COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2012/CLE/gen/1399

BETWEEN

SUMNER POINT PROPERTIES LIMITED

Applicant

-AND-

DAVID E. CUMMINGS

1st Respondent

-AND-

BRYAN MEYRAN

2nd Respondent

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mrs. Tanya Wright of World Legal Services for the Applicant
Ms. Travette Pyfrom of Pyfrom Farrington Chambers for the Respondents

Hearing Dates: 15 September, 16 September, 21 September 2020

Costs – Indemnity costs – Whether Applicant can now seek indemnity costs - Reasonable costs – S 30(1) Supreme Court Act – RSC O 59 rr 2(2) and 3(2) applied

On 16 August 2018, Bain J. found that the 1st and 2ndRespondents ("the Respondents") were guilty of breaching the terms of an Injunctive Order and were in contempt of court. Bain J. retired before sentencing the Respondents. She referred the matter to me for sentencing. On 12 March 2020, I sentenced each Respondent to a fine of $25,000 to be paid within six days or, in default, three months imprisonment at the Bahamas Department of Corrections ("the Sentencing Ruling"). I stayed the Sentencing Ruling as the Respondents had appealed the decision of Bain J and a ruling of the Court of Appeal was imminent. On 30 July 2020, the Court of Appeal dismissed the 1st Respondent's appeal and affirmed the decision of Bain J. to hold him in contempt of court. The appeal against the 2nd Respondent was upheld thereby quashing the decision of Bain J.

The Applicant now applies to enforce the Sentencing Ruling against the 1st Respondent and also to award costs on an indemnity basis in relation to the sentencing hearing on the grounds that the conduct of the 1st Respondent offends the laws of The Bahamas and that he was insincere and unapologetic at the sentencing hearing. The 1st Respondent opposes the

application arguing that in its Notice of Motion, the Applicant sought costs of and incidental to the application and cannotnow turn around and seek indemnity costs. In any event, says the 1st Respondent, costs were already awarded at the end of the hearing for contempt of court and no additional costs should be awarded for the sentencing hearing. The Respondent also argues that there is nothing "exceptional" or "disgraceful" or "egregious" in the conduct of the 1st Respondent to justify an award of costs on an indemnity basis to the Applicant.

HELD: The 1st Respondent shall pay costs on a party to party basis to the Applicant which is assessed at $30,342.25.

1. A judge in a contempt hearing cannot order costs in a subsequent sentencing hearing which did not take place before that judge unless there was a prior agreement between the parties and the court. In any event, Bain J did not make an order for costs in the sentencing hearing.

2. There is no principle in law which precludes an applicant from applying for costs on an indemnity basis even if it were not expressly stated in the prayer for relief in its Notice of Motion. In the interest of justice, the Court has power to amend the Notice of Motion at any stage of the proceedings.

3. The court has power in contentious proceedings to order the unsuccessful party to pay the costs of the successful party on bases other than party to party. One of those bases includes orders for costs on an indemnity basis: **E.M.I. Records Ltd. V Ian Cameron Wallace Ltd and another** [1983] 1 Ch. 59 considered.

4. 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 can be properly categorized as disgraceful or deserving of moral condemnation: **Levine v Callenders & Co. et al** [1998] BHS J. No. 75 – per Sawyer CJ at page 4.

5. The facts of the present case do not justify an order for costs on an indemnity basis as the conduct of the 1st Respondent cannot be categorized as "exceptional" or "disgraceful" or "egregious".Costs aretherefore awarded to the Applicant on a party to party basis.

6. In civil proceedings, costs are entirely discretionary; see section 30(1) of the Supreme Court Act, Order 59 rr 2(2) and 3(2) of the Rules of the Supreme Court ("RSC").

7. Costs must be reasonable. In deciding what would be reasonable the court must take into account all the circumstances of the case, including but not limited to (a) any order that has already been made; (b) the care, speed and economy with which the case was prepared; (c) the conduct of the parties before as well as during the proceedings; (d) the degree of responsibility accepted by the legal practitioner; (e) the importance of the matter to the parties; (f) the novelty, weight and complexity of the case; and (g) the time reasonably spent on the case:**McPhee (as Administrator of the Estate of Thelma Mackey) v Stuart** [2018] 1 BHS J. No. 18 [unreported] applied.

8. Reasonable costs are awarded to the Applicant in the sum of $30,342.25.

RULING

Charles J:

Introduction

[1] The Applicant brought committal proceedings against the 1st and 2nd Respondents (collectively "the Respondents") for alleged breaches of an Injunctive Order made by Bain J. on 19 October 2012. The Injunction was sought and granted to restrain the 1st Respondent, his servants and/or agents from trespassing on two tracts of land located on the Island of Rum Cay, The Bahamas.

[2] On 16 August 2018, Bain J. found that the Respondents were guilty of breaching the terms of the Injunctive Order and were in contempt of court. Shortly after finding the Respondents guilty of contempt of court, Bain J. retired and referred the matter to me for sentencing.

[3] I conducted a sentencing hearing and, on 12 March 2020, I sentenced each Respondent to a fine of $25,000 to be paid within six days or, in default, three months imprisonment at the Bahamas Department of Corrections ("the Sentencing Ruling").

[4] I stayed theSentencing Ruling upon being advised that the Respondents had appealed the decision of Bain J and a decision of the Court of Appeal was imminent.

[5] On 30 July 2020, the Court of Appeal dismissed the 1st Respondent's appeal and affirmed the decision of Bain J. to hold him in contempt of court. The appeal against the 2nd Respondent was upheld thereby quashing the decision of Bain J.

[6] Shortly after the Court of Appeal Ruling, the Applicant applied to the court to enforce the Sentencing Ruling against the 1st Respondent. The Applicant also sought costs on an indemnity basis in relation to the sentencing hearing on the

grounds that the conduct of the 1st Respondent offends the laws of The Bahamas and that he was insincere and unapologetic at the sentencing hearing.

[7] Other issues were raised which are not germane to this Ruling. The single issue before the court relates to costs to be paid by the 1st Respondent to the Applicant.

The law on indemnity costs

[8] There is no doubt that the court has the jurisdiction to determine whether indemnity costs ought to be ordered.

[9] A good starting point is the case of **E.M.I. Records Ltd v Ian Cameron Wallace Ltd and another**[1983] 1 Ch. 59 where 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.

[10] **E.M.I. Records Ltd**was cited with approval by Sawyer CJ in **Levine v Callenders& Co. et al**[1998] BHS J. No 75 where 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."**

[11] The test for the award of indemnity costs was said to be the process of "exceptional circumstances":**Bowen-Jonesv Bowen-Jones and others** [1986] 3 All ER 163 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**."

[12] 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-Jonesand 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".**

[13] 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</u>**

> **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. 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]

[14] In **Levine v Callenders& Co,** Sawyer CJ echoed similar 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."** [Emphasis added]

Discussion, analysis and conclusion

[15] 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 principle when there are exceptional circumstances to do so. Usually, 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.

[16] A court, in making an order for indemnity costs, will have regard to conduct which is so unreasonable during the course of the trial to justify an order for indemnity costs.In this regard, I am guided by the dicta of Judge Peter Coulson QC in **Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd** [2005] EWHC 2174. At [14], his Lordship stated:

> **"I do not believe that unnecessary or unreasonable pursuit of litigation must involve an ulterior purpose in order to trigger the court's discretion to order indemnity costs. I consider that to**

maintain a claim that you know, or ought to know, is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs."

[17] A useful approach to adopt is to be found in **Cook on Costs 2015** at [24.9] under the heading **"Culpability and abuse of process"**.The learned author said:

> **"Traditionally costs on the indemnity basis have been awarded only where there has been some culpability or abuse of process such as:**
>
> **(a) deceit or underhandedness by a party;**
> **(b) abuse of the courts procedure;**
> **(c) failure to come to court with open hands;**
> **(d) the making of tenuous claims;**
> **(e) reliance on utterly unjustified defences;**
> **(f) the introduction and reliance upon voluminous and unnecessary evidence; or**
> **(g) extraneous motives for litigation.**
>
> **What is clear is that the exercise of the court's discretion is best considered by reference to specific examples of where the court has made indemnity costs orders. It is one of those situations where it is hard to pinpoint specific conduct, but one knows it when one sees it!"**

[18] The concept of unreasonableness in **Atlantic Bar & Grill Limited v Posthouse Hotels**[supra] involves conduct which was outside the norm. This concept coupled with the list enumerated by **Cook on Costs**illustrate examples of circumstances where the court may make an award of costs on an indemnity basis.

[19] In the present case, learned Counsel for the 1st Respondent, Ms. Pyfrom submitted that the Applicant has not made out a case for indemnity costs which ought not to be granted over and above the costs ordered by Bain J in her judgment dated 18 August 2018.She next submitted that the Applicant has not produced a single authority in support of its position that indemnity costs or any costs are usually awarded at the end of a sentencing hearing; costs are awarded at the end of the trial for contempt of court. She also submitted that there is not a single authority which supports an application for costs of sentencing as a separate issue from the costs of the contempt application. The sentencing flows

from the finding of contempt and any order for costs made vis-à-vis the contempt application equally applies to the sentencing hearing which arises as a result of the finding of contempt.

[20] Bain J. did not deal with the issue of costs in the sentencing hearing. She could not because she did not hear the sentencing of the Respondents.She could have if the parties had expressly agreed that the application for costs was an "umbrella application" as Ms. Pyfrom labelled it. There was no such agreement by the parties or order of the learned judge to that effect.

[21] Ms. Pyfrom next submitted that, in its Notice of Motion for Contempt filed on 18 May 2015,the Applicant sought, in the prayer for relief:

> **"1. An Order that the 1st Respondent, David E. Cummings, do stand committed to Her Majesty's Prison at Fox Hill for his contempt of this Honourable Court;**
>
> **2. .....**
>
> **3. An Order that the 1st Respondent and 2nd Respondent do pay the costs of and incidental to this application."**

[22] According to Counsel, the Applicant is bound by its Notice of Motion and cannot, at the sentencing stage, change its position.

[23] In my judgment, there is no principle in law that precludes the Applicant from applying for costs on an indemnity basis even if it were not expressly stated in the prayer for relief in its Notice of Motion. In the interest of justice, the Court has power to amend the Notice of Motion at any stage of the proceedings.

[24] That being said, I did not find that the 1st Respondent's conduct in the sentencing hearing fell outside of the norm to be regarded as "disgraceful"or "egregious" or "exceptional." Ms. Wright complained that his apology was insincere and came very late in the hearing. This is what I stated in the Sentencing Ruling at paragraph 14. Ms. Pyfrom now points out that an apology could only have been made when the 1st Respondent tookthe witness stand. I agree.

[25] In my considered opinion, the facts of this case do not justify an order for costs on an indemnity basis. Such an order would be overly harsh and draconian.

[26] I willtherefore order that the 1st Respondent, David E. Cummings do pay costs to the Applicant on a party to party basis.

Reasonable costs

[27] The issue of costs has always been a vexing one. Sometimes, it drags on longer than the actual hearing. Next, reasonable costs do not mean exaggerated costs. As often happens in this jurisdiction, there is little or no receipt to vouch what the client pays to his attorney(s); the result being that the amount of costs sought by successful parties is scaled upwards leaving the unsuccessful party to try to minimize those costs.

[28] The Applicant has submitted three invoices from three different attorneys who had carriage of this matter during the sentencing phase and this hearing. The Applicant seeks costs between $40,000 and $58,000. The 1st Respondent proposes$15,000.

The law

[29] In civil proceedings, costs are entirely discretionary. Section 30(1) of the Supreme Court Act 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.**"[Emphasis added]

[30] The principle that costs are discretionary is further fortified in Order 59, rule 2(2) of the Rules of the Supreme Court ("RSC") which 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."[Emphasis added]

[31] Order 59, rule 3(2) of the RSC is helpful. It 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.**"

[32] Costs must be reasonable. There is no gainsaying to that. There are certain factors that the Court must consider in determining what are reasonable costs. In **McPhee (as Administrator of the Estate of Thelma Mackey) v Stuart** [2018] 1 BHS J. No. 18 [unreported] at [8], this Court enumerated the factors as:

> **"In deciding what would be reasonable the Court must take into account all the circumstances, including but not limited to:**
>
> **a) any order that has already been made;**
>
> **b) the care, speed and economy with which the case was prepared;**
>
> **c) the conduct of the parties before as well as during the proceedings;**
>
> **d) the degree of responsibility accepted by the legal practitioner;**
>
> **e) the importance of the matter to the parties;**
>
> **f) the novelty, weight and complexity of the case; and**
>
> **g) the time reasonably spent on the case."**

[33] Having scrutinized the three Bills of Costs, I will make the following awards:

- Mr. Thompson's fees for professional services $15,000.00
- Mr. Lundy's two appearances before me $ 1,500.00
- Mrs. Wright's appearances on the two occasions before me and the time reasonably spent in preparing for this hearing $10,000.00
- Out of pocket expenses incurred by the Applicant $ 3,842.25

TOTAL	**$ 30,342.25**

[34] Costs in the sum of $30,342.25 are awarded to the Applicant to be paid within 21 days hereof.

[35] Last but not least, I am extremely grateful to both Counsel for their comprehensive submissions which were prepared with short deadlines.

Dated this 21st day of September, A.D., 2020

Indra H. Charles
Justice