

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

Cause No.: G 64 of 2020

**IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 79 (1) OF THE LABOUR LAW (2011
REVISION)**

AND IN THE MATTER OF GCR ORDER 55

BETWEEN

MARSH MANAGEMENT SERVICES (CAYMAN) LTD

APPELLANT

AND

NATHANIEL CLAYTON PRICE

RESPONDENT

DECISION IN CHAMBERS FOLLOWING WRITTEN SUBMISSIONS

Appearances: **Mr. Hector Robinson QC and Ms. Angelique McLoughlin of
Mourant for the Appellant**

**Mr. Mark Goodman and Ms. Natasha Partos of Campbells
for the Respondent**

Before: **The Hon. Justice Robin McMillan**

Draft Judgment Circulated: **18 September 2020**

Judgment Delivered: **22 September 2020**





HEADNOTE

The inability to impose interest on damages awarded under the Labour Law – The jurisdiction of the Grand Court to award costs in relation to appeals under the Labour Law – The circumspection of the Court in awarding indemnity costs to a successful party.

JUDGMENT

Introduction

1. This matter arises from an earlier Judgment of this Court delivered on 8 July 2020, which upheld a decision of the Labour Appeals Tribunal (“LAT”) dated 9 March 2020. In effect, the Court resolved in favour of the Respondent the issues which are identified in the Judgment.
2. Accordingly, in relation to the legal issues and facts set out in that Judgment, it is unnecessary to add any further major comment.
3. However, what is now before the Court concerns the jurisdiction of the Grand Court to award interest on damages awarded by the LAT and the jurisdiction to award costs in relation to what may conveniently be called the costs of the proceedings below, together with the related question of what level of costs at large is appropriate in the circumstances of the case.
4. Written Submissions dated 5 August 2020 have been made by the Respondent. Written Submissions dated 12 August 2020 have been made by the Appellant. Finally, Written Reply Submissions dated 19 August 2020 have also been made by the Respondent.

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5. All of this material has been reviewed and considered in relation to what is in the main an issue as to the jurisdiction of the Court as well as to the level of costs. Ultimately in this regard the Court has concluded that the Appellant's Submissions have merit and are to be preferred and that the Respondent's Submissions are in substance misconceived.



Entitlement to Interest

6. On 26 February 2018, the Respondent was invited to a termination meeting with Ms. Boucher and Ms. Charnley and latterly Ms. De Silva on behalf of the Appellant ("the Termination Meeting"). At the Termination Meeting the Respondent was informed without warning that his employment was being terminated. After the Termination Meeting, the Respondent was escorted from the building.
7. On 16 May 2018 the Respondent filed a complaint with the Labour Tribunal ("LT") and made a claim for unfair dismissal pursuant to Section 54(1) of the Labour Law (the "Complaint"). The matter then proceeded to the LAT.
8. The Respondent therefore claims that he should be entitled to interest on his unfair dismissal award of US 149,423.02 against the Appellant extending from 26 February 2018.
9. His argument is developed in his Written Submissions at paragraphs 5-10 in the following way:



"5. *The Court's jurisdiction to award interest originates from s.34(1) of the Judicature Law (2017), which provides that the Court may make an award for interest on any judgment sum, at "such rate as the court sees fit, not exceeding the rate prescribed from time by time by rules of court....for all or any part of the period between the date when the cause of action arose, and (b) in the case of the sum for which judgment is given, the date of the judgment".*

6. *In accordance with the Judgement Debts (Rates of Interest) Rules 1995:*

6.1 *Rule 4(a)"Pre-Judgment Interest" the Court may order the payment of simple interest upon any debt ... at a rate not exceeding the rate prescribed in the law;*

6.2 *Rule 5(a)"Post- judgment interest" interest shall be payable at the rate prescribed in the schedule to the law on the principal amount of all judgment debts from the date of service of the judgment or order; and*

6.3 *Rule 5(b)(ii) and 5(b)(iii) interest is payable on all orders for costs from the date of the date of the service of the judgment or order; or in the case of taxed costs, the date of service of the certificate of taxation.*

7. *In accordance with the Judgment Debts (Rates of Interest) Rules 2012, the prescribed and applicable rate of interest in United States Dollars is 2 $\frac{3}{8}$ %.*

8. His Lordship is respectfully invited to read Sycamore Bidco Ltd v Breslin and Dawson [2013] EWHC 174 (Ch) in full, and to give particular regard to paragraphs 6-16, in which the following principles are derived:



8.1 The principle of awarding interest on a judgment debt is intended to compensate a plaintiff (or successful party) for the time that he has been deprived of the use of his money by a wrongdoer; accordingly, interest should generally run from the date of accrual of the cause of action [paragraph 6].

8.2 The power of the Court to award interest is discretionary, however "that discretion is not unfettered in the sense that the court can do what it likes on a case by case basis". The starting point for the Court is that interest should run from the date on which the cause of action accrues, unless, on the facts of the case, it falls into one of the three exceptions set out in General Tire & Rubber Co. v Firestone Tire Rubber Co Ltd [1975] 1 WLR 819 below:

(a) First, that the defendant neither knew, nor reasonably could have been expected to know, that the plaintiff was likely to issue a claim against him and so was in no position to tender payment. In such circumstances, interest should be calculated from the date of the claim; or



(b) *Secondly, that the plaintiff has been guilty of unreasonable delay in prosecuting his claim; or*

(c) *Finally, that it would be unjust in all the circumstances of the case to order interest from the date of the plaintiff's loss [the third exception is derived from General Tire & Rubber Co. v Firestone Tire Rubber Co Ltd [1975] 1 WLR 819 but was not cited in *Sycamore Bidco Ltd* above].*

9. *When one applies these principles to the facts of this case, it is plain that none of the exceptions to the general rule, that interest shall run from the date upon which the action arose, apply. His Lordship is respectfully invited to recall that the Appellant unfairly dismissed the Respondent on 26 February 2018. Therefore, the Court's starting point, in the exercise of its discretion, should be to award the Respondent interest on his damages from 26 February 2018.*

10. *This case does not fall into one of the three exceptions referred to in paragraph 8.2 above for the following reasons:*



10.1 *First, the Appellant knew or ought to have reasonably known that the Respondent would issue a claim against it in circumstances where an employee of 37 years of good service was marched out of the office and his employment terminated without cause or notice. In addition His Lordship will recall that the Appellant offered the Respondent an ex gratia payment of US\$64,615.38 on the day of his termination, provided that the Respondent agreed to release and discharge any claims he had against the Appellant. Therefore, it can be inferred that the ex gratia payment was offered because the Appellant was aware that the Respondent may issue legal proceedings against it and wanted to try to mitigate against that risk.*

10.2 *Secondly, the Respondent did not delay prosecuting his claim. The Respondent was dismissed on 26 February 2018 and his claim to the Labour Tribunal was filed on 16 May 2018, less than three months later; and*

10.3 *Finally, this is not a case in which, in all of the circumstances, it is just and equitable for interest to run from a date other than 26 February 2018 for the following reasons:*

(a) The LAT found as a matter of fact that the Respondent had been unfairly dismissed on 26 February 2018. Therefore, the Respondent has been deprived of

US\$149,423.02, the judgment sum, for almost 2 ½ years;



- (b) The Appellant sought and obtained a stay of the LAT decision therefore extending the period in which the Respondent has been deprived of his rights;*
- (c) As a consequence of his unfair dismissal the Respondent was forced to obtain new employment and accept a reduction in his income of approximately 30%;*
- (d) The Appellant unfairly dismissed the Respondent after 37 years of good service but nonetheless has fought this case at every stage; and*
- (e) The Appellant's appeal and general conduct in defending this claim was, for the reasons set out in more detail below, unreasonable."*

10. However, in relation to interest the Appellant takes fundamental issue with the proposition being advanced that a proceeding before the LT or the LAT is in law an action in the first place.

11. The Appellant's Written Submissions at paragraphs 4-11 proceed thus:

"4. The Respondent's argument in support of the claim for interest is based on the Grand Court's general jurisdiction under s34 of the Judicature Law, pursuant to which the Respondent claims interest 'from the date the cause of action arose' (that is pre-judgment interest) and 'in the case of the sum for which judgment is given, the date of judgment' (that is, post-judgment interest. The Respondent also relies on Sycamore Bidco Ltd v

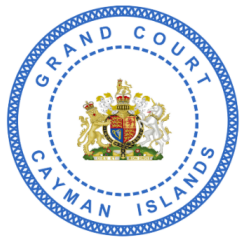
Breslin and Dawson [2013] EWHC 174 which sets out the exceptions to the principle that [where interest is payable] interest should run from the date the cause of action accrued.

5. *The Respondent's argument is entirely misconceived. The discretion to award interest is conferred by statute. With respect to causes brought before the Grand Court that discretion is conferred by the Judicature Law, in which case the Grand Court's discretion applies both to pre-judgment interest and post-judgment interest. The Grand Court has no jurisdiction to award interest on an award made by either the LT or the LAT from any date prior to the date of the decision pursuant to which the award was made. A proceeding before the LT or the LAT is not an 'action' within the meaning of s.34 of the Judicature Law. An action in this context is a claim commenced in the Grand Court.*

6. *On an appeal from a decision of the LAT, the Grand Court is not exercising its original jurisdiction conferred by the Grand Court Law or the Judicature Law. The Grand Court's jurisdiction on such an appeal is conferred by s79 of the Labour Law. That appellate jurisdiction, like the jurisdiction exercisable by any appellate court or tribunal, is purely statutory, and must be exercised within the confines of the jurisdiction conferred by the governing statute. The powers of the Grand Court on the hearing of an appeal pursuant to s79 of the Labour Law are set out at GCR Order 55, particularly GCR Order 55, r.6 and r.7.*



7. *Neither the Labour Law nor the GCR Order 55 confers on the Grand Court the power to award interest on an award of either the LT or the LAT for any period prior to the date of the decision pursuant to which the award was made. It would have been extraordinary if the contrary were the case, since the Labour Law confers no jurisdiction on either the LT or the LAT to award interest, and there has been no instance in which either the LT or the LAT has awarded interest on an award.*
8. *The Grand Court's jurisdiction to award interest from the date of the award is derived from section 76(2) of the Labour Law, which provides that:*




'An award made by the Labour Tribunal under section 46 (severance pay) or section 55 (unfair dismissal) may be enforced in like manner to a judgment of the Grand Court for the payment of a sum of money.'

This is the provision which invokes the jurisdiction of the Grand Court regarding post-judgment interest under section 34 of the Judicature Law.



9. *As specified in 34(1)(b) of the Judicature Law, interest accrues on a sum for which judgment has been given, from the date of the judgment. By analogy, the 'date of the judgment' in this case cannot be a date prior to the date of the LAT decision, that is 9 March 2020 since, prior to that date, there was no award capable of enforcement by the Respondent 'in like manner to a judgment of the Grand Court for the payment of a sum of money.'*

10. *None of the cases relied on at paragraph 8 of the Respondent's submissions have any relevance or application to principles relevant to the award of interest in this case. The decision in General Tire & Rubber Co. v Firestone Tire Rubber Co Ltd is irrelevant to this case because the Appellant is not seeking to bring its case within any of the exceptions to the exercise of the Grand Court's discretion to award of pre-judgment interest. The Grand Court has no such discretion in this case because it has no jurisdiction under the governing statutes (the Labour Law and the Judicature Law), nor the rules (GCR Order 55), to award interest on an award of the LT or LAT for any date prior to the date of the award.*



11. *The Labour Law establishes a statutory scheme which envisages a simple, relatively straightforward process for the resolution of claims. Within that framework neither the LT nor the LAT have any powers not expressly conferred by the statute. As such, neither tribunal has the power to award interest or costs. Within the context of that statutory framework it is not open to a party to recover either interest or costs 'by the back door' by way of claims or applications made in the Grand Court."*

12. The Respondent in his Written Reply Submissions disputes these arguments but it appears to the Court that he continues to fall into error by treating the proceedings below as though they constitute or amount to an action as such. Not all legal proceedings can be classified as actions.

13. The Respondent also relies on what is alleged to be a concession set out in an email from Mourant dated 22 July 2020 wherein it was recorded that the Appellant would agree to pay interest on the award at the rate of 2.345% per annum from 9 March 2020 (the date of the decision of the LAT) to the date of payment, claiming in effect that this somehow opens the door to this Court having the power to award to the Respondent interest on his damages from any date predating the Judgment of the Court. Nonetheless, where this Court has no relevant jurisdiction a concession by a party cannot *per se* create one regardless of how concessions by a party may be characterised.

14. The Court accepts that for the purpose of these proceedings and the calculation of interest the date of Judgment even by analogy can only be at earliest the date of the LAT decision and not before that date, there having been in the circumstances of this particular case no difference or no practical difference between the decision of the LAT and the decision of the Grand Court. The Court concludes that the Court has no statutory or procedural power to award interest on an award of either the LT or the LAT for any period prior to the decision pursuant to which the award was made.
15. As the Appellant observes, and as this Court agrees, the Labour Law establishes a simple process for the resolution of employment disputes. Within that scheme neither the LT nor the LAT has the power to award interest, or for that matter to award costs. This Court would wish only to add that parties should not be discouraged from asserting their respective rights through any anxiety or concern that doing so might have onerous financial obligations beyond those which properly may be the subject matter of the disputes themselves.
16. Accordingly, the legal argument of the Appellant in relation to the scope of interest payment is duly upheld and that of the Respondent is rejected.



Costs

17. The Respondent's arguments as to the scope of an award of costs in his favour are comprehensively set out at paragraphs 12-13 of his Written Submissions in these terms:

"12 *The Respondent seeks his costs of the Appeal and the proceedings below. It is undisputable that the Respondent was the successful party and there is nothing preventing the Court from awarding the Respondent his costs of the action to reflect the general rule that costs follow the event.*

13 *The Appellant is mistaken when it suggests that the Court's jurisdiction in this matter is limited to the powers prescribed to by the Labour Law (2011 Revision) and GCR, 0.55 and therefore it does not have the power to award the Respondent his costs of the Appeal and the proceedings below for the following reasons:*

13.1 *Upon the Appellant filing its notion of appeal dated 1 April 2020 these proceedings moved from the LAT to the Grand Court, where all of the Grand Court Rules, including to GCR 0.62 apply. It is perfectly plain that upon the Appellant bringing its appeal in the Grand Court, the Court has all of the powers to hear the appeal prescribed to it by the GCR. The Court's powers are in part prescribed by GCR 0.55, however, it would be wrong as a matter of principle and*



law to consider that the Court's powers in relation to appeals from the LAT are limited solely to the provisions in GCR 0.55 and it is otherwise entitled to disregard the provisions of the GCR, including, for example, the Overriding Objective.

13.2 *In its Originating Motion the Appellant sought an order from the Court that the Respondent pay the costs of the appeal to be taxed if not agreed. In addition, the Appellant has conceded that the Respondent should be entitled to his costs of the appeal on the standard basis. Therefore the Appellant's position that: (i) it sought relief from the Court that is only available pursuant to GCR 0.62 and (ii) the Respondent be entitled to his costs of the appeal on the standard basis; but (iii) the Court does not have the jurisdiction to consider any matters which are not expressed in the Labour Law (2011 Revision) or GCR 0.55 are mutually exclusive and contradictory. If the Court is entitled to award the Respondent his costs of the appeal pursuant to GCR 0.62 then the Court must have all of the powers conferred to it by GCR 0.62. The Appellant cannot cherry pick which rules it accepts are applicable and those which are not.*





13.3 *If the legislator had intended to limit the Court's powers, pertaining to the issue of costs, arising from an appeal from the LAT, this could and would have been expressed in the GCR. It is not, and therefore the Court has the power to exercise its discretion and to make an award for the Appellant to pay the Respondent's costs of the Appeal and below.*

13.4 *As the LAT found and as this Court upheld, the Appellant was unfairly dismissed by the Respondent on 26 February 2018. Accordingly, to enforce his rights, the Respondent has had to fund these proceedings for over two years. In order to do justice between the parties the Respondent should be entitled to recover the costs that he has incurred in bringing and defending the action and subsequent appeals.*

13.5 *Finally, the Court is invited to reflect that the Appellant offered the Respondent an ex gratia payment of \$64,615.38 on the day of his termination. This was not accepted by the Respondent because it was contingent on him signing a release agreement discharging any claims that he had against the Appellant. This is material for two reasons first, it can be inferred that the Appellant was aware that terminating the Respondent, an employee of 37 years good service without notice, involved a high risk of future litigation that it attempted to mitigate*

against. Secondly, the Appellant has now been ordered to pay the Respondent \$149,423.02, therefore the Appellant has been ordered pay \$84,807.64 more than it had originally offered to the Respondent.

13.6 *Accordingly, despite being on notice of the litigation risks associated with the Respondent's dismissal the Appellant strongly defended the Respondent's claim before the LT and before the LAT and lodged a further appeal to this court. As a consequence the Respondent has incurred legal costs in the region of \$140,000.00 to enforce his rights to a complete payment for unfair dismissal, and it is likely that the Appellant's legal costs are similar. As a consequence of the Appellant's conduct the legal costs in this claim are disproportionate to amount of money which was in dispute. If the Appellant had adopted a more measured and reasonable approach to the Respondent's dismissal and these proceedings, then the Respondent's costs could have been reduced if not avoided at all."*



18. The Appellant on the other hand emphasizes that neither the LT nor the LAT has the statutory power to award costs, and that therefore it is not open to a party to recover costs simply by means of claims or applications made in the Grand Court. In support of this proposition the Appellant argues as follows at paragraphs 12-15 of its Written Submissions:

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"12. *In Taylor v Royal Bank of Canada Trust Company (Cayman) Limited BC [2018 (1) CILR 412 at [94 to 100], Hellman J. (Ag.), addressing the question whether a claimant before the Labour Tribunal may recover costs of those proceedings by way of a claim in the Grand Court, said this, at [99]:*



'The Labour Law does not empower the tribunal to award costs because the legislature intended such costs to be irrecoverable. This is in keeping with the policy underpinning the Labour Law that Labour tribunals should be affordable and therefore readily accessible. To allow tribunal costs to be recoverable as damages would undermine this policy...'

And at [100]:

'The legislative intent was that costs incurred in the Labour Tribunal should be irrecoverable. Allowing their recovery "by the back door" as damages, whether from a party to the tribunal proceedings or from a non-party, would undermine the policy of the statute.'

13. *The court's reasoning in Taylor v RBC regarding the legislative intent behind the statutory scheme under the Labour Law is consistent with this court's determination at paragraph 124 of the judgment in this case where the court states:*

'Here we have a code of law and practice designed and intended to protect employees against the consequences of unfair dismissal. Such persons should be able to read about and to understand their rights and obligations without recourse to arcane and seemingly impenetrable legal complexity.'

Under such a scheme there is no scope for the right to recover the equivalent of pre-judgment interest on an award, unless the statute expressly creates such a right. By contrast, the statute expressly provides that an award may be recovered in the same manner as a judgment of the Grand Court, by virtue of which, the Respondent becomes entitled to recover the equivalent of post-judgment interest, which the Appellant has conceded. The Respondent's claim for interest on the award for any period prior to the date of the LAT award ought therefore to be rejected.



Costs

Costs of the LT and LAT proceedings

14. *Neither the LT nor the LAT have jurisdiction under the Labour Law to award costs arising from proceedings brought before either tribunal. This issue was authoritatively decided by the Grand Court in Taylor v RBC (supra).*



15. *The principle that the costs of tribunal proceedings are irrecoverable as damages applies in equal measure to such costs being irrecoverable following an appeal. It would be absurd if the position were otherwise, as it would mean that a successful party who had no right to recover costs before the relevant tribunal could acquire such a right just by virtue of the other party exercising the statutory right of appeal, that is to say, 'by the back door'."*

19. The Respondent in reply seeks to distinguish the *Taylor* case in this way at paragraphs 4-6:

"4. *The Court has the power to grant the Respondent his costs of the appeal and below pursuant to GCR O. 62, r.4. The Respondent does not accept that the issue of whether the Grand Court is permitted to award a successful party, on appeal from the LAT, its costs of the proceedings below has been determined by Taylor v RBC.*

5. *As set out above, in Taylor v RBC the court was asked to determine whether or not a Plaintiff could seek his costs of LT and LAT proceedings as damages in the Grand Court, and the Court determined that he could not. The Grand Court was not hearing an appeal from the LAT and it did not consider or decide that a successful party in the Grand Court is not permitted to recover his or her costs of proceedings below. At paragraph 156 of Taylor v RBC the court confirmed that in relation to the issue of costs:*

"My provisional view is that the costs of the O.14A applications should be reserved to the trial judge, to be determined together with the costs of the trial, and that the defendants as the successful parties, should be awarded the costs of the O.18, r.19 application on the basis that costs should follow the event. However it is open to the parties to seek to persuade me otherwise."

6. *Therefore, in Taylor v RBC, the Judge expressly confirmed that he was not dealing with the issue of costs and did not express any view, whether upon hearing an appeal from the LAT the Grand Court has the power to award the successful party his costs of the proceedings and below."*



20. The Respondent is entirely correct to state that the issues in the *Taylor* case arose in the context of a Writ Action claiming damages for breach of contract. It was only in the course of such proceedings that a claim for damages arose in relation to the costs of certain proceedings in the LT.

21. The learned Judge states at paragraph 98 that as the Tribunal had no power to award costs, the occasion for a court or tribunal to determine the Plaintiff's Tribunal costs *"has not yet arisen."*

22. Nonetheless he then goes on to state in any event at paragraph 99 that the Labour Law does not empower the tribunal to award costs because the legislature intended such costs to be irrecoverable. It would be very odd indeed if costs which are intended to be irrecoverable under one statute could somehow then be recoverable under another one. In other words, the learned Judge in the course of his Judgment was clearly expressing views which are not only relevant but also applicable to the present matter.
23. As this Court sees the question, this principle of underlying statutory intent entirely undermines all of the Respondent's arguments set out at his paragraph 13 and renders them nugatory.
24. Ultimately it must be the case that the Court has no jurisdiction to award costs in respect of the proceedings before the LT and the LAT. In this context as this Court has previously pointed out, recourse to arcane and seemingly impenetrable legal complexity is best avoided.
25. Moreover, an appeal to the Grand Court may be made upon a point of law only. Once again, this ensures that any appeal is as economical as possible, as straightforward as possible and as cost effective as possible. The Respondent is entitled to recover the costs of his appeal, and no more than the costs of his appeal.



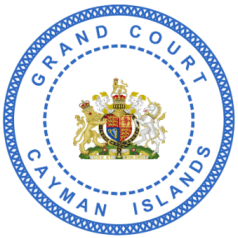
Indemnity Costs

26. In relation to his costs as the successful party, the Respondent contends that these should be taxed on the indemnity basis in accordance with GCR O .62, r.4(11), raising the question whether anything has been done or any omission has been made improperly, unreasonably or negligently on the part of the Appellant.

27. The legal argument is developed at paragraphs 14-17.5 in this manner:

"14 *GCR O.62, r.4(11) provides that the Court may make an order for costs to be taxed on the indemnity basis if it 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.*

15 *In AHAB v SAAD [2012 (2) CILR 1] at paragraph 10 Chief Justice Smellie said: the jurisdiction of the Court to order indemnity costs is "wide and flexible, allowing the Court to exercise its discretion as the circumstances of the case may require".*





16 *Smellie CJ further cited, with approval, Simms v Law Society [2006] 2 Costs L.R.245; [2009] EWCA Civ. 849 and summarised the principles therein which he confirmed are suitable to be adopted by this Court, namely that when considering whether a costs order should be made against a party on the indemnity basis, the Court should consider if the party's conduct deserves some mark of disapproval, therefore the Court should principally consider the losing parties' conduct of the case, rather than the substantive merits of his position [11].*

17 *Talent Business v China Yinmore [2015 (2) CILR 113] from paragraph 41, Smellie C.J endorsed Tomlinson J's principles as at paragraph 25 of Three Rivers v Bank of England [2006] EWHC 816 (Comm) as being of assistance, namely:*

17.1 *The Court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.*

17.2 *The critical requirement before an indemnity order can be made in the successful [party's] favour is that there must be some conduct or circumstance which takes the case out of the norm.*



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

17.4 *The court can and should have regard to the 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.*

17.5 *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."*

28. The Court finds this aspect of the Respondent's costs arguments somewhat surprising, in that certainly as a matter of impression this Court found nothing in the conduct of the Appellant which merits the disapproval of the Court in any material respect. In addition, as the Court explicitly indicates at paragraph 102 of its earlier Judgment, the question raised by the appeal was a question of some legal uncertainty.

29. In light of that prevailing uncertainty, the Court necessarily sought the wide and ample assistance of counsel. In no way should a party be discouraged from providing assistance by a concern that in doing so its conduct was in some way improper or in this case unreasonable.

30. Nonetheless, the Respondent sets out his criticisms at paragraph 17.6 as follows:

"17.6 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 the very late stage of 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, by its conduct, turns a case into an unprecedented factual enquiry by the pursuit of an unjustified case;*



- (d) *Where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, farfetched;*
- (e) *Where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;*
- (f) *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.”*



31. In addition to alleging that the Appellant’s case lacks any merit and was misconceived as unreasonable the Respondent also makes complaint as to Grounds 3 and 4 of the Grounds of Appeal set out in full at paragraph 6 of the Judgment. The Respondent asserts that they should not have been brought, and that they were subsequently not pursued.
32. The Court has some misgivings as to the scope of these complaints. Tactical and strategic decisions have to be made by parties in the course of legal proceedings. These are decisions for the parties themselves and in normal circumstances the Court’s approval or disapproval of those decisions is frankly neither here nor there.

33. The Appellant rejects the Respondent's assertions in robust language at paragraphs 18-22 of the Written Submissions:

"18. By GCR Order 62, r.4(11):

'The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it 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.' (Emphasis supplied.)



19. *In Ahmad Hamad Algozaibi Brothers Company v Saad Investments Company Limited and others [2012 (2) CILR 1], Smellie CJ confirmed that this jurisdiction ought to be exercised only in 'exceptional circumstances' (citing Bonotto v Boccaletti [2001 CILR 292 (CICA)]; and '..only where there is some aspect of a party's conduct of the case which deserves some mark of disapproval. It is not just to penalise a party for running litigation which it has lost...' (citing Simms v Law Society [2005] EWCA Civ. 849); and further, that 'the conduct would need to be unreasonable to a high degree (citing Simon Brown LJ in Kiam v MGN (No. 2) [2002] 2 All E.R. 242, 246.*

20. *As such, indemnity costs may be awarded against a party who has abused the process of the court by deliberately making false representations and then colluding in lying to the court to excuse their failure to disclose vital documents: Nike Real Estate Limited v De Bruyne [2002 CILR 31], or by knowingly advancing a false claim: Al Sadik v Investcorp Bank SC [2012 (2) CILR 33].*

21. *In determining whether to exercise the discretion to award costs on the indemnity basis the court ought to have regard to the conduct of the unsuccessful party, not the merits of that party's case: Ahmad Hamad Algosaibi Brothers Company v Saad Investments Company Limited and others (supra). Even the filing of a claim considered to be novel and unlikely to succeed would not be sufficient to warrant an order for costs on the indemnity basis: Sagicor General Insurance (Cayman) Limited v Crawford Adjusters (Cayman) Limited [2008 CILR 482]. Neither would the filing and pursuit of a claim which, with the benefit of hindsight is determined to have been weak: Bennett v Attorney General [2010 (1) CILR 478].*





22. *There is no aspect of the Appellant's conduct of this appeal which takes it within the type of behavior which could be considered to be improper, unreasonable or negligent, or which for that matter is anything but exemplary. The appeal was brought expeditiously and was heard within three months of being filed. The appeal raised complex issues of law of fundamental public importance which had not been previously decided at the appellate level in this jurisdiction. The main issue in the appeal was determined in favour of the Appellant at first instance by an experienced Labour Tribunal and was reversed by the LAT. It was an issue which demanded clarification and guidance from the Grand Court. The judgment of the court has now provided guidance on an issue which will now be of significant benefit when the issue is again raised before the Labour Tribunal."*

34. Having heard this appeal and having reviewed the learned submissions made on behalf of the Appellant and the Respondent, the Court is entirely satisfied that the conduct of the Appellant has been both reasonable and judicious. When inviting the Court to consider and to determine questions of law which are unusual and novel as well as important, the parties must be at liberty to develop their arguments as they see fit and as the interests of justice in all fairness allow.

35. Accordingly in exercising its discretion the Court has no difficulty in rejecting the submission that indemnity costs have any role to play in the proceedings which have been concluded.

Conclusion

36. Interest on damages shall be calculated only upon the basis which the Court has previously indicated.

37. Similarly costs in favour of the Respondent shall be awarded for the proceedings in the Grand Court only.

38. For the reasons identified costs shall be on a standard basis only.

39. In light of the subsequent decisions which are the subject of the instant Ruling, the costs of and arising from this Ruling are awarded to the successful party, being on this occasion the Appellant.



THE HON. JUSTICE ROBIN MCMILLAN

JUDGE OF THE GRAND COURT

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