In The Supreme Court of Bermuda

CIVIL JURISDICTION
2015: No. 152

BETWEEN:

BS&R GROUP LIMITED
Plaintiff/Defendant by Counterclaim

-and-

WESTPORT ARCHITECTURE
First Defendant/First Plaintiff by Counterclaim

- and -

C.W. CONSTRUCTION AND LANDSCAPING LIMITED
Second Defendant/Second Plaintiff by Counterclaim

SECOND RULING (INDEMNITY COSTS)

Restored Application for Indemnity Costs
Test for indemnity costs clarified by the Court of Appeal to be "out of the norm", rather than "exceptional circumstances"
Purpose of indemnity costs not to punish the paying party, but to give a more fair result for the party in whose favour a costs order is made

Date of Hearing: **8 May 2024**
Date of Ruling: **22 July 2024**

<u>Appearances</u>: **Allan Doughty, MJM Limited, for the Plaintiff**
Scott Pearman for First Defendant

RULING of Mussenden J

<u>Introduction</u>

1. A trial of this matter took place and I issued a Judgment dated 22 December 2021. I directed that unless either party filed a Form 31TC within 7 days of the date of the Judgment to be heard on costs, that costs would follow the event in favour of BS&R Group Limited ("**BS&R**") on a standard basis, to be taxed by the Registrar if not agreed.

2. BS&R did file an application to be heard on costs and applied for an award of costs on an indemnity basis. On 6 July 2022 I heard submissions on the application for indemnity costs. On 6 September 2022 I issued a Ruling ("**First Costs Ruling**") in which I found that I was not satisfied that there were exceptional circumstances to warrant an order for costs on an indemnity basis. In that First Costs Ruling, I applied the test of '*exceptional circumstances*' which was based on the decision of Ground J in *DeGroote v MacMillan et al* [1993] Bda LR 66 and *Phoenix Global Fund Ltd. v Citigroup Funds Services (Bermuda) Limited & Ano* [2009] Bda LR 70 (SC).

3. In *St. John's Trust Company (PVT) Limited v Medlands (PTC) and Ors* [2022] CA (Bda) 18 Civ (2 November 2022) the Court of Appeal for Bermuda clarified that the correct approach to indemnity costs in Bermuda is to apply the approach of the Courts of England and Wales, namely the '*out of the norm*' test. I granted leave to appeal to the Court of Appeal and by way of a Consent Order, dated 21 March 2023. The Court of Appeal, then allowed the appeal, on the papers, and the application for indemnity costs was restored before me, to apply the law as clarified by the Court of Appeal in the *St. John's* case.

Background

4. The total of the Judgment for the three construction jobs performed by BS&R (the "**Three Jobs**") was in favor of BS&R against the First Defendant Westport Architecture (a Firm) ("**WA**") in the amount of $85,780.03. The partners of WA are Mr. Frederick Stephen West ("**Mr. West**") and his son Arthur ('Tripp') West ("**Tripp West**"). Also, I found that C.W. Construction and Landscaping Limited ("**CWC**") was not the entity that WA had contracted with for the Three Jobs.

Law on Indemnity Costs

5. The Rules of the Supreme Court ("**RSC**") Order 62 rule 12(2) sets out the following:

   "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 Registrar 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."

6. In the *St. John's* case, Smellie JA stated as follows:

   "23. In Crisson, a case which involved the claimant, by reliance on misleading evidence, obtaining from the Supreme Court a freezing injunction which had "catastrophic effect on the life of Mr Crisson", the Court of Appeal concluded at [5] that the nature and conduct of the case constituted such exceptional circumstances that the making of an indemnity costs order was warranted. The Court cited no authority for the formulation of principle which it declared, no doubt considering it unnecessary to do so: the test as formulated reflects the well-established position to be gleaned from the English case law, where the Court of Appeal has repeatedly stated that indemnity costs may be ordered when the circumstances are "out of the norm."

24. As Waller LJ explained in Esure Services Ltd v Quarcoo [2009] EWCA Civ 595 at [25], the formulation "out of the norm" reflects "something outside the ordinary and reasonable conduct of proceedings."

25. It is now clear also from the English case law that there is no scope for the application of some other more stringent "exceptionality" test such as proposed on behalf of SJTC in its submissions relying on specific Bermudian cases. Thus, in Whaleys (Bradford) Limited v Bennett [2017] 6 Costs LR 1241; [2017] EWCA Civ 2143, David Richards LJ (as he then was) said, in agreement with Newey LJ who gave the lead judgment (at [28]):

> *"In my view it was unfortunate that the judge [below] used the word "exceptional" to describe the circumstances that may justify an order for indemnity costs. The formulation repeatedly used by this court is "out of the norm", reflecting, as Waller LJ said in Esures Services Ltd v Quarcoo (above) at [25] , "something outside the ordinary and reasonable conduct of proceedings". Whatever the precise linguistic analysis, "exceptional" is apt as a matter of ordinary usage to suggest a stricter test and is best avoided. Its use in this case gave rise to an arguable ground of appeal and while I am satisfied, particularly in light of the submissions made to him, that the judge was not applying a stricter test, for the future it would be preferable if judges expressly used the test of "out of the norm" established by this court."*

28. It is significant that the earlier decision of this Court in American Patriot Insurance v Mutual Holdings [2012] Bda L.R. 23 appears not to have been considered in Ivanishvilli. In Mutual Holdings, having referred at [26] to the requirement for "exceptional circumstances" applied in both Phoenix Global v Citigroup and De Groote, Evans LA in delivering the judgment of the Court said:

> *"In our judgment, it would be wrong to say that indemnity costs should be ordered in every case where fraud is proved, <u>but equally wrong to suggest that they can only be ordered when the proceedings have been misconducted by the losing party. Both "the way the litigation has been conducted" and the "underlying nature of</u>*

the claim" (per Kawaley J in Lisa SA v Leamington and Avicola ([2008] Bda L.R. 61) at para 6) *may be relevant in determining whether or not the circumstances are such as to make an indemnity costs order just."* [emphases added by the Court of Appeal]

29. Thus, while not expressly disapproving of the stricter exceptionality test, this Court did not adopt it, instead preferring an approach which would allow for a discretionary assessment on the case by case basis, as to whether an order for indemnity costs is justified. And while not itself purporting to set a test by which the discretion should be exercised, the approach of the Court there was, in my view, more consistent with an enquiry as to whether litigation has been conducted "out of the norm" than with the stricter test.

30. It follows, in my view, that we should now confirm that the latter test- that firmly approved in the English case law - is the test to be applied."

7. In *Bhagwan v Corbishley et al* [2022] CA (Bda) 20 Civ, 1 December 2022, issued shortly after *St. John's,* in respect of considering indemnity costs, Smellie J stated as follows:
"33. Rather than as a mark of the Court's disapproval of a lawyer's conduct of proceedings, the focus here is upon whether the successful Respondents to the appeal should have their costs paid by the unsuccessful Appellant, on account of his or his lawyer's improper or unreasonable conduct of his appeal, on a more favourable basis so far as the onus or proof as to reasonableness is concerned. While an indemnity costs order implicitly carries the court's disapproval of the lawyer's or party's conduct of litigation, its purpose is not to punish the paying party but to give a more fair result for the party in whose favour a costs order is made – see Three Rivers District Council and Others v Bank of England [2006] EWHC 816 (Comm) at [14] per Tomlinson J citing Petrotrade Inc v Texaco Ltd (Note) [2001, [2002] 1 WLR 947, per Lord Woolf MR, at p 949 and Victor Kermit Kiam 11 v MGN Ltd [2002] EWCA Civ 66 at para 12, [2002] 2 All ER 242 per Simon Brown LJ." [emphasis added]

8. In *Bhagwan*, Smellie JA made reference to the "*well known eight main indicia*" identified by Tomlinson J in *Three Rivers District Council and Others v Bank of England* [2006] 5 Costs LR 714 (QB). Those eight indicia are as follows:

   "(1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.

   (2) The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstance which takes the case out of the norm.

   (3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness.

   (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.

   (5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.

   (6) A fortiori, where the claim includes allegations of dishonesty, let alone allegations of conduct meriting an award to the Claimant of exemplary damages, and those allegations are pursued aggressively inter alia by hostile cross examination.

   (7) Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that is a further ground.

   (8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings;

      (a) Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time;

      (b) Where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;

(c) Where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media;
(d) Where the claimant, by its conduct, turns a case into an unprecedented factual enquiry by the pursuit of an unjustified case;
(e) Where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;
(f) Where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;
(g) Where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat."

BS&R's Application

9. Mr. Doughty submitted that indemnity costs were warranted in this case for a number of reasons as set out below.

Whether in all the circumstances, the defence to BS&R's claim conducted in a manner that fell outside the norms of litigation

10. Mr. Doughty submitted that BS&R won every point in the claim and defence to the counterclaim. He noted that the Defendants were pressuring BS&R to settle the claim for $35,000, which was approximately 35% of the total judgment amount of $85,780.03. He argued that it was clear that the Defendants, by their offer, were trying to pressure BS&R to abandon their claims in two of the Three Jobs for an amount less than the claim in the third job. He noted that in the Judgment, I stated [paragraph 157] that I took a dim view of the credibility of Tripp West in his conduct of withholding payment from one job to affect a result in another job.

11. Mr. Doughty submitted that the Defendants conduct was unreasonable in that they attempted to manipulate the value of the claim to their advantage.

Whether there was unreasonable conduct on the part of the Defendants before the trial

12. Mr. Doughty submitted that the decision of the Defendant, to proceed to trial without counsel, greatly increased the expense of case for BS&R. This included the Defendants seeking an adjournment of the first trial date to so as to allow further time to consider the second expert opinion of Mr. Timothy Berry. Mr. Doughty then submitted that the first adjournment ultimately proved to be a waste of time, as Tripp West later claimed to have sufficient expertise as an architect, to deal with Mr. Berry's conclusions. Mr. Doughty then submitted that, during the course of the trial, Tripp West did not contest Mr. Berry's conclusions or take the opportunity to cross-examine Mr. Berry, concerning his written reports. When, during the course of the trial, Mr. Doughty observed that Mr. Berry had not been cross-examined on his evidence, Tripp West then tried to claim that he did not have an opportunity to cross-examine Mr. Berry.

13. Mr. Doughty submitted that the Defendants filed a witness statement of Roy Correia, who was never called to testify, thereby wasting billable time of BS&R's counsel who prepared to cross-examine Mr. Correia. Also, he claimed that the Defendants request for a second adjournment came after he had prepared for that hearing date. He noted that the purpose for the second adjournment was to allow the Defendants to amend their counterclaim and file further witness statements, having being warned that such witnesses should be called at trial, something which the Defendants failed to do. He argued that this too was unreasonable conduct.

14. Mr. Doughty submitted that, although I found in the First Costs Ruling that the Defendants were litigants in person, "flying by the seats of their pants", and that I would only attach limited consideration to their conduct, I should reconsider their conduct in light of the correct test. In respect of the conduct of litigants in person, he cited the case of *EDF Energy*

Customers Ltd. v Re-Energized Ltd. [2019] WHC 652 (Ch) where Paul Matthews HHJ made a number of observations as set out below.

a. In *Tinkler v Elliott* [2012] EWCA Civ 1289 Maurice Kay LJ stated that "*An opponent of a litigant in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person.*"
b. In *Hysaj v Home Secretary* [2014] EWCA Civ 1633 where the Court stated that "*… if proceedings are not to become a free-for-all, the court must insist on litigants of all kinds following the rules. In my view, therefore, being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules.*"
c. In *Nata Lee Ltd. v Abid* [2014] EWCA Civ 1652 where Briggs LJ stated "*There may be cases in which the fact that a party is a litigant in person has some consequences in the determination of applications for relief from sanctions, but this is likely to operate in the margins.*"
d. In *Barton v Wright Hassall LLP* where Lord Sumption in essence stated that the lack of representation will not usually justify applying to litigants in person a lower standard of compliance with the rules or orders of the court.

15. Mr. Doughty submitted that the consequence of the Second Adjournment, was that the time of the Court and counsel was wasted as the result of the unreasonable conduct on the part of the Defendants. The second adjournment also resulted in an 18-month delay after two further short-notice administrative adjournments due to the Covid 19 pandemic. Mr. Doughty submitted that the Court should accept that there was a need for a detailed understanding of the issues that were in dispute and that adequate preparation time was necessary for a successful cross-examination.

<u>Was there unreasonable conduct on the part of the Defendants during the trial</u>

16. Mr. Doughty submitted that several events took place during the trial that supported an order for indemnity cost. These included the following:

a. Stephen West admitted to using notes, compiled during the overnight period of his evidence on oath;
b. Tripp West's admission that he had spoken to Stephen West outside of Court hours while he was still sworn and giving evidence;
c. Tripp West had prepared questions for Stephen West to answer, despite Stephen West being under cross-examination;
d. The above events took place despite the caution by the Court to BS&R's witnesses that they should not discuss their evidence with anyone while they were under oath; and
e. Tripp West's interference in the cross-examination of Stephen West, essentially correcting an answer by Stephen West, who later seemed to fashion his answer to suit the correction.

17. Mr. Doughty submitted that the actions of the Defendants in their conduct of their defence demonstrated their thought processes. He cited the case of *Esure Services Ltd. v Quarcoo* [2009] EWCA 595, a case involving a claim of dishonesty, where Waller LJ of the Court of Appeal stated that "*In my view, the word "norm" was not intended to reflect whether what occurred was something that happened often so that in one sense it might be seen as "normal", but was intended to reflect something outside the ordinary and reasonable conduct of proceedings*." Mr Doughty submitted that in the *St. John's Costs Judgment*, the ruling of *Quarcoo* was adopted where the Court stated "*As Waller LJ explained in Esure, the formulation of "out of the norm" reflects "something out of the ordinary and reasonable conduct of proceedings.*"

18. Mr. Doughty submitted that despite the findings in the First Costs Ruling, in light of the *St. Johns Costs Judgment*, the Court should find that the conduct as set out above should not only be found to be "*out of the norm*", but should also be found to be contumelious in that it ignored the warnings of the Court that witnesses were not to speak to each other while under oath.

Whether it was unreasonable for the First and Second Defendants to raise particular defences and counterclaims

The alleged padding of bills by BS&R

19. Mr. Doughty submitted that the Defendants accused BS&R of 'padding' its bills. He pointed to the First Costs Ruling where I dealt with this issue finding that I was not satisfied that this was a grave impropriety going to the heart of the matter and affecting its whole conduct as I was of the view that in everyday life people question charges for services rendered without it amounting to serious allegations of fraud. Mr. Doughty highlighted that although the Defendants did not expressly plead fraud, they did claim in their affidavit evidence, without supporting evidence, that BS&R's bills were too high in relation to the work provided, describing the extra charges at the Vista Verde Job as disproportionate, excessive, inflated, nonsense, increased and not agreed. To combat this, BS&R were obliged to call a quantity surveyor to opine as to the fairness of the invoices as billed, only for the Defendants to not challenge the evidence of Mr. Berry, albeit claiming later that they were not allowed to cross-examine him, and to not even challenge the witness for BS&R about whether the bills were "padded". In light of these events, Mr. Doughty submitted that the Defendants wasted a substantial amount of BS&R's time and costs by raising a fanciful defence which was not pursued. Further, he argued that although I had already found that the Defendants' allegation of padding bills did not amount to an allegation of fraud, the Court should still be mindful that the defence was raised but was not seriously pursued, the issue of the proportionality of the bills was aired at the first date for directions, in an attempt to influence BS&R against leading expert evidence and there was no challenge to Mr. Berry's conclusions.

The claim that CWC was the proper defendant and Second Plaintiff by Counterclaim to the proceedings

20. Mr. Doughty submitted that a substantial amount of time and costs was spent on the defence that CWC was a party to the proceedings, both as the proper defendant, and as a plaintiff

by counterclaim, notions that were rejected by the Court on the basis that there was no evidence to support the contentions. Mr. Doughty highlighted that the Court stated "*In light of the abundance of evidence that supports the finding that WA was the actual Defendant in the case, in my view Mr. West's credibility is questionable when a significant plank of the defence was to shift any liability for whatever reason from WA to CWC.*" Thus, Mr. Doughty argued that it was patently unreasonable of the Defendants to take the position that CWC was the party to the contracts and that behaviour fell "*outside the norm*" given the time and expense required to pursue the case and defend the counterclaim.

The Counterclaims

21. Mr. Doughty submitted that the original counterclaim was in the amount of $46,663.50 and pleaded multiple complaints. After several adjournments, the amended counterclaim was filed with supporting evidence from a further witness, who was not called at trial, thus rendering the witness statement to be of no value. In any event, the counterclaims were dismissed in their entirety.

22. Mr. Doughty submitted that the second adjournment was sought as the Defendants were not ready for trial, were not acting in good faith, and relied on a weak counterclaim and other fanciful excuses. He argued that counterclaims and the amended counterclaims should not have been brought and the conduct surrounding the amendment of the counterclaims took the conduct of the litigation well outside the norms of civil litigation.

Whether the defences run by the First and Second Defendant were speculative, weak, opportunistic and/or thin

23. Mr. Doughty submitted that the totality of the Defendants' defeat indicate that the defences run by the Defendants were speculative, weak, opportunistic and thin. Further, the conduct of the Defendants in respect of the two adjournments was opportunistic.

Summary of BS&R's Position

24. Mr. Doughty submitted that when BS&R filed its Writ against the Defendants, it was obvious that in the absence of a written contract, each term of the agreements had to be proved, the documentary evidence was voluminous and complex and had to be distilled into succinct witness statements. Mr. Doughty further said that to prove the Plaintiff's case, the cross-examination would have to be long and difficult given the numerous allegations the Defendants made against BS&R and to justify their own behavior. Therefore, the Defendants presented "moving targets", which included who the actual defendant was, whether further discovery was forthcoming, who the witnesses were going to be and when the trial would actually take place. These "moving targets" resulted in further legal expense to BS&R which in hindsight, proved to be unnecessary. Mr. Doughty submitted that it was "*outside he norm*" for a litigant to complain at the first direction hearing that as the value of the claim was so low, there should be costs consequences for leading expert evidence, to frustrate the trial process by seeking adjournments, to force BS&R to expend legal fees to ensure it was ready for trial each time and to prepare and deal with unfounded allegations and hopeless arguments.

25. Mr. Doughty submitted that although the Defendants were litigants in person from January 2019 to July 2022, the common law holds that the discretion to offer relief from sanctions to a self-represented person is limited. He highlighted that the purpose for an order for indemnity costs was not to punish the paying party, but rather to provide a more fair result for the party in whose favour the costs order has been made. He argued that BS&R was the innocent party and although the claim was under $100,000, BS&R meticulously prepared its case and ensured that it was ready for trial despite constantly shifting trail dates. Thus, it would be unjust to deny BS&R the fruit of its judgment on the basis of an order that costs be assessed on the standard basis, given the conduct of the Defendants.

Westport Architecture's Reply

26. Mr. Pearman resisted BS&R's application. Mr. Pearman submitted that this was a dispute about a low value claim, concerning the fabrication of cabinets and a wooden deck. He submitted that the true value was only about $50,000 because there was a payment into court of $35,000. He stated that the damages have been paid and thus the remaining issue is about the costs, which by 6 April 2022 had exceeded $250,000, an amount which he claimed was excessive for such a small claim.

27. Mr. Pearman submitted, that like the first indemnity costs application, the Court should again decline the indemnity costs application as it is not a dispute that merits an award of indemnity costs, even on the clarified test.

28. Mr. Pearman submitted that indemnity costs still remain the exception, rather than the rule. He relied on *St. John's* and *Bhagwan* where the Court of Appeal observed that the departure from ordering costs payable on the standard basis requires something "*out of the norm*" either in terms of "*the nature of the action or the manner of its conduct*". He argued that there are strong public policy reasons why an order for indemnity costs is not "the norm", firstly, because such an order reduces the judicial scrutiny of the Registrar on taxation, and secondly, because such an order increases costs recovery for the receiving party well beyond the standard basis. This was on the basis that RSC Order 62 rule 12(2) entitles the receiving party to 100% of all reasonable costs incurred and it requires that any doubts in the mind of the Registrar – as to the reasonableness or otherwise of the receiving party's costs – must be resolved in favour of the receiving party.

29. Mr. Pearman submitted that the test for indemnity costs had not been met by BS&R. Additionally, he argued that BS&R's costs are remarkably high, when taking into account the small sum of $50,000 actually in dispute between the parties, in essence legal costs exceeding damages by a ratio of greater than 5:1. Thus, indemnity costs should be denied in the interest of justice and on the basis that if BS&R's costs have been reasonably incurred, then BS&R should not shirk from any lawful challenge, still far less from fair and proper judicial scrutiny.

30. Mr. Pearman relied on *Crisson v Marshall Diel & Myers Ltd.* [2021] CA (Bda) 13 Civ where the Court of Appeal made an award for indemnity costs stating "*in order for indemnity costs to be ordered it is necessary that there is something significantly out of the ordinary in respect of the manner in which the case has been conducted, or its nature, which justifies the making of such an order*". Mr. Pearman submitted that in *Crisson*, indemnity costs were ordered because the respondent attorneys had twice misrepresented the position before the first instance Court, thereby leaving in place for 18 months a restraining order which deprived their former client of access to much of his asset base and which must have caused '*a deleterious effect on his business affairs ... and on him personally*". Mr. Pearman concluded that the Court found that this was "*significantly out of the ordinary*".

31. Mr. Pearman submitted that the Court should stand by its original view to order costs on the standard basis. He stated that even if the BS&R could demonstrate that the nature of the claim or its conduct was "out of the norm", such nature or conduct must also be sufficient to justify the discretionary step of awarding indemnity costs. He argued that BS&R's evidence in support mainly pointed to the conduct of the Defendants which focused mainly on procedural delays, which were not of their making. Additionally, delay, without more, does not amount to "*the level of unreasonableness or impropriety so "outside the norm", as to justify an order of indemnity costs*" as Smellie JA stated in *Bhagwan*.

32. Mr. Pearman submitted that the Defendants were litigants in person which whilst not giving them free licence, it can and likely should excuse errors of the uninitiated. Further, the behavior of the Defendants fell well short of the "*unreasonableness or impropriety so outside the norm*".

<u>Analysis</u>

33. In my view I grant the application for costs on an indemnity basis for several reasons.

34. First, in the First Costs Ruling, following the "*exceptional circumstances*" test, I found as follows:
    a. I made no findings in the Judgment in this matter against Mr. West or Tripp West of dishonesty;
    b. I found that CWC was not the party that BS&R had contracted with;
    c. I found no merit in Mr. Doughty's arguments that the delay should be considered as exceptional circumstances to warrant an order for indemnity costs;
    d. I found that several issues were not of a grave impropriety going to the heart of the matter and affecting its whole conduct, namely the issues of: (i) the revelation that WA was a partnership; (ii) Stephen West's and Tripp's West's conduct during trial; (iii) padding bills; and (iv) the Phantom Punch Lists.

35. Second, I have given consideration to the arguments by Mr. Doughty about the Defendants appearing as litigants in person and sanctions that can flow from the same. I rely on the case of *EDF Energy Customers Ltd.* (and the four cases cited therein), to form the view that: (i) the Defendants should have been following the rules, and, being a litigant in person is not a good reason for failing to comply with the rules (*Hysaj*); (ii) the fact that the Defendants were litigants in person "*should operate in the margins*" in respect of consequences for relief from sanctions (*Nata Lee Ltd.*); and (iii) the Defendants, as litigants in person, should not be afforded a lower standard of compliance with the rules and orders of the Court (*Barton*). The cumulative effect of these findings is that, despite my reasoning in the First Costs Ruling that their conduct did not amount to exceptional circumstances, I am now of the view that I should attach more than a limited measure of consideration to their conduct.

36. In my view, the conduct of the Defendants at trial was out of the norm in the sense that it was unreasonable for several reasons as follows: (i) Tripp West admitted that he had spoken to Stephen West while Stephen West was giving evidence on oath; (ii) Tripp West had prepared questions for Stephen West after Stephen West was giving evidence on oath; (iii) and Tripp West interrupted Steven West's evidence on cross-examination in an attempt to correct his answer; and (iv) these events took place despite the Court's cautions to

witnesses giving evidence on oath not to discuss their evidence with anyone. I rely on *Esure Services Ltd.* that these matters were outside the ordinary and reasonable conduct of proceedings.

37. Third, in my Judgment I expressed a dim view of the credibility of Tripp West in his conduct of withholding payment from one job to affect a result in another job [paragraph 157]. I also accept Mr. Doughty's submission that BS&R won every point in the claim and defence to the counterclaim, despite the pressures of the Defendants to make BS&R abandon its claim in two of the Three Jobs. Thus, I am satisfied that this conduct by the Defendants was unreasonable in that they attempted to manipulate the claim in this way.

38. Fourth, in respect of the claim that BS&R were padding their bills, in my view the Defendants conduct was out of the norm in the litigation. They raised the issue without supporting evidence, they cautioned BS&R about calling expert evidence on the point, they were aware that expert evidence had been secured and had been filed, they knew that the expert was going to give evidence in Court and did so, they did not challenge the expert evidence or the witnesses of BS&R about the issue and then they later claimed that they were not allowed to cross-examine the expert witness. I agree that a considerable amount of time and costs were incurred to resist a fanciful defence which was not pursued. I remind myself of the principal in *Bhagwan* that an indemnity costs order is not to punish the paying party but to give a more fair result for the party in whose favour a costs order is made. In my view, the Defendants embarked on a course of conduct in relation to the issue of padding the bills which, in the absence of relevant evidence, was wholly unreasonable.

39. Fifth, I have considered that the Defendants sought and were granted two adjournments, the second of which was further adjourned by the consequences of the Covid 19 Pandemic. The reasons for the adjournments were to amend the counterclaim and to file further witness statements, neither reason having an impact on the case as the counterclaim was defeated and the further witnesses did not appear at trial to give evidence. These adjournments led to delay and costs being incurred as counsel for BS&R had to prepare for the hearings. My initial view is that these delays could properly be addressed on the standard basis but I remind myself of the principle in *Bhagwan* where Smellie JA stated

that the aim of an indemnity costs order was to give a more fair result for the party in whose favour a costs order is made. In my view, in respect of the adjournment as the request of the Defendants and the resulting delays and their futility, BS&R should have the benefit of a more fair result on this point.

40. Sixth, I have considered the totality of the Defence and its conduct, including advancing that CWC was the proper defendant and plaintiff by counterclaim, the hopelessness of the counterclaims and the issue of padding the invoices as well as the delay caused by the adjournments. I rely on *Bhagwan* where Smellie JA referred to the well-known indicia identified by Tomlinson J in *Three Rivers District Council and Others*. In my view, I have had regard to all the circumstances of the case, and I regard the conduct of the Defendants as set out above, which takes the case out of the norm. I have come to the conclusion that the conduct amounts to unreasonableness, on the part of the Defendants, due to their conduct before and during the trial. I have also concluded that the defence and counterclaim were weak, and the unreasonable conduct of playing off BS&R in respect of one job against another job which was opportunistic.

41. Seventh, I have considered the submissions advanced by Mr. Pearman for the Defendants. I do not accept those arguments, in particular that since this was a small claim the costs should not be so considerable and awarding indemnity costs reduces the judicial scrutiny of the Registrar on taxation. In doing so, I am guided by the principal that a more fair result should be achieved for the successful party BS&R. The essence of the reasoning is that the Defendants, as litigants in person, embarked on a course of conduct before and during trial that took it out of the norm. There are consequences for such conduct.

<u>Conclusion</u>

42. In light of the reasons set out above, I am satisfied that the conduct of the Defendants in the proceedings was "*out of the norm*" to warrant an order for costs on an indemnity basis, where the intention is to achieve a more fair result. Therefore, I grant BS&R's application for indemnity costs.

43. Unless either party files a Form 31TC within 7 days of the date of this Second Ruling (Indemnity Costs) to be heard on the subject of costs of this application, I direct that for this second application for indemnity costs, that costs shall follow the event in favour of BS&R on an indemnity basis, to be taxed by the Registrar if not agreed.

Dated 22 July 2024

____

HON. MR. LARRY MUSSENDEN
CHIEF JUSTICE OF THE SUPREME COURT