IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G274 of 2012

BETWEEN:

BEVERLY HEMMINGS

Plaintiff

AND:

P.M.C. LTD (Trading as) CHRISSIE TOMLINSON HOSPITAL

Defendant

Appearances:	**Mr. Irvin Banks for the Plaintiff** **Mr. Phillip Boni for the Defendant**
Before:	**Hon. Justice Richard Williams**
Hearing strike out application:	**6th February 2013**
Draft judgment strike out application circulated:	**22nd February 2013**
Judgment strike out application circulated:	**28th February 2013**
Written submissions on costs filed:	**26th March 2013**
Draft Judgment on costs circulated:	**30th May 2013**
Date of Judgment on costs:	**4th June 2013**

JUDGMENT

The Background

1. At the hearing on 6th February 2013 the Plaintiff withdrew her claim for breach of contract in respect of accrued banked hours, her claim for breach of contract in relation to overtime and her defamation claim. The only remaining claim for consideration was the dismissal claim. I delivered reasons for judgment in this case on 26th March 2013 in which I struck out the dismissal claim in the Writ of Summons and Statement of Claim as disclosing no reasonable cause of action. Accordingly, the Defendant was successful overall in this case.

The Application

2. The only issues remaining are as to whether the costs of the strike-out and/or the withdrawn claims should follow the event, and as to whether the costs should be on the standard or indemnity basis. I have considered the written submissions on costs submitted by the parties following the delivery of my judgment. The facts and background of this case are set out in some detail in my previous judgment. I will not repeat them.

3. The Defendant seeks costs, primarily on the basis of the ordinary rule that costs follow the event. The first request by the Defendant is for an award of indemnity costs. In the alternative, if the Court is not willing to order the Plaintiff to pay costs to be taxed on the indemnity basis, the Defendant seeks to have its costs of the proceedings to be taxed on the standard basis.

4. The Plaintiff seeks to persuade the Court to make no order as to costs or minimal costs in relation to the Defendant's application to strike out.

The Law and Conclusions in Relation to the Awarding of Costs

5. The award of costs is in the discretion of a trial judge, but the discretion should be exercised along well – settled lines. The basic principle set out in GCR O.62, r.4 is that costs should follow the event except where it appears in all the circumstances of the case that some other order should be made as to the whole or any part of the costs. Therefore, I have a wide discretion to do justice between the parties, although this discretion must be exercised judicially, having regard to the underlying principle that the "real winner", as distinct from a nominal winner, is generally entitled to his costs. Further, I should not embark on a minute examination of all the various issues and the time taken to determine every issue, but should consider the event or outcome of the litigation and, in the light of that consideration, and any timely offers of settlement that were made, should use a broad brush in attempting to arrive at a just result.

6. The general rule governing that the award of costs to a successful Defendant was laid down by Atkin LJ in ***Ritter v Godfrey*** [1920] 2 KB 47 at 60:

> *"In the case of a wholly successful defendant, in my opinion the judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation, or (2) has done*

something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains."

7. GCR O.62, r.5(2) provides:

"Where a party by notice in writing and without leave discontinues an action or counterclaim or withdraws any particular claim made by him as against any other party (except for the purposes of obtaining a default judgment), that other party shall be entitled to his costs of the action or counterclaim or his costs occasioned by the Claim withdrawn, as the case may be, incurred to the time of receipt of the notice of discontinuance or withdrawal."

8. When considering the claims which have been withdrawn by the Plaintiff, the matters to be taken into account appear in a series of cases helpfully summarised in the Court of Appeal decision in ***Erica Brooks v HSBC Bank Ltd*** [2011] EWCA Civ 354. Moore-Bick LJ at paragraphs 6 to 7 stated that he was of the view that the judge had fairly summarised the effect of the authorities which had been drawn to his attention and that the following the principles were not in dispute:

"(1) When a (plaintiff) discontinues the proceedings, there is a presumption...that the Defendant should recover his costs; the burden is on the (plaintiff) to show a good reason for departing from that position;

(2) The fact that the (plaintiff) would or might well have succeeded at trial is not in itself a sufficient reason for doing so;

(3) However, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption:

(4) The mere fact that the (plaintiff's) decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;

(5) If the (plaintiff) is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he has not himself contributed;

(6) However, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason from departing from the rule."

Since ***Messih v McMillan Williams*** [2010] EWCA Civ 844 one can add that it is not a good reason to displace the presumption that the Plaintiff has obtained all he could hope to achieve against another party.

9. Moore – Bick LJ summarised in the position at paragraph 10 :

"...A (plaintiff) who seeks to persuade the court to depart from the normal position must provide cogent reasons for doing so and is unlikely to satisfy that requirement save in unusual circumstances. The reason was well expressed by Proudman J in Maini v Maini: a (plaintiff) who commences proceedings takes upon himself the risk of the litigation. If he succeeds he can expect to recover his costs, but if he fails or abandons the claim at whatever stage of the process, it is normally unjust to make the defendant bear the costs

of proceedings which were forced upon him and which the claimant is unable or unwilling to carry through to judgment. That principle also underlies the decision of this court in Messih v Macmillan Williams. There may be cases in which it can be said that the defendant has brought the litigation on himself, but even that is unlikely to justify a departure from the rule if the (plaintiff) discontinues in circumstances which amount to a failure of the claim."

10. The Plaintiff contends that a no costs order should be made as the bringing of the case was in the public interest. The Plaintiff relies upon the case of ***Hanks*** v ***Minister of Housing and Local Government*** [1963] 1 QB 999. However, it is clear that the bringing of the withdrawn defamation claim, withdrawn overtime claim and the withdrawn banked hours claim cannot be regarded as being in the public interest. I am not satisfied that the dismissal claim can be regarded, unlike the ***Hanks*** case, as being a test case. There is helpful case law from the Grand Court[1] and recent clarifying case law from the highest level in England and Wales.[2] Although I accept that this has been a developing area of the law in fairly recent years, the Plaintiff failed to recognise the effect and applicability of that precedent. That said, I recognise this case is the first time that the ***Edwards*** case has been considered by the Courts in Cayman and that claims in relation to "stigma" damages have in the past taxed the Courts in England and Wales. The

[1] Roulstone and Coffee v Cayman Airways Limited (1992-93) CILR 259.
[2] Edwards v Chesterfield Royal Hospital NHS Foundation Trust & Botham v Minister of Defence [2011] UKSC 58, [2012] IRLR 129 reaffirming by a majority of 4 to 3 the approach in Johnson v Unisys Ltd [2011] ICR 480.

outcome of the case, which was brought by the Plaintiff for financial reward, did not benefit the Defendant as it was already aware of the appropriate approach from this case law. I am also aware, even if it were a case involving some public interest aspect, that of itself does not necessarily warrant departure from the general rule that costs follow the event.

11. In addition, I find no merit in a reliance on the case of ***CI v RD and Others*** Cause Nos. 27 and 47 of 2005, Levers J, 10th May 2055 in support of a contention that the Court should make an order for minimal cost. Upon reading the judgment of Levers J it is not apparent that the Court exercised its discretion by ordering a reduced sum of costs. In fact, it appears that the costs ordered in each cause were, as stated by Levers J, the "*costs of and incidental to the application*", in other words, the actual costs incurred in what appeared to be a straightforward hearing.

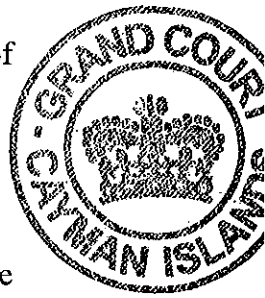
12. I am satisfied that the Defendant has succeeded in all the relief sought. On the arguments before me, in relation to the dismissal claim, there is no reason to depart from the normal rule that costs should follow the event. I reach this conclusion accepting that I am entitled to deny costs to a successful party where the justice of the case demands that.[3] Some examples of when the Court may deny costs in favour of the successful party are given in the White Book (Supreme Court Practice, 1999, Vol. 1, para. 62/2/11):

[3] see Henderson J at paragraph 29 in ***Sagicor General Insurance (Cayman) Limited and Another v Crawford Adjusters (Cayman) Limited and Others*** Cause No. 78 of 2006, 9 December 2011.

"A successful party may be deprived of his costs if he presents a false case or false evidence, or acts oppressively in the action (Bayliss Baxter Ltd v Sabath [1958] 1 W.L.R. 529; [1958] 2 All E.R. 209, CA). See also Anglo-Cyprian Trade Agencies Ltd. v Paphos Wine Industries Ltd. [1951] 1 All E.R. 873 and Jones v McKie and Mersey Docks and Harbour Board [1964] 1 W.L.R.,960, CA; [1964] 2 All E.R. 842, CA, where a successful defendant was deprived of costs and in Hobbs v Marlowe [1978] A.C. 16; [1977] 2 All E.R. 241 the costs of a successful plaintiff were cut because the action had been continued not for the benefit of the plaintiff, but so that the A.A., of which he was a member, could recover full costs, but in Smith v Springer [1987] 1 W.L.R. 1720; [1987] 3 All E.R. 252, the Court of Appeal allowed an appeal against striking out proceedings where there had been an offer to pay the claim in full but a refusal to pay costs. In Cable v Dallaturca (1977), 121 S.J. 795 a successful defendant was deprived of half the cost of the hearing because of his solicitor's failure to secure a copy of its experts report in accordance with O.38, rr.36 and 40: and in Blue Bell Inc v Falmer International Ltd (1980) 130 New L.J. 5948, CA, the plaintiffs were deprived of their costs of the motion because before its issue they knew that steps were being taken by the defendants to remedy the complaint; .... In Polydor Ltd v Sandhu (1980) 130 New L.J 18, the Court of Appeal held that the judge erred in principle when he made no order for costs as a result of considering an issue which did not fall to be considered."

Although this is a non-exhaustive list, it cannot be said that there has been some sort of disentitling conduct on behalf of the successful Defendant which should

displace the principle that costs follow the event. The Plaintiff, as the losing party, has failed to establish a basis for any departure from the usual rule. There is no valid reason why I should deprive the successful Defendant of his costs in the strike out proceedings. It might be argued that the principle applies all the more in the case of a successful defendant than in that of a successful plaintiff, for the former is brought to Court to answer process, whereas the latter comes to Court of his own free will.



13. Additionally, on the arguments before me, there is no reason to depart from the principle that the Defendant should recover its costs for the parts of the claim in the cause which the Plaintiff has withdrawn. The Plaintiff has shown no good reason as to why I should depart from that general principle. It is clear that those claims would have failed, an additional factor in favour of applying the presumption. It cannot be argued that the withdrawal has come about due to some form of unreasonable conduct on the part of the Defendant.

14. Accordingly, the Plaintiff should pay the costs incurred in relation to all four of the claims brought in cause number 274 of 2012. The issue for me to now go on to consider is whether they should be on the standard basis or the indemnity basis.

The Law in Relation to Awarding Costs on the Indemnity Basis

15. The Court has power to award costs on the indemnity basis which requires the exercise of judicial exercise of a discretion. Caution must be exercised when considering making orders for indemnity costs. I can do no better than herein reiterate the guidance given by Henderson J in ***Daniel Alexander Bennett v the Attorney General of the Cayman Islands*** Cause No. 512/06, May 10, 2010. In ***Bennett*** Henderson J found that he preferred the evidence of the plaintiff and his witnesses which led to him making a decision on liability in favour of the plaintiff. The plaintiff argued that indemnity costs should be awarded on the basis that a number of the defendant's witnesses could not have had a genuine belief in the matters which they urged the Court to find to be the truth.

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16. I make no apology for, and see great merit in, repeating in some detail Henderson J's helpful summary in relation to the approach to be taken by the Grand Court when considering whether to make an award of indemnity costs. At paragraph 5 of his judgment Henderson J referred to GCR O.62, r.4(11) which provides the costs may be awarded on the indemnity basis if the Court is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently. Henderson J explained at paragraph 7 that:

> *"If indemnity costs were to be awarded, the hourly rate for taxation purposes would be that actually agreed upon with the client. That appears from Practice Direction No. 1/01 entitled*

"Guidelines Relating to the Taxation of Costs". Section 7.4 of the Practice Direction provides that:

> *"In the case of taxations on the indemnity basis, hourly rate or scale of rates will be that agreed between the attorney and his client provided that such rate or scale is not unreasonable. The mere fact that the agreed rate is higher than the maximum rate(s) allowable on taxation on the standard basis should not be regarded as evidence that it is unreasonable.""*

17. Henderson J continued:

> *"8. Advancing a defence which is merely weak or unlikely to succeed is to be distinguished from maintaining a defence which is manifestly hopeless. The latter can be characterised as unreasonable. The former is a regular occurrence with which every barrister will be familiar. Many litigants, even after receiving a warning from their legal advisers that the claim or defence is likely to fail, prefer to have that determination made by the Court. That is not, in the typical case, unreasonable. Weak cases will succeed from time to time. The litigant is entitled to prefer a judicial determination based upon all of the evidence over the predictions of his advisers which are limited, as they usually are, by not having observed the other side's witnesses and cross-examination. There are also cases which are hopeless and which appear that way to anyone with the requisite legal training. It is open to a judge to determine that it was unreasonable to bring such a claim or advance such a defence. The usual result of such a*

finding is that the unsuccessful party will pay costs on the indemnity basis.

9. The principle is described well in a recent decision of the Technology and Construction Court in Fitzpatrick Contractors Limited v Tyco Fire and Integrated Solutions (UK) Limited [2008] EWHC 1391. At paragraph 3, Justice Coulson set out his summary of the principles relating to an award of indemnity costs in the United Kingdom. Item 5 is pertinent:

> *"There are a number of decisions, both of the TCC and of other courts, which make plain that the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, whereas the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) will lead to such an order. In both Wales Construction Ltd. V HGP Greentree Allchurch Evans Ltd. [2006] NLR 45, and EO Projects Ltd. V Javid Alavi [2006] BLR 130 this court was persuaded that, in the circumstances of those cases, an order for indemnity costs was appropriate because the claimants should have realized that their claim was hopeless and should not have taken the matter on to trial. However, in Healy-Upright v Bradley & Another [2007] EWHC 3161 the court reiterated that an order for indemnity costs was not justified by the mere fact that the paying party had been found to be wrong, either in fact or in law or both, or by the fact that in hindsight, the result of the case now being known, the position adopted by*

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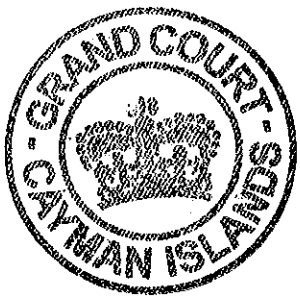
the party may be thought to have been unreasonable."

10. I agree with and adopt the statement of principle, to which I would add the following from Kiam v MGN Ltd. (2) [2002] EWCA Civ 66, at paragraph 12:

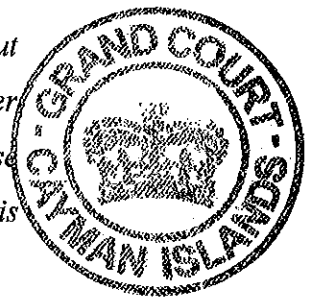
"I for my part, understand the Court there to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. And indemnity costs order made under rule 44 (unlike one made under part 36) does, I think, carry at least some stigma. It is of its nature penal rather than exhortatory."



18. Henderson J then went on to conclude at paragraph 11:

"The assessment of unreasonableness must avoid the wisdom of hindsight. The question is whether it was unreasonable to advance the claim or maintain the defence taking into account what should have been evident to the party concerned at the outset of the trial. In the present case, the Attorney General must have realized that his witnesses could be challenged on the ground that their evidence was contradicted by their own contemporaneous statements. He would not have understood that the Defence was hopeless. Mr. Lynagh, when asked to assess the probability of

success for the purpose of fixing the uplift in his fee agreement, put the estimate at 50%. There is no reason to expect any greater degree of prescience from the Attorney General. For these reasons, I award to the plaintiff his costs on the standard basis only."



Reasons Why the Defendant Contends that an Order for Costs on the Indemnity Basis Should be Made.

19. Mr. Boni, in his written submissions, highlights certain aspects of the litigation which he contends justifies the making of an order for costs on the indemnity basis. In relation to the withdrawn claims, he contends that they should have been withdrawn before the hearing of the strike out application. It is rightly contended that the defamation claim was doomed for failure as there had been no publication and the Statement of Claim did not even allege publication. Mr. Boni reminded the Court that this point had been taken by the Defendant in its Defence which had been served in July 2012. Mr. Boni also pointed out that the issue had been repeated in the strike out summons filed on 10th September 2012, and supporting affidavit sworn by Dr. Stephen Tomlinson on 21st December 2012. Mr. Boni said that, despite this, the Plaintiff had not made any attempt to amend the Statement of Claim or withdraw or discontinue the claim until the hearing of the strike out summons.

20. In relation to the overtime claim Mr. Boni points out that the Plaintiff had signed a contract in which she accepted she was a professional, accepting a higher rate of pay and relinquishing her right to overtime. Again, he says that the Plaintiff, despite this, maintained her overtime claim right up until the hearing of the strike out summons.

21. Mr. Boni also points out that the banked hours claim was hopeless on the facts. He submitted that it must have always been apparent to the Plaintiff that her allegation that the Defendant had cancelled all of her banked hours in April 2010 had no foundation. Mr. Boni noted that the facts clearly show that the banked hours scheme continued to operate until June 2011 and that the Plaintiff was paid in respect of banked hours when she signed a third contract in June 2011. He again pointed out that, despite this, the Plaintiff did not withdraw this claim until the hearing of the strike out summons.

22. Mr. Boni invites the Court, if is not persuaded to make an order on the indemnity costs basis on the case as a whole, to make such an order in relation to the defamation claim, the overtime claim and the banked hours claim . He submits that those claims should never have been brought but, once brought, should have been withdrawn before the hearing of the strike out summons.

23. Mr. Boni submits that the Defendant in its Defence clearly pointed out that the dismissal claim was bad in law. Mr. Boni states that this was repeated in the strike out summons and that the relevant case law was set out in paragraph 13 of the

affidavit sworn by Dr. Tomlinson in December 2012. The Defendant acted appropriately by not rushing to issue its summons to strike out, contacting the Plaintiff to give her ample opportunity to review her case before doing so. In a letter from Mr. Boni to Mr. Banks dated 2nd August 2002 he set out the reasons why the Plaintiff's case as pleaded merited strike out. Mr. Boni stated that before filing the summons for strike his client wanted to give the Plaintiff

> *"an opportunity to consider her case and cure any defect or discontinue her suit."*

Mr. Boni went on to warn:

> *"There will inevitably be significant costs arising from this matter and perhaps involve wasted costs. We therefore advise that your client consider her position very carefully."*

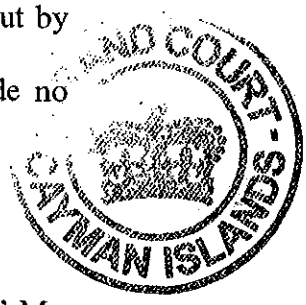
24. However, Mr. Banks in his letter in reply dated 13th August 2012, written "*having received instructions*", referred to the perceived merits in the Plaintiff's claims and stated that any application to strike out would be "*ill-conceived.*" The Plaintiff clearly recognised that costs orders might well be made against an unsuccessful party in any strike out proceedings, as Mr. Banks stated in the letter:

> *"We extend the same advice regarding costs should you proceed with your client's application."*

25. The Plaintiff chose not to take up the written offered opportunity to possibly amend her pleadings, especially in relation to the defamation claim, and/or to

withdraw parts of her claim in a timely fashion before significant costs were incurred.

26. Mr. Boni contends that the affidavit of the Plaintiff contained untruths and serious and irrelevant allegations. He further states that the allegations continue to be made in the submissions in relation to costs. However, as rightly pointed out by Mr. Boni at paragraph 11 of his written submissions, the Court has made no findings of fact in relation to these matters.



27. Mr. Boni concludes that the Plaintiff's conduct is "deserving of sanction." Mr. Boni submits that these claims were good enough to demand a trial, but still required a day of the Court's time at the strike out application. It is submitted that it is not acceptable conduct for the Plaintiff to have used the hearing to vent a relevant but serious allegations relating to the Defendant and its employees and officers.

Conclusion In Relation to the defendant's Application for Costs to be Awarded on the Indemnity Basis

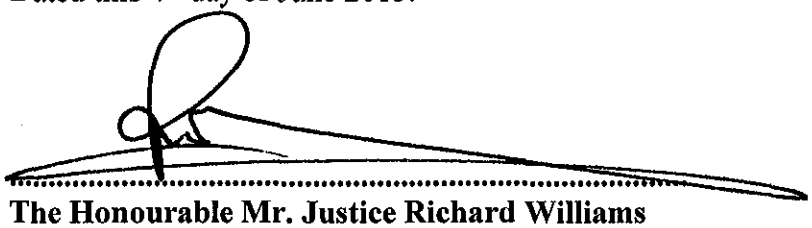
28. As in England and Wales I take the position to be that the award of costs on the indemnity basis is generally reserved to cases where the court wishes to indicate its disapproval of the conduct of the paying party. In the words of Halsbury's Laws, 4th Edition (2007), Volume 10, para 23, note 8:

"Indemnity costs may be awarded against the party whose conduct has been unreasonable, even though the conduct could not properly be regarded as lacking moral probity or deserving of moral condemnation: ***Reid Minty (A Firm) v Taylor*** *[2002] 2 All ER 150."*

29. In this case, due to the nature of the fairly recent clarifying case law coming out of the Supreme Court in England and Wales, there were issues which required considered legal argument relating to the dismissal claim at the strike out application. Prior to the fairly recent decision in ***Edwards***, albeit decided by majority of 4 to 3, there had been a degree of uncertainty as to the correct approach for the Courts to take in relation to the issues raised in the dismissal claim before me. I was greatly helped and guided by the case of ***Edwards***, putting that case in context with preceding authority, and accordingly the defendant succeeded. Therefore, although some of the relevant case law in relation to the dismissal claim was brought to the attention of the plaintiff in December, about six weeks prior to the hearing, the circumstances are such that they fall short of those where indemnity costs should be ordered. I do not characterise the plaintiff's conduct in relation to the dismissal claim as being an abuse of process or wholly unreasonable. The basis of the costs order in relation to cost incurred meeting that part of the claim will be limited to costs on the standard basis.

30. In relation to the claims withdrawn at the hearing of strike out summons. The facts were clear and had been pointed out to the Plaintiff well in advance of the hearing. The defamation case was doomed for failure on the face of the Statement of Claim. The Plaintiff made a conscious and considered decision not to take up the opportunity to seek to amend, despite the suggestion made by the Defendant back in Mr. Boni's letter of August 2012. The claims in relation to banked hours and overtime should have been withdrawn well before the hearing. I am satisfied that to maintain these clearly hopeless claims until this stage was an improper and unreasonable way of conducting the proceedings. In relation to the costs incurred in reaction to those claims this is an appropriate case for an award of costs on an indemnity basis.

Dated this 4th day of June 2013.



The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT