

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
IN THE CIVIL DIVISION**



CAUSE NO. G 169 OF 2019

BETWEEN

- 1) CAYMAN ISLANDS URGENT CARE LTD**
- 2) KAISER DAY CANNACEUTICALS LTD**
- 3) KAISER DAY PHARMACEUTICALS LTD**

APPLICANTS

AND:

- 1) HM DIRECTOR OF CUSTOMS**
- 2) CATHERINE O'NEIL JP**
- 3) COMMISSIONER OF RCIPS**
- 4) THE CHIEF MEDICAL OFFICER**

RESPONDENTS

IN CHAMBERS

Appearances: Mr. James Austin-Smith of Campbells for the Applicants
Ms. Monica Carss-Frisk KC instructed by The Attorney General's
Chambers, for the First, Third and Fourth Respondents

Before: The Honourable Mr. Justice Robin McMillan

Heard: Proceedings decided on Written Submissions

Draft Judgment circulated: 20th February 2023

Judgment delivered: 24th February 2023

HEADNOTE

O.62, r. 4 (11) and O.62, r.11 (2) GCR-improper, unreasonable or negligent conduct-application of relevant principles where the paying parties' defence is manifestly hopeless and/or improper.

JUDGMENT



INTRODUCTION

1. This is an Application by the Applicants in Cause No. G 169 of 2019 for the award of costs on an indemnity basis against the First, Second and Third Respondents (“the Respondents”) arising from an Order of the Court dated 6 December 2022. This Order was made consequent upon the Judgment of this Court dated 4 February 2021, following which as the Court understands the position various discussions took place between counsel.
2. The Applicants do not seek any costs order against the Second Respondent.
3. The Court has directed that this matter be determined on the basis of written submissions. Accordingly, the Court has reviewed the Applicants’ Written Submissions dated 12 December 2022, the Respondents’ Written Submissions dated 19 December 2022 and the Applicants’ Written Reply Submissions dated 23 December 2022.
4. The Court has considered carefully all of these Submissions even though for the purpose of this Judgment the Court will not refer to each one of the various points which have respectively been raised.
5. This is clearly a suitable case where in the exercise of its discretion the Court should order costs to follow the event, there being no circumstances arising in which some other Order should be made as to the whole or any part of the costs (See O.62, r.4 (5) GCR 1995).
6. However, the further issue which here arises is as to the standard of costs.
7. In addressing this issue, the Court reminds itself that the Judgment originally delivered dealt with both the history of the events set out and the factual and legal findings at which the Court ultimately arrived in very great detail. To repeat that exercise would be entirely superfluous. The focus of this Application is as to the merits of the costs arguments which have been put forward and to view the issues from that primary perspective.

OVERVIEW OF THE APPLICANTS' CONTENTIONS AND ASSERTIONS



8. Paragraph 3 of the Applicants' Submissions states:

"3. The Respondents deliberately colluded to abuse their statutory powers and corrupted the judicial process to target the Applicants in an unlawful series of actions over a protracted period. During that process, amongst other things, they unlawfully conspired to ban prescription medications, provided "false and misleading" evidence on oath to a Justice of the Peace, procured and executed an unlawful warrant, unlawfully seized property, accused professional medics of criminal offences in the most public manner and deprived members of the public, including cancer patients in the final months of their lives, of pain-relieving medications. Having been confronted with the overwhelming evidence of their wrongdoing they developed a continually-evolving defence with no basis in fact or law. Notwithstanding various entreaties by the Appellants and the Court to reconsider the weakness of their position they maintained their refusal to admit wrongdoing up to throughout, and after a trial. The First and Fourth Respondents supported their case at trial by providing misleading and untruthful evidence to the Grand Court under oath. By the manner in which they conducted themselves prior to and during the hearing they vastly extended the length of the proceedings, wasted court time and added to the cost incurred by the Applicant victims of their unlawful conspiracy. The refusal of the Respondents to accept the reality of their position persists into this attempt to resist what is an overwhelming case for the ordering of indemnity costs".

9. In light of these strongly expressed comments, it is important to record that the Court made such findings of fact and such determinations of law as it was necessary for the Court to make in order to resolve the matters before it. This approach is reflected in paragraph 390 of the Judgment where Court finds that the Cease Notice is unlawful and it is set aside and that the Search Warrant is unlawful and it is set aside.

10. Although the Court strongly criticised the actions of the Respondents and indeed the manner in which they chose to present their case, the Court did not go beyond that point so as to make findings



of either conspiracy or perjury. The Court was however concerned with the nature and artifice of a continuously-evolving defence. The Court was also troubled by what it found to be in material aspects both misleading evidence and untruthful evidence which was neither persuasive nor reliable. However, once again it should be emphasized that the Court in the discharge of its duties of Judicial Review did not go beyond that specific point.

11. With those comments in mind, the Court now turns to the applicable principles of law.

THE GOVERNING LAW

12. The Applicants rely upon O.62, r.4 (11) GCR which states:

*“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** (emphasis added)”.*

13. The Applicants also rely on O.62, r.11 (2) GCR, dealing with wasted cost orders, which states:

*“Where it appears to the Court in any proceedings that anything has been done or that any omission has been made **improperly, unreasonably or negligently** by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party. (emphasis added)”.*

14. The Applicants then set out at paragraph 5 certain broad principles:

“5 Accordingly, the test is; Were the Respondents acting “improper, unreasonably or negligently”? With regard to the interpretation of the forgoing the following relevant principles are found in the Cayman authorities:

5.1 In considering awards for indemnity costs, the Court’s focus should be primarily on the conduct of the losing party,



- 5.2 *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;*
- 5.3 *Pursuing an action for some ulterior motive is an abuse of the process which may be categorised as improper;*
- 5.4 *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;*
- 5.5 *A party who asserts a position when it knows that it has no legitimate basis for doing so is acting improperly;*
- 5.6 *A party who advances a case which he knows to be false is acting improperly;*
- 5.7 *An order for indemnity costs is appropriate where the part should have realised that their claim was hopeless and should not have taken the matter on to trial.”*
15. In *Ahmad Hamad Algozaibi and Bros. Co. v. Saad Investment Co. Ltd* [2013 (2) CILR 34] Smellie CJ held that in considering awards for indemnity costs, the Court’s focus should be primarily on the conduct of the losing party, not on the substantive merits of the case. Such an award should be made only in exceptional circumstances such as where the losing party had behaved improperly, negligently and unreasonably. The Court considers this guidance to be both succinct and admirable.
16. In *Three Rivers DC v. Bank of England* [2006] 5 Costs LRT 14 Tomlinson J. adopts certain authorities set out at paragraph 731 and states inter alia the following proposition:
- “(4) *The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was*



reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations.”

17. In other words, the primary focus is on the conduct of the losing party during the proceedings, but nonetheless, this is not always completely dispositive. There may on occasion be pre-trial conduct which the Court should consider as well.
18. In addition, as Ms. Carss-Frisk KC helpfully points out at paragraph 10 (1) of the Respondents’ Submissions advancing a defence which is merely weak or unlikely to succeed is to be distinguished from maintaining defence which is manifestly hopeless, and it is the latter which can be characterised as unreasonable.
19. It is further pointed out at paragraph 10 (2) that weak cases will succeed from time to time.
20. The Respondents also place reliance on the following general guidance, set out at paragraphs 8 and 9 of the Respondents’ Submissions:

“8. *The key principles were summarised in the English Court of Appeal in Excelsior Commercial & Industrial Holdings Ltd V Salisbury Hamer Aspen & Johnson (Costs) [2002] EWCA Civ 879, per Woolf LCJ at paras 28-30 and 32.*

9. *The following points are emphasised:*

- (1) *An indemnity cost order is of its nature penal (para 30).*
- (2) *In deciding whether to award indemnity costs, all relevant circumstances must be taken into account (para 29).*
- (3) *Conduct falling short of misconduct deserving of moral condemnation can be so unreasonable as to justify an order for indemnity costs (para 30).*
- (4) *Such conduct would need to be unreasonable to a high degree; not merely wrong or misguided in hindsight (para 30).*



(5) *Before an indemnity costs order can be made, there must be some conduct or some circumstances which takes the case out of the norm (para 32; see also Waller LJ at para 39)."*

21. In *In the Matter of the Avivo Group* (Unreported Judgment dated 11 January 2023, FSD Cause No 145 of 2022 (RPJ) Parker J. states at paragraph 7:

"7. It is only in exceptional cases that the Court should exercise its discretionary jurisdiction to order costs on the indemnity basis: AHAB v Saad Investments Company Limited. The Court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide."

22. All of these judicial dicta are of assistance to this Court in forming an overview of the governing law to be applied.

23. The relevant rules of practice and procedure and the relevant authorities are not inherently complex or obscure. They jointly provide a framework for the consideration of the circumstances in each particular case.

24. With that perspective firmly in mind, the Court will now address the substantive Submissions of both the Applicants and the Respondents.

THE WRITTEN SUBMISSIONS OF THE APPLICANTS

25. The Applicants' principal contentions are set out at paragraph 7-8 of their Submissions:

"7. These submissions will address:

7.1 The Respondents' abuse of process in issuing the Cease Notice and obtaining the Warrant.

7.2 The Respondents' allegations of misconduct and criminal offending against the Applicants.



- 7.3 *The Respondents' pursuit of a hopeless case.*
- 7.4 *The Respondents' advancement of a case that they knew to be false, falsification of evidence and lies on oath.*
- 7.5 *The Respondents' ulterior motives in pursuing the case.*
- 7.6 *The unreasonable manner in which the Respondent's case was conducted by counsel.*
8. *These are interlinked and overlapping categories and evidence against the Respondents in one category will also be relevant in other areas. For example. The Respondents' knowledge that they were pursuing a hopeless case is strengthened by the evidence that they knew it was also false and that they provided untruthful evidence to support it. A finding that any of the grounds was made out would be sufficient to make an order for indemnity cost-taken collectively they provide an overwhelming case."*

26. Regarding the Cease Notice, in essential terms they contend that the Respondents conspired to abuse the Fourth Respondents' powers so as to issue an unlawful Cease Notice. It is of course correct that the Court found that in relation to the items seized the Fourth Respondent knew that there was no health risk to justify issuing the Cease Notice and that for the reasons as set out in the Judgment the Cease Notice was targeted at the Applicants on a basis which the Fourth Respondent himself did not believe to be true. Whether there is or is not clear evidence of part of a conspiracy to abuse the Fourth Respondent's powers, which is also alleged to be a criminal offence, is not a matter for which this Court is the appropriate forum ultimately to decide.
27. The conduct was certainly a source of serious legitimate concern, but for the particular purposes of this costs hearing it is conduct, regarding which this Court need go no further than it already has done.



28. In relation to the Search Warrant, it is stated that the First Respondent provided false and misleading evidence on oath to a Justice of the Peace. Certainly, it was the First Respondent's intention to detain the items in question by whatever means this could be done. All of this is set out at paragraphs 10-12 of the Submissions.
29. Again at paragraphs 13-15 it is stated, inter alia, that at no time was there any evidence that the Applicants intended to supply a controlled drug unlawfully. Paragraph 15 states:

"15 Notwithstanding the clear evidence in their possession the Respondents maintained their allegations of drug dealing against the Applicants for over a year including and throughout a very public trial, causing incalculable harm to the Applicants' business and reputations."

It is specifically in relation to paragraph 15 that a relevant and important consideration does arise because although it is conduct which initially predated the hearing it is highly harmful and prejudicial conduct which continued during the course of the hearing itself also. The allegations were both raised and pursued.

30. It is in that limited context that the Court considers this conduct potentially relevant to the standard of costs to be awarded.
31. Moving from that to the broader picture of the Respondents' pursuit of an allegedly hopeless case in relation to the Search Warrant, the Submissions highlight at paragraphs 16-17 the statement of the Court at paragraph 316 of the Judgment:

"16 The Judgement makes it clear that the Respondents' case was, from the start, completely hopeless. Dealing simply with the technical aspects of the Warrant the Court held:

"Both the gravity and the number of technical difficulties are overwhelming and in all likelihood are without precedent in the Cayman Islands. The contention that they do not render the Warrant void or



invalid nor render the entry and search unlawful is highly implausible and very surprising. (emphasis added)."

17. *The Court reviewed the position with regard to the Warrant more fully at paragraph 341 of the Judgment and set out no less than 12 separate reasons why the Warrant was unlawful. It concluded:*

*"This list is not intended to be exhaustive of the defects, but individually and collectively they provide ample and indeed **overwhelming grounds for which this Warrant must be found to be invalid.**" (emphasis added)".*

32. Especially important in this regard is the contention made at paragraphs 18-19:

"18. *The Court went on to hold that the Warrant had also been obtained for an improper purpose:*

"the Court finds that the entire enterprise was baseless and that it was conducted for an improper purpose, viz, to detain the items by any means...."

19. *The reason that the Court was able to make such clear findings with "no difficulty" was because the strength of the case against the Respondents was overwhelming. The Respondents must also have realised this and yet decided to proceed- their actions were improper and unreasonable."*

33. In summary, this is an alternative way of submitting that the Respondents' case in relation to the Search Warrant was a manifestly hopeless one, a proposition which the Court may in due course find no difficulty in accepting.



34. The argument finds further re-enforcement at paragraph 21 and the late production from the Fourth Respondent of what was obviously a document material to the Court's deliberations and determinations:

"This key document is overwhelming evidence that the CMO knew and explicitly stated that there was no medical justification for his Cease Notice before he issued it. Notwithstanding this the CMO persisted in claiming at trial that he in fact acted for reasons of public health. In light of what he knew his own true opinion was that claim was hopeless."

35. The Applicants then set out various excerpts from the evidence of the Fourth Respondent to support their argument that the Respondents advanced a case which they knew to be false, falsified evidence and lied under oath.

36. In relation to unreasonableness paragraph 26 states:

"26 Having formed the opinion that the Applicants' medications were safe and explicitly stated his intention to act contrary to [medical] guidance he issued the Cease Notice to target the "unfortunate" Applicants, in response to an initiative driven by Customs and the HPC. That was unreasonable. More unreasonably, the CMO contested the position for over a year and through a trial, forcing the Applicants to incur significant expenses including having to obtain an expert report to prove something that it turned out the CMO knew all along (but did not disclose). Finally, and most inexcusably, the CMO provided false evidence to the Court, on oath, to try to deceive it into believing that the Cease Notice was properly issued by him for medical reasons."

37. The conduct described herein is arguably highly unreasonable to the degree that it is outside the norm, and in support of a case which was demonstrably hopeless. On that basis, it is strongly argued that it is conduct worthy of attracting indemnity costs.



38. The Applicants then allude to various aspects of the Fourth Respondent's sworn testimony. Central to that was the ultimate finding of the Court that the Fourth Respondent knew there was no health risk to justify the issuance of the Cease Notice.
39. It is alleged in paragraph 31 that the Fourth Respondent perjured himself in these proceedings to support a case he knew was false. Once again, the Court reiterates that it is beyond the specific scope of these proceedings for this Court to come to such a conclusion. The relentless pursuit of a hopeless case improperly, unreasonably, and even negligently is entirely another matter and there has steadily accumulated a mass of material which can be indicative of that conclusion.
40. The Applicants then proceeds to allege at paragraph 32 that perjury was committed not only in the evidence given on oath to the Justice of the Peace but also in the Grand Court "*in order to attempt to support their hopeless case*".
41. Attention is drawn at paragraphs 34-35 to the paradox that on the one hand Ms. Schneider swore that she was cognizant that the First Respondent has the power of search under section 6 of the Misuse of Drugs Act and yet on the other hand she claimed in her application to the Second Respondent that the Search Warrant was "*necessary*". She asserted that she had rights of entry and yet she informed the Justice of the Peace that she needed a Search Warrant to gain entry.
42. While all of this is troubling and even alarming, it also provides further factual material for the proposition that the Respondents' case as it was presented was improper, hopeless and so negligent as to be reckless.
43. Obviously, these comments reflect the statement of the Court adopted by the Applicants at paragraph 37:

"The Court went on to summaries Customs' evolving position throughout the case (importantly, the key elements of which were articulated on oath by the Customs Officer):

"It is also known that as matters evolved so did a number of different allegations evolve as well, that Doctors Express had failed to make a truthful declaration, that dispensing of cannabinoid vapes was unlawful per se, that there were reasonable grounds for believing that an offence of possession had been committed and finally



that there was reasonable grounds for believing that an offence of possession of a controlled drug with intent to supply has been committed.

The Court finds that none of this was true.” (emphasis added)”.

44. The Applicants then rely upon the Respondents’ “*ulterior motive*” in pursuing the case, on the basis of the Court having found that the entire enterprise was baseless and that it was conducted for an improper purpose.
45. It becomes apparent in paragraph 39 that the ulterior motive is intended to have a broader connotation than simply improper purpose in that it is claimed that the Respondents had “*clear ulterior motives in pursuing this litigation of attempting to cover up their earlier activities*”.
46. With great respect, the Court made no precise finding to that effect. The Court remains focused as it should be focused primarily on conduct within the hearing process rather than with the motivations themselves formed prior to the hearing process. The point being made at paragraphs 38 and 39 is not perhaps a major one, but it is essential in the interest of justice that full regard be paid to the language actually used in the Judgment as distinct from redefining the underlying concepts and inadvertently expanding them.
47. A more problematic question for the Respondents arises in relation to the manner in which it is argued that the case was conducted.
48. Paragraph 40 of the Applicants’ Submissions concisely summarizes the argument:

“The manner in which this case was conducted by counsel was completely improper. The case changed repeatedly and without warning, evidence and arguments were provided late and in breach of court orders, arguments were run without any basis in law or fact and counsel for the Respondent sought throughout to disrupt and delay proceedings. As the Court held:



“the manner in which the First, Third and Fourth Respondents have chosen to conduct their representation without any timely concessions has inevitably added complexity to the proceedings”.

49. There is a good deal of force in this submission and once again it raises the fundamental problem for the Respondents that however their case was formulated and irrespective of the way in which it was formulated the case was hopeless and incapable of coherent presentation in any event.
50. The history as to the lack of pre-trial concessions is set out at paragraphs 41-45. All that Court should state at this juncture is that for the purpose of the instant Application conduct at the trial is of greater moment and relevance than conduct prior to the trial. This qualification in no way impinges on the persuasiveness of the Applicants’ arguments in relation to paragraph 40 of their Submissions. Essentially that is a point to which the Court must pay most careful attention.
51. The Applicants next develop an argument which directly addresses the conduct of the proceedings themselves, for which conduct the Respondents had overriding and ultimate responsibility.
52. Inevitably in the case of litigation counsel on opposing sides will have different perspectives as to what should be done and what should not be done. In large measure, the matters argued from paragraphs 46-51 are based upon such differences. Given the other larger considerations raised in the Submissions as a whole, it is unnecessary and probably unhelpful for the Court to dwell on them unduly with two qualifications.
53. First, in relation to paragraph 47 the Court does not intend to set out the complaints as to behaviour contained in paragraph 47.
54. These instances unnecessarily and unreasonably protracted the proceedings and might well be described as improper. Furthermore, they appear to have had a disruptive effect at least as far as other counsel were concerned as reflected by their comments to the Court. Both protracting proceedings and disrupting proceedings are of course highly undesirable, and the Court should actively discourage such occurrences when they may arise.
55. Seen in that particular light therefore there are some grounds for considering whether or not indemnity costs are appropriate in relation to counsel’s conduct. The Court will return to this issue



at a later point. Nonetheless, it is very important to note that counsel's task in presenting a defence was functionally impossible.

56. Secondly, it is highlighted that during the proceedings an attempt was made to blame the Second Respondent exclusively for any deficiencies in regards to issuing the Search Warrant, an allegation which was subsequently withdrawn as indicated at paragraph 53.
57. Having withdrawn the allegation, it is claimed that counsel for the Respondents then attempted to attribute blame to the Applicants themselves for the issue of the Search Warrant.
58. It is necessary to set out the relevant passages of the Applicants' Submissions to understand how the argument was developed:

"54 Having failed to blame the JP for issuing the Warrant counsel attempted to blame the Applicants:

"In their Supplemental Skeleton Argument dated 4 November 2020 in relation to the Search Warrant the First, Third and Fourth Respondents repeat the fundamental contentions at paragraph 16 that it was the responsibility of the Applicants (despite any error on the Warrant) to have provided CBC Officers Ms. Schneider with evidence that they no longer intended to supply contrary to their advertisement to all Digicel users, prior to her execution of the Warrant and this was not done."

55 This extraordinary submission had absolutely no legal basis. Referring to the Respondents' written submissions the Court noted:

*"The alleged presumption that there are reasonable grounds for suspicion of an offence unless the party suspected provides evidence to the contrary is both **false and dangerous.**" (emphasis added)*

56 The Court noted that there was also "no evidence" that the Customs Officer had claimed that to the JP and stated:



*“If it is being suggested as it is that failure to allay suspicion or remove suspicion is itself the sole cause of suspicion arising then **the Court can only describe the submission as unfairly prejudicial, completely circumstantial and contrary to the public interest.** Here there is either evidence or no evidence. There is no scope or anything in between.”*
(emphasis added)

57 *Regrettably, counsel’s actions went beyond making submissions which were unfair, prejudicial, contrary to the public interest and for which there was no evidence and strayed further into making baseless legal submissions. As the Court noted:*

“The Court specifically enquired of Mr. Gayle as to how failure to retract or to revoke the advertisement could in itself amount to any reasonable suspicion of the trafficking of drugs or even possession of drugs unlawfully. He indicated to the Court that there was a duty to withdraw the advertisement. When pressed as to whether that duty for example was fiduciary, contractual, statutory or otherwise, he suggested that it was statutory. However, he failed to identify any statute where the duty which he relied upon is actually set out.

In the opinion of the Court, there is no such duty. It does not exist.”

59. The Applicants contend that this argument demonstrates not mere incompetence but that it is indicative of making a legal submission to the Court at the very least not knowing or caring whether it is true or not, and accordingly it was unreasonable and improper conduct. It is unnecessary for the Applicants to speculate as to what was in the minds of the Respondents because the points themselves are strongly indicative that there was no defence capable of being coherently presented. Frankly, such a defence can only be described as manifestly hopeless. All avenues of approach in this matter arrive at the same place.



60. On various occasions following exchanges with the Court, the Respondents had the opportunity either to shorten the proceedings or to bring the proceedings to an end. They deliberately declined to avail themselves of those opportunities.
61. The occasion when the Respondents could not even identify the legal source of the duty upon which they fundamentally relied was one of those opportunities. The opportunities will be further examined later in this Judgment.
62. The Applicants further makes complaint as to an alleged lack of candour, particularly emphasising the late disclosure on the final morning of the hearing, and after many months of litigation, of the Fourth Respondent's email in relation to the Cease Notice.
63. They submit at paragraph 60 as follows:

“60 Had that been disclosed properly in September 2019 vast sums of private and public money and court time would have been saved. The Respondent's counsel stated that they were unaware of it until the day it was disclosed, something which the Court accepted. On that basis there are only two other options: Either counsel failed to ask for relevant correspondence from their client the CMO- in which they would have been acting unreasonably (particularly in the face of repeated disclosure requests and knowing for months that the Applicants' case and expert evidence was that no reasonable CMO could have thought the medical evidence justified the Cease Notice). Alternatively, counsel did ask the CMO for relevant correspondence and he didn't disclose the email to them.”

64. The email itself was clearly material to an informed consideration of the issues raised in the Cease Notice and had it not been disclosed that non-disclosure might well have led to erroneous conclusions. In other words, unless and until it was produced the Court did not and could not give consideration to all the relevant facts which would assist it in arriving at a fair and factually informed conclusion.



65. Accordingly, the way in which the matter arose and was dealt with inevitably gives rise to concerns as to the conduct of the Fourth Respondent during the trial itself. No explanation was ever given as to how this very late disclosure even came about.
66. Furthermore, because of the course of events which then followed on from the Cease Notice it was critical for the Court to be fully and properly apprised as to how and why the Cease Notice came about in the first place. In effect, this troubling incident cannot be separated from the entirety of the history of the case.
67. The Court will simply state at this juncture that the late and unexplained production of the email may well amount to unreasonable, improper or at best negligent conduct.
68. The Applicants conclude their submission at paragraph 65 by asserting that the Respondents behaved appallingly and unlawfully and that it is hard to envision a stronger case for the award of indemnity costs than the instant one.

THE WRITTEN SUBMISSIONS OF THE RESPONDENTS

69. The Respondents submit that in conducting the proceedings their conduct was not blameworthy or unreasonable to such a high degree as to merit the exceptional order of indemnity costs. At paragraph 3 of their Written Submissions, they continue as follows:

“The Respondents invite the Court to conclude that, while with the benefit of hindsight, the Respondents’ action under challenge were found to have been unlawful, the defence of the claim was not so manifestly hopeless as to merit indemnity costs. This was a case of considerable public importance, raising issues of statutory interpretation and other public law issues of some complexity, upon which the Respondents were entitled to seek the Court’s ruling”

70. They make reference to certain without prejudice correspondence at paragraph 4. The Applicants had already pointed out that a letter dated 24 August 2020 from the Applicants’ Attorney to the Respondents’ Attorney was headed *“Without Prejudice save as to Costs”*.



71. Although the Court has reviewed this letter, the position of the Court is that correspondence of this nature is of very limited assistance and indeed quite possibly of no assistance. The letter is of course intended to advance their clients' interest as best it can but it does not appear to the Court to have any significant bearing on the issues as to conduct which the Court must now decide. As it was indicated earlier in this Judgment the Court does not propose to address each and every conceivable matter. In fact, it would be neither practical nor relevant even to do so.
72. The Respondents state at paragraph 5 that the relevant principles are not in dispute.
73. However, emphasis is placed on the threshold being high as it focuses specifically on the conduct of the proceedings. This is a narrower characterisation than that of Smellie CJ in the *Ahmad* case where he refers to the Court's focus being "*primarily*" on the conduct of the losing party. There may be some instances as we have seen where conduct may even be relevantly scrutinised where it precedes and then continues into the proceedings themselves. Taken as a whole, this Court considers that the Court's focus should be primarily on the conduct of the losing party, not on the merits of the case and that the Court should concentrate on the course of the proceedings for the primary purpose of conduct rather than on specific purpose alone.

The Respondents refer to the principles summarised in *Excelsior Commercial & Industrial Holdings v Salisbury Hamer Aspden & Johnson (Costs)* [2002] EWCA Civ. 879, per Woolf L CJ at paragraph 28-30 and 32.

74. The Respondents make the following important observations at paragraph 9:

"9. *The following points are emphasized:*

- (1) *An indemnity costs order is of its nature penal (para 30).*
- (2) *In deciding whether to award indemnity costs, all relevant circumstances must be taken into account (para 29).*
- (3) *Conduct falling short of misconduct deserving of moral condemnation can be so unreasonable as to justify an order for indemnity costs (para 30).*



- (4) *Such conduct would need to be unreasonable to a high degree; not merely wrong or misguided in hindsight (para 30).*
- (5) *Before an indemnity costs order can be made, there must be some conduct or some circumstance which takes the case out of the norm (para 32; see also Waller LJ at para 39)."*

75. These propositions are of course entirely correct in principle. The greater difficulty is in applying these propositions, and indeed the general law, to the unusual and extreme circumstances of this case itself.

76. Further elaboration is provided in paragraph 10, and in fairness to the Respondents, this paragraph is now set out in full:

"10. Further helpful guidance was provided by Henderson J in this Court in the case of Bennett v AG [2010 (1) CILR 478. The Respondents draw attention to the following Observations in that case:

- (1) *Advancing a defence which is merely weak or unlikely to succeed is to be distinguished from maintaining a defence which is manifestly hopeless. The latter can be characterized as unreasonable (para 6).*
- (2) *Weak cases will succeed from time to time. The litigant is entitled to prefer a judicial determination based upon all the evidence over the predictions of his advisers which are limited, as they usually are, by not having observed the other side's witnesses under cross-examination (para 6).*
- (3) *The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, whereas the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) will lead to such an order (para 7).*



(4) *An order for indemnity costs is not justified by the mere fact that the paying party has been found to be wrong, either in fact or in law or both, or by the fact that in hindsight, the result of the case now being known, the position adopted by that party may be thought to have been unreasonable (para 7).*

(5) *The assessment of unreasonableness must avoid the wisdom of hindsight. The question is whether it was unreasonable to advance the claim or maintain the defence taking into account what should have been evident to the party concerned at the outset of the trial (para 9)."*

77. Essentially what is being argued is that even if the Respondents' case is considered weak, it is not therefore hopeless simply because it is weak and even weak cases will succeed from time to time.

78. This is an important point which must be carefully weighed. When there are suitable facts and circumstances it can provide an excellent answer to the argument that the losing party's case is hopeless.

79. The Respondents then develop this submission and in paragraph 11 seek to apply the relevant principles in this way:

"11. Applying these principles, the Respondents invite the Court to conclude that, while the Court has found the Respondents' actions which were the subject of the claim to have been "wrong" in several respects (for which the Respondents have apologised to the Applicants), the Respondents were entitled to prefer a judicial determination of the significant public law issues in the case based upon all the evidence, including the oral evidence adduced. In this regard, the Court is invited to consider that the legislation in issue was not straightforward and that much of the significant evidence emerged upon cross-examination of witnesses at the hearing. (Although, significantly, the 4th Respondent was not cross-examined and so did not have put to him in oral evidence the matters on which the Applicants now see to rely.)"



80. Three comments immediately arise at this stage.
81. First, it appears to the Court that in relation to both the setting aside of the Cease Notice and the setting aside of the Search Warrant the law itself already well and clearly established. On its own, the Respondents' expressed preference may not be a sufficient justification to defend a case which is otherwise lacking any legal grounds whereby it can be defended at all.
82. Secondly, the evidence adduced in the instant case, including the oral evidence adduced, was singularly unhelpful to the Respondents. An unpropitious situation grew steadily even worse as the evidence unfolded culminating in the email which emerged with some drama towards the end of the hearing.
83. Thirdly, although significant amounts of evidence did unfold upon cross-examination, it must not be forgotten that quite apart from the evidence, findings as to breaches of the law themselves in respect of both the Cease Notice and the Search Warrant were entirely dispositive of the merits of the case. The explanations for this conclusion are amply set out and considered in the original Judgment.
84. In other words, late-emerging evidence arguably had no bearing on the gravity of the conduct under review except possibly to make that conduct worse and to make the Respondents' case even more hopeless.
85. Then at paragraph 12, the Respondents note with reservation certain mischaracterisations apparently relied upon by the Applicants:

“12. The Applicants' Submissions naturally emphasise a number of the findings against the Respondents in the Judgment. However, it should be noted that in several instances the Applicants seek to rely on matters which were not actually the subject of any findings in the Judgment. In particular, in paragraph 3 of the Submissions, which seeks to summarise the outcome of the case, reference is made to the Respondents deliberately colluding to abuse their statutory powers, corrupting the judicial process, and unlawfully conspiring to ban prescription medications. The Judgment does not contain findings of deliberate collusion, corruption of the judicial process or unlawful conspiracy. Nor does it contain any finding of



fabrication' of evidence (Applicants' Submissions, para 23) or indeed perjury (Applicants' Submission, para 32). The Applicants' attempt at 'improving' upon the findings actually made must be rejected.) ”

86. The Court entirely agrees with this statement. In fact, earlier in this Judgment out of an abundance of caution the Court has already made its position clear on this issue. At the same time, the issue is of sufficient importance to justify repetition.
87. The corresponding need is to bear in mind carefully the relevant findings actually made in the Judgment whether that ultimately helps the Respondents in this context or does not help them.
88. The Respondents then turn at paragraphs 15-17 to consideration of certain general comments made by the Court in relation to what may be called the motivation of the Respondents. However, with great respect, it is necessary to examine paragraph 388 in its entirety to understand the full purpose of what was intended by way of a constructive comment.
89. Paragraph 388 of the Judgment states:

“388 The Court fully recognizes that the Respondents individually and collectively have at heart the interest of the public of the Cayman Islands. All of them are engaged on duties that are important and valuable and which should be suitably appreciated. Errors of judgment from time to time are unfortunately both inevitable and regrettable. However, where they occur as they have both done in the circumstances of this case it is imperative that they be recognized, addressed and mitigated as soon as is practicable. Allowing them to persist as the First Respondent and the Fourth Respondent have done can increase the injustice to which such errors give rise in the first place.”

90. The central point of judicial comment was that where errors of judgment in fact occur it is imperative that they be recognized, addressed and mitigated as soon as practicable. The present Application arises precisely because those errors were not recognized, addressed and mitigated. Instead, as we have seen in the course of the proceedings they were compounded by additional sets of errors. Errors were relentlessly heaped upon errors. Reality was manifestly ignored.



91. To an extent failures are accepted by the Respondents, and indeed they refer to regrettable errors of judgment at paragraph 17. This is an entirely sensible concession on their part.
92. Nonetheless this concession does not in any way alleviate the narrower issue with which this Court is now concerned, viz., as to the appropriate standard of costs primarily in relation to the conduct of proceedings themselves.
93. Turning to the question of complaints as to counsel's conduct of proceeding, at paragraph 18, the Respondents state that they do not accept that "*the picture painted by the Applicants*" is fair or accurate, and that in any event, the Applicants' assertions in this regard fall short of demonstrating conduct reaching the requisite standard. The Court will return to this unfortunate aspect of the case in formulating its conclusions.
94. Finally, the Respondents refer once again to the approach in the *Excelsior* case and the *Bennett* case and they invite the Court to conclude that the conduct of the proceedings, in this case, did not reach the threshold required for it to be appropriate to award indemnity costs.
95. The Court acknowledges the measured and balanced manner in which these costs submissions were presented for consideration.

APPLICANTS' WRITTEN SUBMISSIONS IN REPLY

96. The Applicants take issue with the statement of the Respondents at paragraph 16 of the Respondents' submissions that a distinction has to be drawn between the conduct under challenge in the Judicial Review and the conduct of the proceedings where only the latter is said to be relevant under O.62 r. 4c 11.
97. They specifically assert that while focus should be principally on conduct in the proceedings that is not the same as saying conduct beforehand is not relevant where that behaviour beforehand was as egregious as that of the Respondents' was alleged to be. It was "*out of the norm*" and of particular relevance when considering costs. The Court considers this wider definition to be essentially accurate, but if there is a sufficiency of justification to award indemnity costs on the basis of conduct in the course of proceedings it will probably be unnecessary to go beyond that point in any event.



98. The Applicants take strong issue with the Respondents' contentions at paragraph 11 that they were "entitled to prefer a judicial determination of the significant public law issues based upon all the evidence, including the oral evidence adduced."

99. They make the following point:

"Again, this is to utterly mischaracterise what took place during this litigation and the overwhelming strength of the Applicants' case. It is a particularly bizarre submission in circumstances where the Respondents, and only the Respondents, had all the facts necessary to assess the strength of their case from the outset but concealed these from the Applicants (and the Court) who had to prise them from them (over a year after commencing litigation) by cross-examination and repeated disclosure requests."

100. The Court has already expressed reservations about the Respondents' position on this specific matter. At the same time, what actually emerged at the hearing was highly beneficial to the Applicants and wholly detrimental to the Respondents. The Respondents exercised poor tactical and strategic judgment but that is hardly unique in contested litigation.

101. At paragraph 5 they also draw attention to the Respondents' late change of case and their attempt to blame the Justice of the Peace during the second week of the hearing. As the Court understands it, the Applicants state that what happened prior to the trial and what happened during the trial were both respectively part of a continuous pattern of misbehaviour. However, even if that is all correct, the legal authorities still indicate that the focus of the Court's attention should primarily be on conduct during the trial and the Court has no difficulty in following that principle.

102. Then at paragraph 7 the Applicants refute the claim that they are placing reliance on matters not in the Judgment. They deal with that argument in this way:

"Each of the matters referred to in the Applicants' submissions is an inescapable conclusion from the evidence that came out during the hearings and findings made in the Judgment. Significantly the Respondents do not seek to advance any alternative explanations for that evidence or those findings in the Judgment. The CMO's conflicting statements and sworn evidence remain unexplained. The Customs Officer's conflicting



sworn evidence remains unexplained. If not perjury there is no other possible explanation for these – which are, in any event, the clearest possible evidence that the Respondents knew their case to be false.”

103. The Court can only repeat what it has already made clear. It determined the Judicial Review proceedings in accordance with what the Court was asked to determine and it set aside both the Cease Notice and the Search Warrant. Whether there are inescapable conclusions or not they are not conclusions which this particular Court is best placed to address. It is important to bear in mind at all material times the scope of the proceedings, and now at this final stage within the scope the appropriateness of awarding indemnity costs.
104. The Court has previously set out the Applicants’ argument as to the Court’s findings of improper purpose. They are serious findings and the reasons for arriving at them have been comprehensively set out in the Judgment. However, it is worthy of repetition that the threshold test focuses primarily on the exceptional conduct in the proceedings, perhaps amplified to some degree to take account of some exceptional conduct prior to the proceedings. The threshold does not address the subject matter of the proceedings. If it is obviously alleged as in this case that the defence conduct, for example, is manifestly hopeless or that there is other misconduct of an exceptional nature then that is very much a different matter.
105. The Applicants contend that the Respondents have failed to deal with the various criticisms of counsel’s behaviour at paragraphs 46-64 of their principal Written Submissions and that they cannot be described merely as “*errors of judgment*” The Court will return to this strand of the argument later.
106. The Court has already carefully explained the full context of its references to errors of judgment and the proactive need to correct them as soon as they can be corrected. If the paying party has acted improperly, unreasonably or negligently then in those circumstances an award of indemnity costs is justifiable. No other criteria are necessary.
107. The Applicants argued at paragraph 10 in favour of the admissibility of the correspondence “*Without Prejudice save as to Costs*”. The Court considers it to be self-evidently admissible, but it does not consider the contents to be of any significant assistance.



108. The Applicants then go on to question whether the Respondents did in fact have at hand the interests of the public of the Cayman Islands. The Court considers that it is important to distinguish what the Respondents did, which was unjustifiable in law and in fact, from why they did it. They misguidedly adopted the wrong procedures and therefore those procedures led to the wrong outcome. No doubt all of this has given rise to strong feelings of injustice on the part of the Applicants. The Court has a responsibility to ensure that this Application is decided in accordance with the relevant legal considerations only, and in this critical regard, both Mr. Austin-Smith and Ms. Monica Carss-Frisk KC have provided ample assistance.

OBSERVATIONS OF THE COURT

109. At this stage of the Judgment it is instructive and relevant to highlight certain issues raised by the Court during the course of the hearing and specifically drawn to the attention of counsel for the Respondents for comments. In reality, it was essential that the Respondents could demonstrate that there was at least some arguable response to these questions if the defence was to remain sustainable.

110. First, at paragraphs 80-81 of the Judgment the Court identified evidence establishing that the Cease Notice operated upon the Applicants' Trade and Business Licence and at paragraph 82 the Court commented as to what opportunity was ever provided to the Applicants to be informed of the adverse factors against them which weighed upon the decision and to afford them a means of reply. In other words, surely there was a legitimate expectation that at some appropriate point, the Applicants should be afforded a fair hearing by the Fourth Respondent.

111. The Judgment then continues:

“84. The Court put this question directly to Mr. Gayle and he replied that this Application for Judicial Review was in fact the fair hearing. By that reply, the Court understood Mr. Gayle to mean that prior to this hearing no other form of natural justice hearing was either provided or necessary.



85. *The Court views this position with some dismay. If it amounts to depriving a party of the benefit of its licence without any form or mechanism of redress it is entirely unacceptable”.*
112. It became evident at this point that the Respondents had no answer to the enquiry by the Court, and that with all respect due to the Respondents, the Cease Notice process adopted on this basis alone was fatally flawed.
113. Notwithstanding this conclusion, counsel proceeded with the Respondents’ case in circumstances where in accordance with well-established principles of public law the defence in relation to the Cease Notice should have been immediately abandoned.
114. Secondly, in relation to counsel’s contention that the Cease Notice was directed to all Registered Health Care Practitioners and that it was not targeted at the Applicants as such, the Court notes at paragraphs 108-109 of the Judgment:
- “108. However given that the Applicants were the only medical facility prescribing and dispensing vapourisable medical cannabinoids, and the CMO did not regard their product in the same light as “cheaper vapes “it is difficult to see any reason for including them in the ambit of the Cease Notice as distinct from exempting them from it entirely.*
- 109. It should be noted that the Court pressed Mr. Gayle on this specific point but beyond stating that the Cease Notice applied to all eligible practitioners he was unable to provide any more detailed answers to that question.”*
115. Once again, what is to be emphasized is the lack of any answer or at least any coherent answer to the question being raised as to why a Cease Notice was even directed at the Applicants.
116. Despite the Court having raised this extremely important concern, no practical attention was accorded to it: the Respondents simply carried on with their case.



117. Thirdly, the Court notes at paragraph 231 of the Judgment that in the course of the hearing as a result of an exchange between the Court and counsel for the Respondents counsel made clear that the sole evidential basis for believing that an offence had taken place was that an advertisement by the Applicants had not been retracted or revoked after the Cease Notice was issued.

118. Then at paragraph 261 the Court states:

“261. The Court specifically enquired of Mr. Gayle as to how failure to retract or to revoke the advertisement could in itself amount to any reasonable suspicion of the trafficking of drugs or even possession of drugs unlawfully. He indicated to the Court that there was a duty to withdraw the advertisement. When pressed as to whether that duty for example was fiduciary, contractual, statutory or otherwise, he suggested that it was statutory. However, he failed to identify any statute where the duty which he relied upon is actually set out.

262. In the opinion of the Court there is no such duty. It does not exist.”

119. We see that once again on a matter of fundamental importance, this time in relation to the Search Warrant, an extremely critical question remained unanswered. At such a point in the hearing the Respondents should have very carefully considered their position and drawn the appropriate conclusions.

120. Fourthly, in relation to the specific seizure of the items detained, no effort has ever been made by the Respondents to identify or define any evidential probative value for which in the first place the items had been detained.

121. The Court addresses this troubling matter at paragraphs 267 – 268:

“267. Mr. Gayle’s contention is that the Warrant was not granted in relation to the offence of possession of a controlled drug but in relation to the unstated offence of possession with intent to supply. Clearly there was no basis for claiming as the information did that the items were likely to be relevant and of substantial value to the investigation of the offence of possession in that the Applicants were fully and lawfully licensed to possess the items in any event. Alternatively, in relation to



the offence of possession with intent to supply, no evidential basis has been made out to show reasonable grounds for suspicion that the items themselves provided any evidence of that intent, especially as they were themselves items held entirely lawfully.

268. *At no point have the First and Third Respondents attempted in any way to establish an evidential connection between the specified items and the offence now seemingly upon which their reliance is place. If the possession was indisputably lawful, in what way could the mere possession of the items in any conceivable way give rise to any suspicion of intent to supply?"*

122. The Respondents at no time have endeavoured to answer this question or to come to terms with the underlying justification for even seeking a Search Warrant in relation to the specific items to be detained. In the opinion of the Court, this lack of any demonstrable evidential probative value was absolutely fatal to the Respondents' case as to the legality of the Search Warrant. Nonetheless, they carried on regardless.

123. It is worth repeating that the Court invited counsel to comment on this predicament but no answer was forthcoming.

124. Those observations show how major difficulties confronting the Respondents were consistently brought to their attention and yet they failed to acknowledge and deal with the matters raised. Although this was an opportunity on careful reflection to terminate the proceedings they carried on regardless. Valuable litigation resources were expended for no benefit whatsoever. In fact, the resources were wasted.

THE CONCLUSIONS OF THE COURT

125. The Court has previously stated that it does not intend to address all of the matters put forward by the parties for consideration. Instead, the Court will focus on those matters only which are sufficient to dispose of this Application and which are within the scope of the legal principles already identified.



126. The test as to whether the paying party has conducted the proceedings improperly, unreasonably or negligently is a high one. It focuses primarily on the conduct of the losing party in the proceedings and not on the substantive merits of the case.
127. There is no doubt that the Judgment dated 4 February 2021 was to the effect that the Applicants' case was overwhelming and conversely that the Respondents' case was without any merit at all.
128. The reasons for the decision itself were enumerated in great detail. The reasons have a bearing on the present exercise but only in the context of examining the test as to improper, unreasonable or negligent conduct.
129. The Court is grateful for all the Written Submissions received but it must guard against inadvertently conducting a full or even partial rehearing of the Judicial Review proceedings themselves.
130. The first aspect is to consider whether the Respondents' case was manifestly hopeless and therefore unreasonable to a high and exceptional degree as distinct from merely being weak.
131. In regard to hopelessness, Henderson J, *Bennett v. The Attorney General of the Cayman Islands* [2010 (1)] CILR 478 case states at paragraph 6.

“6. *Advancing a defence which is merely weak or unlikely to succeed is to be distinguished from maintaining a defence which is manifestly hopeless. The latter can be characterized as unreasonable. The former is a regular occurrence with which every barrister will be familiar. Many litigants, even after receiving a warning from their legal advisers that the claim or defence is likely to fail, prefer to have that determination made by the court. That is not, in the typical case, unreasonable. Weak cases will succeed from time to time. The litigant is entitled to prefer a judicial determination based upon all of the evidence over the predictions of his advisers which are limited, as they usually are, by not having observed the other side's witnesses under cross-examination. There are also cases which are hopeless and which appear that way to anyone with the requisite legal training. It is open to a judge to determine that it was unreasonable to bring such*



a claim or advance such a defence. It is the usual result of such a finding is that the unsuccessful party will pay costs on the indemnity basis.”

132. In the present instance the Cease Notice was legally misconceived, and it was executed for an improper purpose. All of that is dealt with at length in the original Judgment and the reasons do not require extensive repeating. The fundamental point to be made here is not that the Cease Notice was set aside on the merits, but that once the facts became fully apparent it has no chance whatsoever of surviving. There are many ways to formulate this conclusion but frankly as a matter of law and as a matter of fact the conclusion speaks for itself.
133. Given such manifest hopelessness the Court concludes that it was unreasonable to defend the Cease Notice. Moreover, because of the factual background and because of the finding that in fact and in law the Fourth Respondent acted for an improper purpose in issuing the Cease Notice the Court further concludes that in those circumstances it was additionally improper to continue to defend the Cease Notice as well as it being unreasonable.
134. In summary, the defence was not simply a weak one but a non-existent one. The true intention behind the Cease Notice only become fully clear as the evidence and the submissions unfolded. As the Court made clear in paragraph 129, the email message dated 14 September 2019 only emerged on the final morning of the Judicial Review hearing:

“129. The email message dated 14 September 2019 only emerged on the final morning of this hearing. It was provided on behalf of the CMO and Ms. Vassel-Webb in response to a specific request from Mr. Austin-Smith. Mr. Gayle stated to the Court that he and Ms. Rambarran had only become aware of it that morning, and the Court accepts that statement.”

135. This was most disappointing conduct and it can only be described as both unreasonable and improper.



136. In relation to the Search Warrant the Court was required to address a very large number of legal and factual issues. As paragraph 316 of the Judgment indicates both the gravity and the number of the technical difficulties revealed were overwhelming and in all likelihood were without precedent in the Cayman Islands.
137. A comprehensive list of what were described as formal errors and deficiencies was summarized at paragraph 341 of the Judgment. There were twelve of them. Although not intended to be exhaustive of the defects, individually and collectively they provided comprehensive and indeed overwhelming grounds for the Search Warrant to be found unlawful and for it to be set aside.
138. Despite these considerations the Court recorded at paragraph 218 that counsel for the Respondents had declined to concede any error on the face of the Search Warrant documents, other than a minor error as to the Applicants' stated address (which the Applicants had consistently denied was an actual error in any case). Ultimately the Respondents changed this position to concede that there were errors but that the errors did not render the Search Warrant documents invalid.
139. In light of the matters subsequently set out by the Court at paragraph 341 this was an extraordinary position to take. The deficiencies singly and collectively were manifestly fatal.
140. This was not merely a hopeless and intractable stance for the Respondents to take but also a highly unreasonable one. Much time and effort was spent by the Applicants going through point after point in their hearing Submissions. Both in this regard and more broadly in relentlessly justifying the unjustifiable, the Respondents' conduct in relation to the Search Warrant was both highly unreasonable and highly improper.
141. At paragraph 147.4 of the Judgment, the Court concluded that the Cease Notice was issued for an improper purpose. At paragraph 347 the Court stated a similar conclusion in relation to the Search Warrant. In contesting these matters in the manner that they did contest them the Respondents substantially added to the injustice which the Applicants had already experienced. Frankly to describe that form of litigious conduct as highly improper is practically an understatement.



142. Criticism has been made of counsel's conduct and there is no doubt that from time to time it both protracted and disrupted the hearing. The ultimate outcome of the hearing was unaffected but in the interests of justice emotional episodes of this nature should be discouraged. The conduct was on occasion below the standard normally to be expected.
143. Having said that, the Court also wishes to record that counsel had conduct of a defence which had no prospects of success and which could aptly be described as desperate. His task was one that was in reality impossible to discharge. Ultimately, responsibility for this lies with the Respondents. The Court accepts the submission of Ms. Carss-Frisk KC that on balance that conduct falls short of the requisite threshold, particularly in the extremely unusual circumstances of the present case.
144. If parties pursue a manifestly hopeless and improper case the consequences directly lie with them.
145. Before concluding these findings one further area is worthy of reiteration in terms of the reasons for the decision of the Court.
146. In the part of this Judgment headed Observations of the Court, a number of occasions were identified which provided an opportunity to the Respondents to reflect carefully on the status of the litigation in which they found themselves. At certain junctures important issues arose on which the Respondents effectively were unable to comment, the reason being that the points were basically unanswerable.
147. Expressed another way, the Respondents were accorded several invitations to come to terms with persuasive arguments which could well have led them to a more orderly outcome for all concerned. Instead, they continued on even in the face of questions from the Judge which they could not answer.

148. Rather than recognising, addressing and mitigating their difficulties, they chose to ignore them. In the opinion of the Court, this was a very serious misjudgement. They pursued a defence which was manifestly hopeless and in some material aspects highly improper.
149. The Applicants' application for indemnity costs against the First Respondent, the Third Respondent and the Fourth Respondent is granted.

Dated this 24th day of February 2023

Robin McMillan

**The Honourable Mr. Justice Robin McMillan
Judge of the Grand Court**