



# 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**

## **THIRD RULING (COSTS)**

*Determining costs for the First Costs Hearing, the Leave Application,  
the Appeal and the Second Costs Hearing*

**Date of Ruling:** 20 January 2025

**Appearances:** Allan Doughty, MJM Limited, for the Plaintiff

Scott Pearman, Conyers Dill & Pearman Limited, for First Defendant

## **RULING of Mussenden CJ**

### **Introduction**

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 *DeGroot 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 by way of a consent order (the “**Consent Order**”), 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.
4. On 8 May 2024 I held a second costs hearing (the “**Second Costs Hearing**”). On 22 July 2024 I issued a Second Costs Ruling (Indemnity Costs) (“**Second Costs Ruling**”) where I granted costs of the trial on an indemnity basis as I was satisfied that the conduct of the Defendant in the proceedings was “*out of the norm*”. The costs order of the trial is not

challenged by the Defendant (having already been determined by the Court). Also, in paragraph 43, I directed that unless either party filed a Form 31TC within 7 days of the date of the Second Costs Ruling to be heard on costs of the Second Costs Hearing, that costs were granted in favour of BS&R on an indemnity basis (the “**Second Costs Hearing Costs Order**”). The Defendant did object to the Second Costs Hearing Costs Order being granted on an indemnity basis.

5. On 22 July 2024, correspondence flowed immediately between the parties and then the Court in respect of the Second Costs Hearing Costs Order (the “**Correspondence**”). I turn to the Correspondence as necessary below. After several rounds of correspondence on the issue, I agreed to determine the issue on the papers.

## **The Correspondence**

### **Initial Submissions of the Defendant**

6. In the Correspondence, Mr. Pearman submitted that the Second Costs Hearing Costs Order should be on the standard basis for three reasons (the “**Three Reasons**”):
  - a. Mr. Doughty for the Plaintiff did not seek for the Second Costs Hearing Costs Order to be awarded on the indemnity basis;
  - b. There was nothing “*out of the norm*” abouts the Second Costs Hearing that was heard on 8 May 2024; and
  - c. Nothing had been identified by either the Plaintiff, or by the Court in its Second Costs Ruling, to provide any basis for the Second Costs Hearing Costs Order for the hearing on 8 May 2024 to be awarded on an indemnity basis.
7. Mr. Pearman submitted that in respect of this one final point, the next steps should be that the Second Costs Hearing Costs Order to follow the event on the usual standard basis. He requested that the Court determine the matter on the papers and expressed the hope that Mr. Doughty would agree that the one point should be determined on the papers.

### Initial Submissions of the Plaintiff

8. In the Correspondence, Mr. Doughty took no issue with the Second Costs Hearing Costs Order being awarded on the indemnity basis. He stated that he had limited time on the day of the hearing to make his submissions. He also referred to the Consent Order which allowed the appeal which held that “*costs of the Appeal shall be costs in the Application to be determined by Mussenden J*”. Thus, Mr. Doughty took the view that clause 3 of the Consent Order meant:
- a. The costs of the first application seeking indemnity costs;
  - b. The filing of the application seeking leave to appeal out of time;
  - c. The drafting of the notice of appeal; and
  - d. The expense of filing, preparing for and arguing the Second Costs Application;
- all which turned on the Second Costs Hearing Costs Order.

### Initial Reply by the Court

9. Having reviewed the Correspondence, on the same 22 July 2024, I caused a reply to be sent to the parties (the “**Paragraph 43 Direction**”) which stated:

*“In respect of paragraph 43 on costs of the application, the Chief Justice states that he was minded to change the order for “indemnity costs” to the “standard basis” if both counsel were agreed on the point. However, in the absence of an agreement, the Chief Justice will not amend paragraph 43 but will be prepared to deal with it on the filing of the relevant forms. He further states that having reviewed the emails from both counsel, in respect of paragraph 43, his preliminary view is to change the order for costs on an indemnity basis to costs on the standard basis.”*

### Written Submissions by the Defendant

10. In the written submissions of the Defendant dated 16 August 2024 the Defendant adopted its submissions in the Correspondence as their substantive submissions. Mr. Pearman also made summary final points including:

- a. The costs order would be for the costs of the two costs applications to be on the standard basis;
  - b. The burden is on the Plaintiff to identify something “*out of the norm*” to cause the Court to consider, in the exercise of its discretion, departing from the usual order of costs on the standard basis to instead order costs on an indemnity basis;
  - c. Counsel for the Plaintiff did not seek for costs of the two costs applications to be on the indemnity basis;
  - d. The Plaintiff’s initial submission in the Correspondence did not identify anything “*out of the norm*” in the conduct of the hearing of the two costs applications;
  - e. The costs of the appeal should be on the standard basis as the appeal was consented to by the Defendant and there was no hearing of the appeal. The Court of Appeal simply agreed a consent order to remit the matter to the trial judge to determine the application for costs of the trial afresh given the change in the law in the indemnity cost area.
11. Mr. Pearman submitted that it was fair and proper in all the circumstances for the costs of the two costs hearings and the appeal (dealt with by consent) to all be taxed on a standard basis, so that the Plaintiff has the burden of satisfying the Registrar upon taxation that any costs have been reasonably incurred.

### **Written Submissions by the Plaintiff**

12. On 27 August 2024 the Plaintiff filed amended written submissions in respect of whether costs should be assessed on the indemnity basis in respect of the following applications:
- a. the First Costs Hearing on 6 July 2022;
  - b. the costs of the application for leave to appeal (the “**Leave Application**”);
  - c. the costs of the appeal, which the Court of Appeal allowed by consent on 21 March 2023 (the “**Appeal**”); and
  - d. The Second Costs Hearing on 8 May 2024;
13. Mr. Doughty submitted that at the Second Costs Hearing, the proceedings were rushed after counsel were advised that the hearing had to finish early. As a result, the issue of how

the costs of that hearing would be assessed was overlooked. He then referred to his submissions in the Correspondence of 22 July 2024. Mr. Doughty's submissions were on three grounds as set out below.

Whether the Learned Chief Justice acted within his discretion when he ordered that the costs of the Second Costs Hearing should be assessed against the Defendant on an indemnity basis

14. Mr. Doughty referred to Order 62, Rules 3 (3) – (4) in respect of the discretion of the Court to order costs on the standard basis and indemnity basis. He referred to *DeGroot v MacMillan* [1993] Bda LR 66 (SC) to show that in that case Ground J was satisfied that the misconduct of the paying party, in relation to the third party, was of sufficient gravity to extend the order for indemnity costs to cover the costs of the application as well as the trial of the action. Mr. Doughty also referred to *Three Rivers District Council and Others v the Governor and Company of the Bank of England* [2006] 5 Costs LR 714 (QB) to show (i) that the trial judge found that the hearing of the application for costs was required by the interest of justice; and (ii) that the trial judge, in his discretion, deemed fit to award the costs of the application on an indemnity basis, on account of the paying party's misconduct at trial.

Whether the Learned Chief Justice erred by ordering that the cost of the application should also be awarded on an indemnity basis without first hearing arguments on that issue

15. Mr. Doughty referred to Mr. Pearman's submissions of the Three Reasons in the Correspondence describing it an irregular message to the Court, the upshot being that in essence, it was an argument that I had erred by not considering them. Mr. Doughty relied on the cases of *DeGroot* and *Three Rivers* (where the conduct of the paying party at trial was sufficient to justify an award of indemnity costs in relation to the costs application) to submit that it was nonsense to suggest that I had erred by not first considering the Three Reasons.

Why costs submissions should not have been made by way of response to a Court request for typographical or editorial comments to the draft ruling

16. Mr. Doughty referred to paragraph 43 of the draft Second Costs Ruling where I set out that unless either party wished to be heard on the issues of costs of the Second Costs Ruling, then costs would follow the event in favour of the Plaintiff on an indemnity basis. He also referred to the cover email from the court associate which stated, in summary, that the draft Second Costs Ruling was issued for typographical or other editorial suggestions noting that it was not issued for commentary on the substance of the Ruling (the “**Embargo**”).
  
17. Mr. Doughty submitted that, given the Embargo, it was not proper for Mr. Pearman to submit arguments about the Second Costs Hearing Costs Order in the Correspondence. Mr. Doughty referred to the case of *In re A (Children) (Judgment Adequacy of Reasoning (Practice Note))* [2012] 1 WLR 595 (CA) where the trial judge has given an *ex tempore* ruling and then invited counsel to raise any points which he had gotten wrong or should cover. Munby J opined that it was counsel’s responsibility to raise with the judge any material omission or lack of reasoning on an issue. Mr. Doughty also referred to the case of *In the matter of L and B (Children)* [2012] UKSC 8 where after an oral judgment the judge stated that “*if any party would be assisted by the provision of detail in relation to specific points she would address them*”, and the next day counsel for the father requested the judge to deal with certain issues in an addendum. Lady Hale stated that this accorded with the guidance given in *In re A (Children)*. Mr. Doughty submitted that these two cases, where counsel were invited to make submissions on the judgments, were not dealing with a judgment that was under embargo.
  
18. Mr. Doughty submitted that there was a mechanism for counsel to address costs of the Second Cost Hearing as set out in paragraph 43 of the Ruling. Thus, it was not appropriate for Mr. Pearman to address the Court on costs of the application nor for the Court to articulate a preliminary view in the Paragraph 43 Direction. He argued that the Court had already found that the conduct of the defendant throughout the proceedings went beyond the norm and warranted costs on an indemnity basis. The conduct continued in Mr.

Pearman making material comments on costs when the submission should have been made via the prescribed usage of the Form 31TC procedure.

19. In conclusion, Mr. Doughty submitted that the Defendant have resisted the cost hearings in various ways and blamed counsel for the Plaintiff for issuing bills which they claim are disproportionately high, tactics which he argued were similar to the strategy employed by the Defendant throughout its commercial relationship with BS&R and the trial of this matter. Mr. Doughty stressed that the Plaintiff had little choice but to pay significant legal fees arising from the First Costs Hearing, the Leave Application, the Appeal and the Second Costs Application. He argued that paragraph 43 should remain undisturbed as a more fair result was warranted in the circumstances, given the lengths to which BS&R had to go to avoid losing money for having pursued justice and winning every battle. Further, he argued that the Second Costs Hearing Cost Order covered all the extant costs matters that remained to be determined. Lastly, Mr. Doughty submitted that should I find that the cost of the Second Costs Hearing should be other than on the indemnity basis, then such a costs ruling should only apply to the Second Costs Hearing and not to an earlier proceedings because I had already concluded that the conduct of the Defendant in the proceedings was “*out of the norm*” to warrant an order for costs on an indemnity basis where the intention was “*to achieve a more fair result*”.

### **Analysis**

20. In my view, I should grant the application for costs on the standard basis for the following applications for the reasons as set out below:

- a. The First Costs Hearing;
- b. The Leave Application;
- c. The Appeal; and
- d. The Second Costs Hearing.



21. First, I do not agree with Mr. Doughty that the Second Costs Hearing Cost Order at paragraph 43 applied to all the remaining costs issues that needed to be determined. In that paragraph 43, I only had in mind the Second Costs Hearing.
22. Second, in respect of the costs of the First Costs Hearing, the Leave Application and the Appeal, in my view there was nothing “*out of the norm*” to warrant an order for indemnity costs. The matters were conducted in the usual or normal way. Further, the Appeal was determined by a Consent Order without a hearing, which was a very reasonable manner in which to deal with the circumstances where the Court of Appeal had recently clarified the approach to the award of indemnity costs. I do not accept Mr. Doughty’s argument that the First Costs Hearing, the Leave Application and the Appeal should have costs awarded on the indemnity basis because of my findings in the Second Costs Ruling about the conduct of the Defendant during trial. In my view, the conduct of the Defendant in the course of the trial proceedings did not extend to the First Costs Hearing, the Leave Application and the Appeal. Thus, in respect of those three matters, I grant costs to the Plaintiff on the standard basis, to be taxed by the Registrar if not agreed.
23. Third, in respect of the costs of the Second Costs Hearing, now having heard submissions from counsel, then similar to the above approach, in my view there was nothing “*out of the norm*” to warrant an order for indemnity costs. Also, I do not accept Mr. Doughty’s arguments that I should award indemnity costs based on the conduct of the Defendant during the trial proceedings. In my view, the Second Costs Hearing was conducted in the usual or normal way. Further, the conduct of the Defendant in the course of the trial proceedings did not extend to the Second Costs Hearing.
24. I do not accept Mr. Doughty’s submission that Mr. Pearman’s conduct to make submissions by way of the Correspondence warrants an award of indemnity costs or that it was a tactic similar to the tactics of the Defendant at trial. In my view, Mr. Pearman was cognizant that this matter had consumed an incredible amount of time and costs by all parties and was desirous to bring the matter to a close without further costs. In his emails on 22 July 2024 Mr. Pearman took the view that the issue of costs in paragraph 43 was a final point which could be determined on the papers with the hope that Mr. Doughty would agree that that

final point should be determined on the papers. I am not satisfied that Mr. Pearman's efforts amounted to the conduct as asserted by Mr. Doughty and to warrant an order for indemnity costs.

### **Conclusion**

25. In light of the above analysis, I have decided that the costs of the First Costs Hearing, the Leave Application, the Appeal and the Second Costs Hearing should be on the standard basis, to be taxed by the Registrar if not agreed. I was not satisfied that there should be an award of indemnity costs in respect of those matters.

26. In this Third Costs Ruling, I have awarded costs to the Plaintiff in four matters on the standard basis. However, I have not accepted the Plaintiff's application for costs to be awarded on the indemnity basis for those four matters. Further, Mr. Pearman expressed the hope that Mr. Doughty would agree that for the Second Costs Hearing, costs should be awarded on the standard basis. In the Court's Paragraph 43 Direction, I had indicated that having reviewed counsel's emails in the Correspondence, my preliminary view was to change the order for costs (for the Second Costs Hearing) on an indemnity basis to costs on a standard basis. Mr. Doughty did not heed those views and pressed on with his application for indemnity costs for which he has not been successful. In the exercise of my discretion, in these circumstances, I direct that for this Third Costs Ruling, there should be no order for costs.

Dated 20 January 2025



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