In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. 188

BETWEEN:

GLOYD ROBINSON **Plaintiff**

-and-

THE BERMUDA CIVIL AVIATION AUTHORITY

First Defendant

-and-

THE MINISTER OF TRANSPORT **Second Defendant**

Before: **The Honourable Chief Justice Hargun**

Appearances: **Mr Vaughan Caines of Forensica Legal for the Plaintiff**
Mr Allan Doughty of MJM Limited for the First Defendant

Date of Judgment: **22 November 2023**

JUDGMENT (Costs)

Application for indemnity costs following a successful strike out application; principles to be applied

HARGUN CJ

Introduction

1. By Judgment dated 6 October 2023, this Court held that having regard to the findings that (i) Mr Robinson does not have the legal standing to pursue these proceedings; (ii) any alleged breach of the Bribery Act 2016 does not give Mr Robinson a private law cause of action which he is able to pursue in these proceedings; (iii) the pursuit of the cause of action based upon tortious interference is not sustainable in all the circumstances; (iv) Mr Robinson is unable to sustain a stand-alone cause of action based upon the principle of vicarious liability of an employer for the wrongful acts of the employee; and (v) the commencement of these proceedings was an abuse of process given that the appropriate challenge to the alleged misconduct on the part of Mr Lynch-Wade should have been made by way of an application for judicial review, the claims made by Mr Robinson in the Statement of Claim must be struck out.

2. Following the delivery of the Judgment the Bermuda Civil Aviation Authority ("**BCAA**"), the First Defendant, makes this application by written submissions, dated 16 October 2023, that the costs of the BCAA, for all stages of these proceedings, including this application, be awarded against Mr Robinson, the Plaintiff, on an indemnity basis, to be taxed if not agreed. Mr Robinson opposes that application and has filed written submissions, dated 23 October 2023. The Court agreed to determine this application on the papers.

3. The BCAA submits that in this case the following misconduct of Mr Robinson falls "out of the norm", and should result in an order for indemnity costs, namely: (i) the

filing of the writ, whose pleaded causes of action can only be described as unreasonable to a high degree, in that they lack any legal foundation and were doomed to fail from the outset; (ii) the pointless advancement and aggressive pursuit of allegations of dishonesty or impropriety against Mr Tariq Lynch-Wade and the BCCA; (iii) an attempt to turn Mr Robinson's claim into an unprecedented factual enquiry by entering the evidence material that alleged misconduct on the part of Mr Lynch-Wade, that have no bearing on the issue of whether Mr Robinson had pleaded case that was not doomed to fail; (iv) filing a right of action which was found to be an exercise in futility and an abuse of process and that the claim should have been brought to an application seeking leave to issue judicial review proceedings; (v) failing to disclose that the company Mr Robertson reported to act for, Jet Test International Limited ("**JTIL**"), had been in liquidation, which begs the question as to whether the Joint Provisional Liquidators of the company were aware that these proceedings had been filed; and (vi) failing to advise the Court, at the outset, that the writ, was filed in Mr Robinson's name, because the Plaintiff was not allowed to list JTIL as a plaintiff to the action.

4. In response, Mr Robinson points out that JTIL was in fact not in liquidation at the time these proceedings were filed and at the date of the hearing seeking to strike out the Statement of Claim. In that regard Mr Robinson has produced a Tomlin Order filed in the Supreme Court of the Commonwealth of The Bahamas dated 24 February 2023 which records the removal of the Joint Provisional Liquidators of JTIL. Mr Robinson contends that whilst he accepts that the Court has struck out the proceedings and the Court has made a number of legal rulings which are against him, the conduct of the proceedings was not so unreasonable so as to take it out of the norm and thereby warrant an order of indemnity costs against him. He accepts that costs should be awarded against him on the standard basis.

5. In *Bidzina Ivanishvili v Credit Suisse Life (Bermuda) Limited* [2022] SC (Bda) 56 Civ (25 July 2022) this Court held at [76] that the Court of Appeal in *Crisson v Marshall Diel & Myres Limited* [2021] CA (Bda) 13 Civ (Costs) applied the test for indemnity

costs as reflected in the English case law and in particular the judgment of Christopher Clarke J (as he then was) in *Balmoral Group Limited v Borelis (UK) Limited* [2006] EWHC 2531 (Comm) and the judgment of Gloster J in JP *Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 2848 (Comm). The Court expressed the view that the expressions used to articulate the test for the award of indemnity costs by Ground CJ in *DeGroote v Macmillan* [1991] Bda LR 27 may not be entirely consistent and going forward it would be preferable for the court to apply the test clearly set out by the Court of Appeal in *Crisson*. The Court further held that there was no public policy reason why the test for the award of indemnity costs should be different in Bermuda from that applied by the English courts.

6. The Court of Appeal itself has confirmed in *St John's Trust (PVT) Limited v Medlands (PTC) Limited et al* [2022] CA (Bda) 18 Civ at [30] that the test to be applied in considering whether indemnity costs should be awarded against a party is the test applied under English law.

7. In *Balmoral Group,* Christopher Clarke J held at [1]:

> "*Balmoral lost the action. They will have to pay the costs. The question I have to decide is whether they should pay the costs, or some of them, on the standard or the indemnity basis. The basic rule is that a successful party is entitled to his costs on the standard basis. The factors to be taken into account in deciding whether to order costs on the latter basis have been helpfully summarised by Tomlinson, J., in Three Rivers District Council v The Governor and Company of the Bank of England [2006] EWGC 816 (Comm). The discretion is a wide one to be determined in the light of all the circumstances of the case. To award costs against an unsuccessful party on an indemnity scale is a departure from the norm.* ***There must, therefore, be something – whether it be the conduct of the claimant or the circumstances of the case –which takes the case outside the norm.*** *It is not necessary that the claimant should be guilty of dishonesty or moral blame. Unreasonableness in the conduct of the proceedings and the raising of particular allegations, or in the manner of raising them may suffice. So may the pursuit of speculative claim involving a high risk of failure or making of allegations of*

dishonesty that turn out to be misconceived, or the conduct of an extensive publicity campaign designed to drive the other party to settlement. The making of grossly exaggerated claim may also be a ground for indemnity costs." (emphasis added)

8. As noted by Christopher Clarke J in *Balmoral Group*, where a party is unsuccessful in making out allegations of fraud made in the pleaded case then in the ordinary course of events that party will be ordered to pay costs on an indemnity basis. The Court retains a complete discretion in the matter, and there may well be factors which indicate that notwithstanding the failure of the claim in fraud indemnity costs are not appropriate (see *Clutterbuck v HSBC Plc* [2015] EWHC 3233 (CH), David Richards J at [16]-[17]

9. The mere fact that a party has lost its case is, of course, not sufficient to persuade the court to order indemnity costs. There must be something more which takes that case out of the norm. In *Suez Fortune Investments Limited v Talbot Underwriting Limited* [2019] EWHC 3300 (Comm), Teare J held at [3]:

"3. In Excelsior Commercial and Industrial Holdings v Salisbury Hammer Aspden and Johnson (a firm) [2002] EWCA Civ 879 the court's power to order costs on the indemnity basis was considered. Lord Woolf MR emphasised that the court had "a wide and generous discretion in making orders as to costs" (paragraph 12) but that there must be "some conduct or (I add) some circumstance which takes the case out of the norm" (paragraph 19). Lord Woolf said that "an indemnity order may be justified not only because of the conduct of the parties, but also because of other particular circumstances of the litigation" (see paragraph 31). Finally he said that "there is an infinite variety of situations which can come before the courts" and that it would be "dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR" (see paragraph 32).

4. Although the requirement that there be some conduct or some circumstance which takes the case out of the norm is not stated in the CPR, that requirement is a necessary consequence of the scheme of the CPR. Costs on the standard basis are the norm and so, in order to justify costs on the indemnity basis there must be something which takes the case out of the norm."

10. Thus, the weakness of the legal argument is not, without more, justification for an indemnity basis of costs. The position might be different if proceedings or steps taken within them are not only based on a plainly hopeless case but are motivated by some ulterior commercial or personal purpose or otherwise fulfilling tactical reasons unconnected with any real belief in their merit (see *Arcadia Group Brands Limited v Visa Inc.* [2015] EWCA Civ 883, per Sir Terrance Ethererton C at [83])

11. Likewise, authorities recognise that it would be a rare case where both sides do not feel that the other has acted unreasonably, an even rarer one, where there would not be at least a measure of truth in such a view. The question is whether there is something out of the ordinary, of which as has been said, takes the case out of the norm. The fact that the plaintiff pursued a claim which was struck out is not sufficient on its own. A losing case is not to be equated with unreasonable conduct (see *Dee v Telegraph Media Group Limited* [2010] EWHC 1939 (QB) per Sharp J at [5]; and *Webster v Ridgeway Foundation School* [2010] RWHC 318 (QB), per Nicol J at [7].

12. In this case the Court has held that on proper legal analysis Mr Robinson could not sue the BCAA because the claims asserted by Mr Robinson belonged to JTIL and not to him in his capacity as a founding shareholder. The Court further held that any alleged breach of statutory duty under the Bribery Act 2016 could not arguably give rise to a private right which Mr Robinson could enforce. Based upon these two principal legal findings the Court concluded that Mr Robinson's claim, as set out in the Statement of Claim, must be struck out.

13. Perhaps it could legitimately be said that Mr Robinson's contention to the contrary in relation to his legal standing to pursue these claims reflected sloppy conduct on his part and on the part of his legal advisers. The same complaint could be made in relation to Mr Robinson's failure to pursue judicial review proceedings in relation to his grievances. However, as the cases make clear, such deficiencies would not ordinarily be reflected in an order for indemnity costs. Of course, there can be exceptions in extreme cases (see *Swift v Brake* [2020] EWHC 2416 (Ch), per HHJ

Paul Matthews at [19]). Ordinarily something more is required than findings by the court that the losing party's legal analysis was faulty and indeed unarguable. That is after all the purpose of the strike out application and not every strike out application would result in an order for indemnity costs against the plaintiff.

14. The Court accepts that Mr Robinson had a genuine complaint arising out of the underlying allegations of wrongdoing on the part of Mr Lynch-Wade and Mr Robinson's contention that the wrongdoing adversely affected his interests as a shareholder of JTIL. This is not a case where Mr Robinson has pursued this litigation for entirely ulterior purposes.

15. The Court was not required to rule that the underlying allegations were unarguable and has not so concluded. The Court also held that, but for the grounds summarised in paragraph [30], the Court would not have struck out Mr Robinson's claim on the ground that BCAA could not arguably be vicariously liable for the alleged conduct of Mr Lynch-Wade.

16. In all the circumstances the Court, in the exercise of its discretion, has concluded that the appropriate and just result is that Mr Robinson should pay the First Defendant's costs on the standard basis to be taxed, if not agreed. The Court makes no further order in favour of the First Defendant at this stage.

17. The Court has determined that the appropriate order in relation to this application is that each party should bear its own costs.

Dated this 22nd day of November 2023

NARINDER K HARGUN
CHIEF JUSTICE