COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2013/CLE/gen/01658 and 2015/CLE/gen/00857

BETWEEN

LOUIS M. BACON

Plaintiff

and

(1) JONES COMMUNICATIONS LIMITED

First Defendant

(2) WENDALL JONES

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mrs. Janet "Lisa" Bostwick-Dean and Mrs. Kelly Bostwick-Toote of Bostwick & Bostwick for the Plaintiff
Mr. Owen C.B. Wells of McKinney Turner & Co. for the Defendants

Hearing Date: 7 February 2018

Costs – Taxation – Application for indemnity costs – Deliberate decision to withhold documents – Flouting discovery orders – Unreasonable conduct – Exceptional and egregious – Section 30 (1) of the Supreme Court Act - Order 59 Rules 2 and 3 of the Rules of the Supreme Court

The Plaintiff, the successful party in two discovery applications, applies for costs to be paid to him on an indemnity basis. The Plaintiff says that this is a proper case for an award of indemnity costs and the grounds for such an award are strengthened by the Ruling of the Court on 9 January 2018 and also, in light of the Defendants' conduct in continuing to withhold documents relevant to an issue in these actions which they did not deny existed in opposing the Discovery Applications. The Plaintiff argues that the Defendants' conduct was so unreasonable that it could properly be regarded as exceptional. The Plaintiff further states that the Defendants' unreasonable conduct has had significant consequences in both actions including the protracted delay in their commencement and elevated costs.

The Defendants oppose the application for indemnity costs and argue that there is no basis for it. They say that, in most cases where the issue of costs arises, the Court will award costs on a party to party basis, more commonly known as a standard basis and there is no need for the Court, in the exercise of its discretion, to depart from this principle. They say that the Defendants, in good faith, were of the opinion that the scope of discovery exceeded the proper limits of the issues as reflected in the pleadings. They also opine that the actions could be adjudicated fairly and properly on the discovery provided. They also say that they were of the belief, albeit misguided, that the Plaintiff's request for discovery was excessive, irrelevant and appeared to be a fishing expedition.

HELD: finding that the conduct of the Defendants was exceptional and egregious and awarding costs to the Plaintiff on an indemnity basis;

1. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. In most cases, such costs would be on a party to party basis. The Court, in the exercise of its wide discretion, may depart from this general principle where there are exceptional and egregious circumstances to do so.

2. The Defendants have flagrantly flouted discovery orders and ought to know that they are withholding documents relevant to both actions. The consequences of the Defendants' first withholding relevant documents and then unreasonably opposing the Plaintiff's applications have been severe and detrimental to the Plaintiff in that (a) he was forced to seek and obtain the documents from third parties; (b) the actions have not made any substantive progress since the applications were issued in March 2017; (c) the trial in the 2013 Action has now been adjourned twice; (d) the discovery application took up a considerable amount of the Court's time; and (e) he has incurred significant costs seeking disclosure of documents which should have been disclosed in the normal course of the proceedings in September 2016 at the latest.

3. The Defendants took a deliberate decision not to disclose documents because such disclosure may assist the Plaintiff's case and thereby undermine their claims not to have participated in a smear campaign and their defences of qualified privilege. This, to my mind, was very unreasonable so as to be properly regarded as exceptional and egregious.

RULING

CHARLES J:

Introduction

[1] On 9 January 2018, I ordered that the Defendants disclose, within fourteen (14) days hereof, all documents that are, or have been , in their possession, custody and power as set out in Schedule One namely:

a. Documents (including but not limited to, electronic and hardcopy correspondence notes, contracts and invoices); communications (including, but not limited to, emails, text messages, voicemail messages and communications via Blackberry Messenger, Twitter and Facebook); interview notes and transcripts; contracts; documents, communications and records relating to all payments made and received and all invoices submitted and received in relation to the Plaintiff and/or Peter Nygard and/or the Smear Campaign which is pleaded at paragraph 8 (c) of the Plaintiff's Writ of Summons filed on 19 June 2015 and;

b. Documents, communications and records relating to the Plaintiff's acceptance speech at the ceremony in New York at which he was given the Audubon Award which is pleaded at paragraphs 3 (a) to 3 (c) of the Defendant's Defence dated 27 April 2016 and/or to the allegations pleaded at the same paragraphs of the Defendants' Defence.

[2] I also ordered that the Second Defendant swears, within fourteen (14) days hereof, an affidavit explaining whether any document, or class of document specified and/or described in Schedule One has at any time been in his possession, custody or power but no longer is and that he details when he parted with it and what has become of it.

[3] My understanding is that, to date, the Defendants have failed and/or refused to comply with this Order. The Defendants have also not sought any extension of time to comply with this Order although I understand that the parties are awaiting a judgment from another judge which may assist them to determine a way forward with the many matters between the parties.

[4] That being said, as the successful party in the Ruling delivered on 9 January 2018 ("the Ruling"), the Plaintiff seeks an order that the Defendants pay him full indemnity for his costs of the consolidated applications.

[5] The Defendants oppose the application for indemnity costs and argue that there is no basis for it. They say that in most cases where the issue of costs arises, the

Court will award costs on a party to party basis, more commonly known as a standard basis and there is no need for the Court, in the exercise of its discretion, to depart from this principle.

[6] On 15 February 2018, I ordered that the Defendants do pay costs to the Plaintiff on an indemnity basis. I promised a written ruling. I do so now.

Costs

[7] The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. The Court has an unfettered discretion in determining the amount of costs that an unsuccessful party has to pay. However, this discretion ought to be exercised judicially, not whimsically or capriciously, but in accordance with established principles and in relation to the facts of the case and on relevant grounds connected with the case, which included any matter relating to the litigation, the parties' conduct in it and the circumstances leading to the litigation, but nothing else: see Buckley L.J. in **Scherer v Counting Instruments Ltd** [1986] 2 All ER 529 at pp. 536-537.

[8] The starting point in applications on this nature must be section 30(1) of the Supreme Court Act which provides:

> "**Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.**"

[9] The discretion to order costs in civil proceedings is further bolstered in Order 59, rule 3(2) of the Rules of the Supreme Court ("RSC") which provides:

> "**If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, 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.**"

[10] Similarly, Order 59, rule 2(2) of the RSC reads:

> "**The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order.**"

[11] Additionally, Order 59 rule 4 empowers the Court to deal with costs at any stage of the proceedings or after the conclusion of the proceedings.

Indemnity costs

[12] In **E.M.I. Records Ltd v Ian Cameron Wallace Ltd and another** [1983] 1 Ch. 59 it was held that the court has power in contentious proceedings to order the unsuccessful party to pay the successful party's costs on bases other than party and party and common fund basis under rule 28 (UK) and those other bases included orders for costs on an indemnity basis as well as on the solicitor and client basis and the solicitor and own client basis.

[13] **E.M.I. Records Ltd** was cited with approval by Sawyer CJ in **Levine v Callenders & Co. et al** 1998 BHS J. No 75. She stated at pp. 2-3:

> **"As I understand that decision, the Vice Chancellor held, among other things, that the wide discretion set out in section 50 of the Supreme Court of Judicature (Consolidation) Act 1925, (England) which was continued under s.51 of the 1981 Act gives the High Court of that country, the power to make an order for costs on "an indemnity" basis in inter partes litigation, particularly in cases involving contempt of court proceedings. In addition, he equated such an order to an order for costs on solicitor and own client basis under Order 62, r 29(1) of the English Rules of the Supreme Court."**

[14] The test for the award of indemnity costs was said in **Bowen-Jones v Bowen-Jones and others** [1986] 3 All ER 163 to be the process of "exceptional circumstances" and in **Connaught Restaurants Ltd v Indoor Leisure Ltd** [1992] C.I.L.L 798, it is said to be the presence of factors that take the case outside the run of normal litigation. In that case the factor was litigation was fought **"bitterly or unreasonably**."

[15] Upon considering an application for indemnity costs, Mr. Justice Rattee in **Atlantic Bar & Grill Limited v Posthouse Hotels Ltd** [2000] C.P. Rep. 32 referred to the decision of Knox J in **Bowen-Jones v Bowen-Jones and others** [1986] 3 All ER 163 in which Knox J cited a passage from the well-known judgment of Brightman L.J. (as he then was) in **Bartlett v Barclays Bank Trust Co. Ltd. (No. 2)**[1980] Ch. 515. Brightman L.J. had this to say at p.547:

> **"…It is not, I think, the policy of the courts in hostile litigation to give the successful party an indemnity against the expense to which he has been put and, therefore, to compensate him for the loss which he has inevitably suffered, save in very special cases. Why this should be, I do not know, but the practice is well-established and I do not think that there is any sufficient reason to depart from the practice in the case before me".**

[16] Mr. Justice Rattee continued:

> **"Knox J. applied that principle in the case before him. He relied also on the case of *Wailes v Stapleton Construction and Commercial Services Ltd and Unum Ltd. [1997] 2 L.L.R. 112,* in which Newman J said, at p.117:**
>
> > **'The circumstances in which an order for indemnity costs can be made, while an open ended discretion so far as the rules are concerned, is obviously one which must be exercised on judicial discretion.'**
>
> **Having then cited various authorities his Lordship went on to say:**
>
> > **'In summary, the position appears to be that, where there are circumstances of a party behaving in litigation in a way which can be properly categorized as disgraceful, or deserving of moral condemnation, in such cases an order for indemnity costs may be appropriate.'**
>
> **Newman J. went on to say this:**
>
> > **'There may be cases otherwise, falling short of such behaviour in which the Court considers it appropriate to order indemnity costs. <u>The threshold of qualification which a party would appear to have to establish is that there has been, on the party to be impugned by such an order, some conduct which can be properly categorized as unreasonable, and I would add to that in a way which the Court is satisfied constitutes unreasonableness of such a high degree that it can be categorized as exceptional</u>. There are varying ways in which the course of litigation, parties to it could be categorized as having behaved unreasonably, but one would not, simply as a result of that,**

> **decide that they should pay costs on an indemnity basis.'** [Emphasis added]

[17] In **Levine v Callenders & Co,** Sawyer CJ echoed the same sentiments and stated at p. 4:

> **"While I accept the general principle that the conduct of a party, in some cases, will justify an award of costs on an indemnity or solicitor and client basis, in my judgment conduct which would justify such an order would have to be egregious –for example, a breach of an undertaking by a party (as in the case of a Mareva injunction mentioned earlier –which is itself a specie of contempt) and contumacious contempt of court. A failure to comply with the rules of pleading is not, in my judgment, in and of itself, a reason to award costs on an indemnity basis."**

[18] A common thread running through these judicial authorities suggests that it is not possible to define the exact circumstances in which indemnity costs might be ordered. It therefore remains a matter for the judge exercising his discretion based on judicial principles. Typically, an award for costs on an indemnity basis can be made in exceptional cases where the conduct of a party can be considered egregious or where the conduct of a party can be properly categorized as disgraceful or deserving of moral condemnation.

Parties' submissions

[19] Learned Counsel Mr. Wells argued that the award of costs on an indemnity basis is an exceptional circumstance which must be justified based upon extraordinary factors aimed at punishing the party paying costs. Notwithstanding that it should never be the intention of the court to punish a party by the award of cost; this is generally the real outcome of such award. He submitted that in **Greenslade on Cost**, this point was phrased this way: "*From an analysis of the cases where costs were awarded on an indemnity basis the test in practice often appears to be the conduct of the paying party. This is so even though the expressed policy of the courts is not to use costs as a means of punishing a party*".

[20] Mr. Wells submitted that in most cases where the issue of costs arises, the Court would award costs on a party to party basis. The Court, in the exercise of its wide

discretion, would only depart from this general principle where there are exceptional and egregious circumstances to do so.

[21] Learned Counsel, Mr. Wells submitted that this is not a case to depart from the general principle as the Defendants in good faith were of the opinion and conducted this litigation on the premise that the scope of discovery sought by the Plaintiff exceeded the proper limits of the issues as reflected in the pleadings. The Defendants considered that the matter could be adjudicated fairly and properly on the discovery already provided. The Defendants next submitted that their belief, albeit misguided, was that the Plaintiff's request for discovery was excessive, irrelevant and appeared to be a fishing expedition to feed its evidentiary hunger in its eight (8) actions against Mr. Peter Nygard and others.

[22] Mr. Wells maintained that an award of indemnity costs at this interlocutory stage of the proceedings may be prejudicial to the Defendants.

[23] Learned Counsel Mrs. Bostwick-Dean who appeared for the Plaintiff submitted that this is a proper case for an award of indemnity costs and the grounds for such an award are further strengthened by the Ruling and also, in light of the Defendants' conduct in continuing to withhold documents relevant to an issue in these actions which they did not deny existed in opposing the Discovery Applications. Learned Counsel submitted that that conduct was (at the least) so unreasonable that it could properly be regarded as exceptional. It has had significant consequences for this litigation.

[24] Learned Counsel contended that in the case management of these trials, the original date for disclosure in the 2013 Action was 15 September 2016 and in the 2015 Action, it was 30 September 2016 ("the discovery orders"). According to her, the Defendants have flagrantly flouted the discovery orders and must have known that they were withholding documents relevant to these proceedings. They have not said the documents sought by the Plaintiff do not exist or are not in their possession. Rather they persisted in avoiding disclosing the documents

sought on the basis of relevance and made unfounded allegations against the Plaintiff that the Discovery Applications were a fishing expedition and/or for the Plaintiff to frame a new case and/or use it in extant litigations before the Court.

[25] According to learned Counsel, it is plain that the matters to which the documents relate are issues which arise on the pleadings in both actions. The Ruling makes clear that evidence relating to the circumstances of publication of the defamatory words (including the issue of malice on the part of the Defendants), the existence of a smear campaign and the Plaintiff's Acceptance Speech for the Audubon Award is relevant to both actions: see, in particular, paragraphs 40, 42, 45, 47, 49 and 50 of the Ruling. That much is clear from even a cursory analysis of the pleadings.

[26] Mrs. Bostwick-Dean next submitted that the Defendants were content for the Court to determine these actions without a full picture and the Plaintiff invites the Court to infer that the Defendants deliberately withheld relevant documents which would undermine their claims not to have participated in a smear campaign, and their defences of qualified privilege. This, according to her, strikes at the heart of what is required to achieve a fair trial.

[27] She further submitted that the Defendants had from the date of close of pleadings (i.e. 2 January 2015 in the 2013 Action and 7 July 2016 in the 2015 Action) to the date for filing the Lists of Documents (i.e. 15 September 2016 in the 2013 Action and 30 September 2016 in the 2015 Action) to disclose these documents, but failed to do so.

[28] The Defendants' discovery lists were filed late, on 18 November 2016, in breach of the original discovery deadlines. They contained just 17 documents which included 11 statements of case from previous proceedings which are publicly accessible and no electronic documents or emails: see Ms Afia's affidavit at paragraph 3.

[29] The Defendants have had ample opportunity to remedy the deficiencies in their disclosure. Having inspected the Defendants' disclosure on 20 December 2016, the Plaintiff's attorneys wrote to the Defendants regarding the deficiencies in their disclosure on 11 January 2017 and again on 26 January 2017 requesting voluntary disclosure of the documents sought. Those requests were ignored by the Defendants. The applications for discovery were issued on 27 March 2017. On 27 July 2017, the Defendants filed a supplemental list of documents disclosing the novel "Gone With The Wind" and some other documents.

[30] Mrs. Bostwick-Dean submitted that instead of complying with their disclosure obligations (albeit some six months after the original discovery deadlines), the Defendants have refused to co-operate and unreasonably opposed the applications on the spurious grounds that such documents were not relevant. It is plain, from the face of the pleadings, that these documents are strictly relevant, and were found by the Court to fall squarely within the documents sought by the Plaintiff: see paragraph 49 of the Judgment.

[31] Learned Counsel argued that there was no basis to oppose the applications and/or to criticise the Plaintiff's applications spuriously asserting that he was merely seeking to fish for evidence for use in other proceedings and/or frame a new case and/or use the documents in extant litigations before the Court. In any event, the Plaintiff could not use any such documents without the Court's permission.

Analysis and Conclusion

[32] The general rule is, in most cases where the issue of costs arises, the Court will award costs on a party to party basis. The Court does so in the judicial exercise of its discretion and would only depart from this course when there are exceptional and egregious circumstances to do so. It is not possible to define the exact circumstance in which indemnity costs might be ordered. Overall, it remains a matter for the judge exercising his discretion based on judicial principles but, as a rule, an award for indemnity costs can be made in

exceptional cases where the conduct of a party can be considered egregious or where the conduct of a party can be properly categorized as disgraceful or deserving of moral condemnation. Undoubtedly, each case will depend on its own peculiar facts and circumstances.

[33] The facts which gave rise to the Plaintiff's applications for indemnity costs have their genesis in two libel actions filed by the Plaintiff. The Plaintiff complained that the publications, broadcasted either on the Defendants' television station or published in their newspaper, the *Bahama Journal*, made seriously defamatory and false claims about him. In the 2013 Action, it is alleged that the Plaintiff is a racist and a supporter of the Ku Klux Klan who has sought to bar Black Bahamian people from Clifton Bay. In the 2015 Action, the Plaintiff is portrayed as a racist and white supremacist bent on ruling over native Bahamians and that there are reasonable grounds to suspect that he is guilty of causing the death of a man named Dan Tuckfield, and of his involvement in serious customs offences, drug offences and illegal drug trafficking.

[34] It is the Plaintiff's pleaded case in both actions that these false and defamatory words were published as part of a smear campaign designed to discredit him.

[35] The Defendants filed their defences on 24 November 2014 in the 2013 Action and on 27 April 2016 in the 2015 Action.

[36] In the 2013 Action, the Defendants' defences are summarised at paragraphs 13-16 of the Ruling. The Plaintiff's Reply is summarised at paragraph 17.

[37] In the 2015 Action:

(i) In respect of the first publication, the Defendants deny responsibility for publication on the basis that the words were fair comment on a matter of public interest and/or were published on an occasion of qualified privilege. Particulars of fair comment and qualified privilege are pleaded making reference to an interview given by Mr Keod Smith in which he referred to the Plaintiff's Acceptance Speech of the Audubon Award.

(ii) In respect of the second publication, the Defendants advance substantially the same defences and repeat the particulars of fair comment and qualified privilege: see paragraph 5(3)(c).

(iii) In their response to the plea of damages, the Defendants deny, at paragraph 8 that they have behaved maliciously or that they '*have conducted and/or continue to conduct a smear campaign against the Plaintiff*': paragraph 8(a).

[38] In the Reply to the 2015 Action filed on 23 June 2016 issue is joined and the Plaintiff disputes that the Defendants were entitled to succeed on defences of qualified privilege to the world at large: see paragraphs 3.2 to 3.4.4 and 4.2 to 4.3.3. A plea of malice is also raised to defeat the defences of qualified privilege and /or fair comment: paragraphs 4.4 to 4.4.4.

[39] The original date for disclosure was 15 September 2016 in the 2013 Action and 30 September 2016 in the 2015 Action: see Orders dated 24 August 2016 in both actions ("the discovery orders").

[40] I agree with the Plaintiff that the Defendants flagrantly flouted the discovery orders and ought to know that they are withholding documents relevant to both proceedings. Instead of disclosing the documents, they made unfounded allegations against the Plaintiff that the Discovery Applications were irrelevant and/or a fishing expedition and/or for use by the Plaintiff to frame a new case and/or for his use in extant litigations before the Court.

[41] It is evident from the Ruling that the matters to which the documents relate are issues which arise on the pleadings in both actions: see paragraphs 40, 42, 45, 47, 49 and 50.

[42] As learned Counsel Mrs. Bostwick-Dean correctly pointed out, the Defendants were happy for the Court to determine these actions without a full picture. It appears that the reason for deliberately withholding relevant documents in their possession, custody and power is that such disclosure may emasculate their

allegations that they did not participate in a smear campaign and/or their defences of qualified privilege.

[43] In my opinion, the Defendants have had ample opportunity to remedy the deficiencies in their disclosure. They simply ignored the two written requests by the Plaintiff's attorneys to do so. To my mind, the Plaintiff had no other recourse but to approach the Court. The consolidated applications for discovery were issued on 27 March 2017. On 27 July 2017, the Defendants filed a supplemental list of documents disclosing the novel "Gone With The Wind" and some other documents including emails that were sent to and from, or copied to Mr. Jones, and/or other employees or agents of Jones Communications Limited. Instead of complying with their disclosure obligations (some six months after the original discovery deadlines), the Defendants have failed and/or refused to co-operate and unreasonably opposed the applications on the grounds that such documents were not relevant. That submission did not find favour with the Court as is evident in paragraph 49 of the Ruling.

[44] Unquestionably, the consequences of the Defendants' first withholding relevant documents and then unreasonably opposing the Plaintiff's applications have been severe and detrimental to the Plaintiff in that (a) he was forced to seek and obtain the documents from third parties; (b) the actions have not made any substantive progress since the applications were issued in March 2017; (c) the trial in the 2013 Action has now been adjourned twice; (d) the discovery application took up a considerable amount of the Court's time; and (e) the Plaintiff has incurred significant costs seeking disclosure of documents which should have been disclosed in the normal course of the proceedings in September 2016 at the latest.

[45] Learned Counsel Mrs. Bostwick-Dean, correctly submitted, in my view, that the Defendants took a deliberate decision not to disclose documents because such disclosure may assist the Plaintiff's case and thereby undermine their claims not to have participated in a smear campaign and their defences of qualified

privilege. This was very unreasonable so as to be properly regarded as exceptional. Since the Defendants do not deny that the documents sought existed and are and/or were in their possession, custody or power all along, their conduct can properly be categorised as disgraceful, and deserving of moral condemnation. The Defendants not only sought to withhold relevant documents but also, in opposing the Plaintiff's applications for discovery made unfounded allegations about the purposes for which the Plaintiff sought the documents. In my considered opinion, such conduct was exceptional and warrants an award of indemnity costs in favour of the Plaintiff. I so find.

Dated the 6th day of April, A.D., 2018

Indra H. Charles
Justice