IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. GC 80 of 2022

IN THE MATTER OF THE REGISTERED LAND ACT (2018 REVISION)

BETWEEN

CAYMAN KAI PROPERTY OWNERS ASSOCIATION

Plaintiff

AND

SEA WATCH VILLAS LTD

Defendant

ON THE PAPERS

Written Submissions from: **Walkers on behalf of the Plaintiff**
Jackson Law on behalf of the Defendant

Before: **Hon Justice Alistair Walters (Actg.)**

Draft circulated: **20 January 2023**

Written Decision Delivered: **27 January 2023**

HEADNOTE

Costs of unsuccessful application for leave to appeal - Circumstances in which indemnity or wasted costs might be awarded.

COSTS JUDGMENT

1. These proceedings were started by the Plaintiff which is an unincorporated association (the "Association") by way of Originating Summons dated 6 April 2022. The members of the Association

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are some of the owners of houses and land that are within an area known as Cayman Kai which comprises approximately 350 parcels of land. As between the various parcels of land within Cayman Kai there are restrictive covenants (the "Restrictive Covenants").

2. The proceedings alleged that the Defendant which is the registered proprietor of Block 33B, Parcel 139 (the "Property") which is included within Cayman Kai breached the Restrictive Covenants.

3. The Plaintiff's claim was put as follows:

> *"1. A declaration that the Defendant's construction of the proposed dwelling (the "**Dwelling**") on Block 33B, Parcel 139 of Registration Section Cayman Kai is in breach of the restrictive covenants registered thereon.*
> *2. Until further order of the Court, orders to restrain the Defendant from continued construction of the Dwelling as proposed.*
> *3. Such further or other relief as this Honourable Court thinks fit.*
> *4. Costs."*

4. After a number of affidavits were exchanged, the Defendant issued a summons dated 9 August 2022 seeking an order striking out the proceedings pursuant to GCR O. 18, r. 19 (a) and (d) on the basis that the Plaintiff did not possess the requisite *locus standi* whether in its own capacity or in a representative capacity to bring and continue the proceedings.

5. In response, although not accepting that it was necessary, the Plaintiff issued its own summons dated 19 July 2022 seeking leave to amend its Originating Summons:

5.1 To add after the name of the Association as Plaintiff the words "*On behalf of the Proprietors*" and to then list the names of owners of homes and land in Cayman Kai.

5.2 To add after the name of the Association in the body of the Originating Summons the words "*... as the representative for and on behalf of the proprietors set out herein...*".

5.3 A minor amendment to the reference to the registration details of the Property.

6. The basis for the Plaintiff's application to amend the Originating Summons was GCR O.15, r. 12 which provides that:

> *"12.(1)Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and, unless the Court otherwise order, continued, by or against any one or more of them as representing all of as representing all except one or more of them."*

7. Although relying on GCR O.15, r. 12, the Plaintiff's counsel argued at the hearing and at the hearing of the subsequent application for leave to appeal, that the decision of Sanderson J. in the case *Cayman Kai Property Owners Association v. Cayman Island Basic Industries Limited, North Coast Resort Management Limited and Cayman Kai Development Limited*[1] constitutes binding authority that the Plaintiff did have *locus standi* to bring this action in its own name.

8. Having heard the parties, I indicated to them that I was of the opinion that the 2006 decision of Sanderson J. had not specifically addressed the question of whether the Association could properly act in a representative capacity on behalf of some or all of its members and did not appear to have been appointed in that capacity. I did not agree with Mr Basdeo that for the purposes of GCR O. 15, r.12 it could properly be said that the Association shared the same interest as its members for the purposes of these proceedings. That being the case, in my view, the proposed amendment did not cure the Plaintiff's lack of standing to act as the Plaintiff on behalf of the relevant members. It seemed to me that the correct format for an amendment would have been for one of those members individually to be substituted as the Plaintiff on behalf of the remainder.

9. Moreover, in my opinion, the action should not have proceeded by way of Originating Summons at all. By virtue of the issues raised it should have proceeded by way of a writ action with detailed pleadings. During the hearing on 18 August 2022 I gave consideration to whether an order should be made pursuant to GCR O. 28, r.8 that the proceedings should be continued as if they had been commenced by way of a writ and whether the affidavits filed could stand as pleadings.

10. Taking into account the issues in relation to the capacity of the Plaintiff and the fact that the affidavits filed on behalf of the parties (and in particular the Plaintiff) did not address the precise relief sought by the Plaintiff beyond very simplistic reference to an injunction and declaration, I took the view that the overriding objective would not be served by making any orders under GCR O.28, r.8. To do so

[1] [2006 CILR 117].

would either require substantial amendments to the Originating Summons with consequential pleadings served by the Defendant (the costs of which would be the responsibility of the Plaintiff in the usual way) or further detailed exchanges of affidavit evidence setting out the complete case of the aggrieved members of the Association and responsive affidavits from the Defendant.

11. As a result, at the hearing on 18 August 2022, I made an order striking out/dismissing the proceedings on the basis that it would be most expedient for the aggrieved members of the Association to re-start a properly pleaded writ action. As a consequence, the parties filed an agreed order on 30 August 2022 giving effect to my decision and providing that the Plaintiff shall pay the Defendant's costs of an incidental to the proceedings to be taxed if not agreed[2].

12. On 16 November 2022, I heard an application by the Plaintiff for leave to appeal against my decision. For the reasons that I gave on 30 November 2022[3], I refused to give leave to appeal.

13. The question now is what costs order should be made in relation to the application for leave to appeal and the costs of preparing the written arguments in relation to that issue.

14. Pursuant to GCR O.62, r.4, the Court has a wide jurisdiction as to costs. Sub-rule (2) sets out the general rue as follows:

> *"(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court."*

GCR O.62, r.4, (5) makes it clear that:

> *"If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."*

15. The position of the Defendant in relation to costs is as follows:

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[2] For the avoidance of doubt, where the basis of taxation (standard or indemnity) is not stated in an order then taxation is on the standard basis (GCR O. 62, r.13 (4).

[3] Some of which I have repeated here.

15.1 The case should have been commenced by way of writ from the outset, not by way of originating summons.

15.2 At the hearing on 18 August 2022, the court raised questions about the nature of the relief sought by the Plaintiff and how it had been pleaded and was of the view that considerable and disproportionate costs would be incurred in treating the action as one started by way of writ pursuant to GCR O. 28, r.8, hence the court's decision to dismiss the action. On that basis, it is argued that the Plaintiff should not have incurred any further costs by seeking leave to appeal against that decision but should have started fresh proceedings. Even if an appeal was successful it was argued that the Plaintiff would just end up where it started, having to amend substantially its original pleadings.

15.3 On 3 November 2022, prior to the hearing of the unsuccessful application for leave to appeal, the Defendant put the Plaintiff on notice that it was of the view that the application for leave to appeal was meritless and frivolous and, if unsuccessful, it would be seeking costs on an indemnity basis and/or a wasted costs order.

15.4 In relation to the question of wasted costs, it says that the Plaintiff and/or its Counsel acted negligently in continuing to pursue what the Defendant describes as ill-fated proceedings, despite the fact that it says that it was obvious that the Plaintiff was unlikely to succeed in respect of its application for leave to appeal. It also raises the question of a wasted costs order against the Plaintiff's counsel on the basis that it says that the Plaintiff is an unincorporated association against which a costs order might not be enforceable, which lacked capacity and as a result of failing to file the correct originating process all of which left the proceedings doomed to failure[4].

16. An award of costs on an indemnity basis means that:

> *"On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party; and in these rules the term "the indemnity basis" in relation to the taxation of costs shall be construed accordingly.."*[5]

[4] This contention can only relate to the application for leave to appeal as the earlier costs have already been provided for in the order filed on 30 August 2022.
[5] GCR O. 62, r. 13 (3).

17. An order for wasted costs is governed by GCR O.62, r.11 which states:

> *"11. (1) In Part III of this Order the expression "attorney" shall include a "foreign lawyer".*
> *(2) 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.*
> *(3) Subject to the following provisions of this rule, where it appears to the Court that costs have been incurred improperly, unreasonably or negligently in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition, the Court may order –*
> *(a) the attorney whom it considers to be responsible (whether personally or through an employee or agent) to repay to his client costs which the client has been ordered to pay to any other party to the proceedings; or*
> *(b) the attorney personally to indemnify such other parties against costs payable by them.*
> *(4) The amount payable under a wasted costs order made under paragraph 3(b) of this rule shall be taxed on an indemnity basis."*

18. The Defendant says that the liability of the Plaintiff's Counsel is plain and obvious and can be dealt with by the Court on a summary basis without evidence or investigation[6].

19. The Defendant refers to the case of *Myers v Elman*[7] in which a wasted costs order was sought against a solicitor. The particular misconduct alleged was that the solicitor had delivered defences which he must have known or suspected to be false and that he had prepared and permitted his clients to make affidavits of documents which were inadequate and false. In *Myers v Elman,* Viscount Maugham said at 489:

> *"...I think it is the duty of the Court to be equally anxious to see that solicitors not only perform their duty towards their clients, but also towards all those against whom they are concerned..."*

Furthermore, at para. 45, 302:

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[6] GCR O. 62, r. 12 (1).
[7] [1939] 4 All ER 484, [1940] AC 282.

> *"The primary object of the Court is not to punish the solicitor but to protect the client who has suffered and to indemnify the party who has been injured. Order LXV, s.11 of the Rules of the Supreme Court provides the necessary machinery where the person injured is the client of the solicitor. It is a rule supplementary to the summary jurisdiction of the Court. It is not limited to misconduct or default, but expressly extends to costs incurred improperly or without reasonable cause, or which have proved fruitless by reason of undue delay in proceeding. . . The jurisdiction to order the solicitor to pay costs to the opposite party is exercised on similar grounds."*

20. *Myers v Elman* was considered by the Court of Appeal in *Gill v Seymour (trading as ATTIC BILLARD LOUNGE)*[8] which came to summarize what are described as the five fundamental propositions for which *Myers v Elman* stands as authority:

> *"(1) The court's jurisdiction to make a wasted costs order against a solicitor is quite distinct from the disciplinary jurisdiction exercised over solicitors.*
> *(2) Whereas a disciplinary order against a solicitor requires a finding that he has been personally guilty of serious professional misconduct the making of a wasted costs order does not.*
> *(3) The court's jurisdiction to make a wasted costs order against a solicitor is founded on a breach of the duty owed by the solicitor to the court to perform his duty as an officer of the court in promoting within his own sphere the cause of justice.*
> *(4) To show a breach of that duty it is not necessary to establish dishonesty, criminal conduct, personal obliquity or behaviour such as would warrant striking a solicitor off the roll. While mere mistake or error of judgment would not justify an order, misconduct, default or even negligence is enough if the negligence is serious or gross.*
> *(5) The jurisdiction is compensatory and not merely punitive."*

21. The Court of Appeal in *Gill v Seymour*[9], went on to consider the term "negligent" in this context and held:

> *"...we are clear that 'negligent' should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession."*

22. The Defendant submits that the filing of an action by a plaintiff without the requisite *locus-standi* and by way of incorrect originating process, taken together with Counsel having been expressly

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[8] [2002 CILR 233] at 237 quoted the English Court of Appeal (per Bingham, M.R.) in *Ridehalgh v. Horsefield* [1994] Ch. at 227, also cited with approval by Smellie CJ in *Al-Ibraheem v Bank of Butterfield International (Cayman) Ltd* [2000 CILR 507].
[9] At 240.

notified of those deficiencies, still maintaining the proceedings and then filing a hopeless application for leave to appeal, amounts to the type of 'negligent' behaviour described in *Gill v Seymour*[10].

23. In its written submissions on costs, the Plaintiff's counsel make it clear that the Plaintiff does not resist an order for costs of the leave to appeal application to be taxed on the standard basis if not agreed.

24. The Plaintiff says that the general principles in relation to indemnity costs are well settled and were recently summarised by Segal J. in *Jafar v Abraaj Holdings* [11] as follows:

24.1 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 has conducted that part of the proceedings to which the order relates improperly, unreasonably, or negligently;

24.2 the nature of such an order is exceptional, although the jurisdiction is wide and flexible, allowing the Court to exercise its discretion as the circumstances of the case may require;

24.3 pursuing a weak claim will not ordinarily, 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 justify such an order; and

24.4 the principal consideration is not the substantive merits of the unsuccessful party's case, but his conduct in advancing a claim that he knew was meritless.

25. In *Ahmad Hamad Algosaibi and Brothers Company v Saad Investments Company Ltd*[12], Smellie CJ observed that (at paragraph 17):

> *"I proceed by emphasizing my acceptance of the principle that AHAB should not have an award of indemnity costs made against it simply to punish it for having failed in its claims. The issue here is whether AHAB conducted its claim 'unreasonably' or 'improperly' in the sense contemplated by GCR O. 62 r. 4(11). 'Unreasonable' or 'improper' in this context does not mean merely wrong or misguided in hindsight..."*

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[10] Again, in light of the order filed on 30 August 2022, it seems to me that these arguments can only relate to the conduct of the application for leave to appeal.
[11] Unreported, 17 January 2022 at paragraph 10.
[12] [2013 (2) CILR 344]

26. In *Sagicor General Insurance (Cayman) Limited v Crawford Adjusters (Cayman) Limited*[13], the Court held at paragraph 25 that:

> *"[t]he fact that the claim was novel and not very likely to succeed is not, in and of itself, a justification for awarding costs on the indemnity basis."*

27. In relation to the question of indemnity costs on a leave to appeal application the Plaintiff refers to *In the Matter of Trina Solar Limited*[14], in which Segal J. said at paragraph 12 that:

> *"I do not consider that the Applicant's conduct in applying for leave to appeal is unreasonable such that they should be ordered to pay the Respondents' costs on an indemnity basis. I consider, as I have said, that the Applicant's position is unmeritorious and that its legal arguments are bad but in this litigation which has been hard fought on both sides I do not consider it right to penalise the Applicant for pursuing all its remedies and an appeal (although I would remind the attorneys and counsel on both sides that they need on occasions to reduce the volume of their cross-complaints, made against each other's conduct and motives, and manage the litigation in a way that avoids unnecessary rhetoric and focuses on the needs and interests of their respective clients)."*

28. The Plaintiff does not accept that any aspect of its conduct has been improper, unreasonable or negligent. Furthermore, it argues that the authorities are clear that being wrong or misguided in hindsight is insufficient conduct to require indemnity costs. The Plaintiff submits that the issues in dispute were not straightforward and each of the Plaintiff's grounds were entirely arguable and proper to make. It says that whilst the Court may have disagreed with each of the grounds for leave to appeal, this does not mean it was improper, unreasonable or negligent for the Plaintiff to advance them.

29. Finally, it makes the point that the observations in *Trina Solar* are particularly relevant. On this basis, it argues the Defendant's application for indemnity costs must fail.

30. The principles that the Court should apply when considering an application for leave to appeal have been helpfully set out by Doyle J. in a recent group of matters[15]. The judge referred to the case of

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[13] [2011 (2) CILR 471].
[14] Unreported, 19 July 2017.
[15] Abbreviated *Chia Hsing Wang v Credit Suisse AG and Credit Suisse London Nominees Ltd* FSD 262 of 2021, 10 May 2022

Telesystem International Wireless Incorporated v CVC/Opportunity Equity Partners L.P.[16] which set out the test to be applied"

> "*The general test if whether leave to appeal should be granted is: Does the appeal have a real (i.e. realistic, not fanciful) prospect of success? .... In exceptional circumstances leave will be granted even where no such prospect exists if the appeal involved an issue which should be examined by the Court of Appeal in the public interest, e.g. when a public policy issue arises or a binding authority requires reconsideration. The relative significance of the issues and costs necessary to examine them will be a relevant factor.*
>
> *In an appeal on a point of law (including on the ground that a finding or the lower court is unsupported by evidence), leave should not be granted unless the court considers there is a real prospect that the Court of Appeal will come to a different conclusion that will materially affect the outcome of the case...*
>
> *If the court is unsure whether leave should be granted, it should then refuse leave and allow the Court of Appeal to decide the matter."*

31. These are the principles that I applied when refusing leave to appeal. As I have mentioned above, I was not of the view that the Plaintiff had a reasonable prospect of success or that there were any public interest grounds that might justify giving leave. As Doyle J. mentioned in the *Chia Hsing Wang* case[17], the jurisdiction *"The jurisdiction of a judge to give or to refuse leave to appeal from his own decision "is a very delicate one".* An appellant has a right to seek leave to appeal and, if unsuccessful, has a right to seek leave direct from the Court of Appeal (and might be successful). As Smellie CJ said in *Ahmad Hamad Algosaibi and* Segal J. discussed in *Trina Solar*, in the absence of unreasonable behaviour (possibly closer to behaviour amounting to an abuse of process), pursuing a wrong, misguided or unmeritorious application for leave to appeal does not in itself justify the award of indemnity costs. The question is whether the paying party conducted itself improperly, unreasonably, or negligently.

32. Having considered the arguments put forward I am not of the view that the Plaintiff has behaved in a way that could justify an order for indemnity costs against in in connection with the unsuccessful application for leave to appeal. It disagreed with my decision, sought leave to appeal and was unsuccessful. Whether it seeks leave from the Court of Appeal is a separate matter. Having decided

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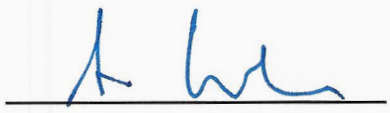
[16] 2001 CILR N-21.
[17] Paragraph 6 of the judgment, quoting Malone CJ in *Universal Surety.*

that, I certainly do not think that there is any question of a wasted costs order against the Plaintiff's counsel and have considered that issue no further.

33. The Plaintiff has raised a question about the necessity for a hearing in relation to the application for leave to appeal and the cost associated with that and the costs incurred in dealing with the costs argument itself. The hearing of the application for leave to appeal was in my view of some use and the issues which were developed went beyond the parties' written arguments. I have dealt with the question of the cost of that application on the papers without necessitating a further hearing. Although some time has been spent by the parties on that I do not see any reason to separate those costs from the costs of the application for leave to appeal and on that basis order that all the costs of the applications for leave to appeal (including in relation to costs) are to be paid by the Plaintiff on the standard basis to be taxed if not agreed.



Hon Justice Alistair Walters
Acting Judge of the Grand Court