IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

G0190 OF 2020

BETWEEN:

VELMA ANN SULLY

1st Plaintiff

LOUIS-HERATD SULLY

2nd Plaintiff

AND:

FIDELITY BANK (CAYMAN) LIMITED

Defendant

On the Papers

Before: **Hon. Justice Marlene I. Carter**

Appearances: **Mr. James Chapman of Chapmans, Attorney-at-Law for the Plaintiffs**
Mr. James Austin-Smith of Campbells for the Defendant

Ruling: **27 May 2024**

RULING ON COSTS

1. These proceedings are brought for the consideration of costs following the Judgment of the Court for the Defendant on an application to Strike the Plaintiffs' Statement of Claim, as *"disclosing no reasonable cause of action."* The Court was minded to order costs to the Defendant on the standard basis.

2. Counsel for the Defendant seeks indemnity costs against the Plaintiffs. He offered the following principles based on the test, *"Were the Plaintiffs acting 'improper[ly] unreasonably or negligently'?"* pursuant to the Grand Court Rules (the "**GCR**")[1]:

> *"a. In considering awards for indemnity costs, the Court's focus should be primarily on the conduct of the losing party;*
> *b. Where a claim or defence is speculative, weak, opportunistic or thin, a party who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails;*
> *c. Pursuing an action for some ulterior motive is an abuse of the process which may be categorised as improper;*
> *d. The making of allegations of misconduct and conspiracy which are maintained for a period of time and then abandoned on the eve of trial is a ground for indemnity costs to be ordered on the basis that such conduct is improper and/or unreasonable;*
> *e. A party who asserts a position when it knows that it has no legitimate basis for doing so is acting improperly;*
> *f. A party who advances a case which he knows to be false is acting improperly;*
> *g. An order for indemnity costs is appropriate where the party should have realised that their claim was hopeless and should not have taken the matter on to trial."*

3. Counsel for the Defendant submitted that in this case, the following factors present good basis for the instant application:

> *(i) that the test is very clearly satisfied in the instant case where the Plaintiffs have brought a case which was speculative and opportunistic, the plaintiffs were unable to identify any factual or legal basis for any of the tortious, contractual or statutory claims.*
>
> *(ii) Counsel for the Plaintiff's refusal to comply with reasonable requests had the effect of unnecessarily and completely unreasonably running up costs.*
>
> *(iii) Counsel's actions after the second hearing in attempting to list a further, abusive, application even after having been told to desist by the Judge and Clerk of Court were equally unreasonable and further ran up costs negligently."*
>
> *(iv) The submissions by Counsel for the Defendant in his skeleton arguments of false, unsupported and highly defamatory allegations against both the Defendant and its counsel.*

[1] Order 62, Rules 4(11) and 11(2)

Counsel claimed that the Defendant has been "economical with the truth" in court filings. And further accused the Defendant and its counsel of dishonesty and/or deliberately running up the costs of the court proceedings.

4. The Court was referred to the statement of Henderson J. in the Privy Council case ***Sagicor Gen. Ins. (Cayman) Limited v Crawford Adjusters (Cayman) Ltd***[2]:

"*It goes without saying that such allegations have a detrimental effect on the reputations of those involved and that such allegations should never be made lightly. Every attorney in the Cayman Islands has a positive obligation to refrain from making allegations of fraud and dishonest conduct unless there is a case of substance which gives rise to a reasonable expectation that the allegations can be proved. From the failure of these plaintiffs to prosecute their case, I infer that they have never been in possession of a body of evidence capable of establishing fraud or conspiracy. These few comments, without more, provide ample justification for an award of indemnity costs. I award such costs to each defendant now.*"

5. The Court was also referred to the following in the case of ***Natixis S.A. v Marex Financial Ltd & Anor***[3]:

"...the starting point, at least, is that if you make a fraud claim and pursue it and then either withdraw it or lose at trial, the starting point is that an order for indemnity costs is the appropriate order. Nevertheless Mr Weekes points out, rightly, as I have already foreshadowed, that the court retains a complete discretion as to what the appropriate order as to costs is in all the circumstances…

I do not regard it as a strong case of fraud that was advanced. I consider that a very serious allegation was made in circumstances where it was questionable whether it should have been made and thereafter pursued, certainly pursued through to the bitter end in written closing submissions. I have considered carefully the factors identified by Mr Weekes, and as they are developed in his skeleton argument at paragraph 18, but I consider that this is a classic case where Marex's conduct in pleading and pursuing the claim in fraud takes matters out of the norm, and where the starting point is also the end point.

It was a case in relation to which, ultimately there was no, or no sufficient, evidence to support or justify the claim for fraud. It was rightly withdrawn. The only pity is that it was not

[2] [2008 CILR 482]
[3] [2019] EWHC 3163 (Comm), at paragraphs 49 – 59

withdrawn at an earlier stage. In those circumstances, on established principles, and in the exercise of my discretion, I consider the appropriate order in relation to those costs is that they be on indemnity basis, and I so order…"

6. It was further submitted on behalf of the Defendant that:

> *"28. In the instant case counsel made extremely serious allegations of dishonesty, lying, misleading the court and professional misconduct against the Defendant and against Defence counsel. The allegations were baseless and made without any evidence. They should never have been made. They were made in breach of the Code of Conduct. They were repeated through to a final (strike out) hearing at which the Plaintiffs lost. They were never withdrawn.*
>
> *29. The Plaintiffs should pay the Defendant's costs on the indemnity basis."*

Plaintiff's submissions

7. Counsel for the Plaintiff submits that the order for costs in this matter ought best to be *"no order as to costs"*. It was submitted that such an order would allow the parties to end the action, and draw a line under the matter, and move on, given the passage of time and all other relevant circumstances.

8. While Counsel for the Plaintiff accepts that the Plaintiffs could have sought pre-action Norwich Pharmacal Disclosure, he states that *"such is not usual and/or is extraordinary."* Also, *"Given the approach in this writ action by the Defendant it is impossible to suggest the Defendant would have assisted with pre-action disclosure when it did not, and apparently still will not, assist post issue and during the proceedings."*

9. Counsel for the Plaintiff contends that the Court has fallen into error in arriving at the conclusion that it did on the application. Counsel states further that: *"it should be that the costs ought to be paid by the party who loses the cause once the discovery is known/given. If the discovery exonerates the Defendant, then the costs go in that event. If the discovery exonerates the Plaintiffs, then it is right and just that the Defendant pays the costs in that event."*

10. Counsel does not directly address the matters referred to by the Defendant at paragraph twenty-eight (28) of its submissions and referenced above.

The Law

11. GCR O.62, r.4 (11):

"The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently."

12. The discretion to award indemnity costs must be exercised judicially in the light of the particular facts of each case. The Court must find some special or unusual conduct on the part of the losing party in order to justify a departure from the ordinary costs order. The award of costs on an indemnity basis is generally reserved for cases where the Court wishes to indicate its disapproval of the conduct of the paying party where such conduct is unreasonable, though it could not be said to be lacking moral probity or deserving moral condemnation.[4]

13. I have considered the application and the circumstances of this case. The approach taken by the Plaintiffs was not a traditional approach in seeking to achieve their objective. Ultimately this led to this Court being unable to find any proper basis for the claims that were brought against the Defendant. However, I am loathe to grant the application for indemnity costs sought.

14. In order to award costs on the indemnity basis this court would have to be satisfied that the conduct complained of was unreasonable to a high degree. Indemnity costs should be awarded only in the most severe circumstances. Such costs are not awarded where the conduct is merely wrong or misguided in hindsight or even to be implied from a tenuous claim being brought before the Court. An order for Indemnity Costs is not a Penal Order. The Plaintiffs are not to be penalised for having the audacity to initiate or oppose proceedings. The Court must also be careful not to penalise the Plaintiffs for the conduct of their counsel. In this case much of the complaint regarding is directed at Counsel himself.

15. In all the circumstances, taking into account the authorities and the submissions of counsel, the order of this court is that the Plaintiffs shall pay the Defendant's costs on the standard basis to be taxed if not agreed.

Carter J.

Hon. Justice Marlene I. Carter
Judge of the Grand Court

[4] Reid Minty (A Firm) v Taylor [2002] 2 All ER 150