery for the receiving party well beyond the standard basis.
- 8. Mr. Pearman submitted that the legal test for an award of indemnity costs is not met by BS&R. Further, he argued that BS&R's costs in this action are unusually high, particularly when taking into account the small sum of \$50,000 that was actually in dispute between the parties.

9. Mr. Pearman argued that the test set by Ground J (as he then was) in *DeGroot v MacMillan* was a high bar. He cited several cases where indemnity cost were considered including as follows:
- a. *Lisa S.A. v Leamington Reinsurance Company Ltd. and Anor* [2008] Bda L.R. 61 where Kawaley J (as he then was) declined to order indemnity costs even where a party had been involved in “*deliberate wrongdoing*” and “*filed a false affidavit*”. The Court ordered cost on a standard basis because “*the false affidavit had no material impact on the aborted application in which it was filed*”.
 - b. *KL v DR* [2021] SC (Bda) 37 Civ where I cited both *DeGroot* and *Phoenix Global* and declined to order indemnity costs stating “*the various grounds for awarding costs on an indemnity basis, namely grave impropriety going to the heart of the action and affecting its whole conduct and the way the litigation has been conducted do not arise in this matter ... an order for indemnity costs ... is unwarranted.*”
 - c. *Noesis Consulting Limited v Saturn Solar Developments Ltd.* [2021] Sc (Bda) 50 Com where I cited *DeGroot* and rejected the Defendant’s application for indemnity costs as I was “*not persuaded that the use or context amounted to ‘grave impropriety’* and further, I found that the conduct “*did not affect the ‘whole conduct’ of the matter*”.
 - d. In *Crisson v Marshall Diel & Myers Ltd.* [2021] Ca (Bda) 13 Civ where the Court of Appeal made an award for indemnity costs stating “*in order for indemnity costs to be ordered it is necessary that there is something significantly out of the ordinary in respect of the manner in which the case has been conducted, or its nature, which justifies the making of such as order*”. Mr. Pearman submitted that in *Crisson*, indemnity costs were ordered because the respondent attorneys had twice misrepresented the position before the first instance Court, thereby leaving in place for 18 months a restraining order which deprived their former client of access to much of his asset base and which must have caused “*a deleterious effect on his business affairs ... and on him personally*”. The Court found that this was truly an exceptional case.

10. Mr. Pearman submitted that the present case is not one where there are exceptional circumstances. Further that even if BS&R could demonstrate conduct amounting to exceptional circumstances, such conduct must be sufficient to justify the draconian step of awarding indemnity costs. Mr. Pearman argued that BS&R pointed to certain conduct of WA which in the round focused mainly on the reasons for procedural delays, many of which were not of WA's making. He stressed that even when a party's action does cause some delay, that fact, - without more – does not amount to impropriety. Nor is it – without more – an “exceptional circumstance” which potentially justifies indemnity costs.
11. Mr. Pearman submitted that Mr. West and Tripp West were litigants in person for WA. He noted that that does not give them free licence but that it can and likely should excuse errors of the uninitiated.

Analysis

12. In my view I decline the application for costs on an indemnity basis for several reasons. First, I made no findings in the Judgment in this matter against Mr. West or Tripp West of dishonesty.
13. Second, in respect of the issues concerning the status of WA's legal personality, I am not of the view that the revelation that WA was a partnership was a grave impropriety that went to the heart of the matter. The heart of the matter was the issue of liability for the Three Jobs. The issue of whether WA was a sole proprietor or a partnership unveiled itself through the course of the trial but it did not affect the whole conduct of the matter.
14. Third, in the Judgment I found that CWC was not the party that WA had contracted with for the Three Jobs. In paragraph 134 of the Judgment I stated “*In light of the abundance of evidence that supports the finding that WA was the actual Defendant in this case, in my view Mr. West's credibility is questionable when a significant plank of the defence was to shift any liability for whatever reason from WA to CWC.*” Thus, I rejected Mr. West's and Tripp West's case that CWC was the party that contracted with BS&R. Despite that

finding, I do not find that WA's position on this was a grave impropriety that went to the heart of the matter as again, the heart of the matter was the issue of liability for the Three Jobs.

15. Fourth, in respect of the delays, I find no merit in Mr. Doughty's arguments that the delays should be considered as exceptional circumstances to warrant an order for indemnity costs. By the time of the first trial adjournment the Defendants were without counsel and thereafter represented themselves, practically "flying by the seat of their pants" as the litigation moved on. There were reasons for the applications for the adjournments and the Court was satisfied to grant the adjournments. In any event, BS&R would have or will have the costs of the adjournments on the standard basis.
16. Fifth, in respect of the conduct of Mr. Stephen West and Tripp West during the trial, in my view, their conduct, as complained of, does not amount to exceptional circumstances. I do note that they were litigants in person and as I have already said they were "flying by the seats of their pants". I do not regard that as a complete excuse for their conduct but I am of the view that I should attach a limited measure of consideration to it. In both being witnesses and Tripp West leading the advocacy, to my mind there was confusion and a lack of understanding at times by them about their roles and about the procedure and rules of the Court. The matters were not assisted by the fact that the trial was being conducted by audio-visual means which presents some difficulties in keeping a handle on what was transpiring in their respective locations. In any event, I do not consider their conduct to be of grave impropriety going to the heart of the matter and affecting its whole conduct.
17. Sixth, in respect of the issue of padding bills, I am not satisfied that this issue amounts to grave impropriety going to the heart of the matter and affecting its whole conduct. This was a trial primarily about construction/carpentry matters, invoicing and charges for extras. Any case of this kind would have to deal with whether or not the correct amounts were charged for the work performed. It occurs to me that in everyday life, people question charges for services rendered without it amounting to serious allegations of fraud against the service provider. In doing so, I find no merit in these arguments.

18. Seventh, in respect of the Phantom Punch Lists, I do not agree that this was a grave impropriety going to the heart of the matter and affecting its whole conduct. In practical terms, Mr. Stephen West and Tripp West were “clutching at straws” when faced with the skillful cross-examination of counsel and they could find no supporting evidence for their claims of other Punch Lists.

Conclusion

19. In light of the reasons set out above, I am not satisfied that there are exceptional circumstances to warrant an order for costs on an indemnity basis. Therefore, I deny BS&R’s application.

20. Unless either party files a Form 31TC within 7 days of the date of this Ruling (Indemnity Costs) to be heard on the subject of costs of this application, I direct that for this application for indemnity costs, that costs shall follow the event in favour of WA on a standard basis, to be taxed by the Registrar if not agreed.

Dated 6 September 2022

**HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT**